

SUBMISSIONS TO:

Commission of Inquiry into the Actions of Canadian
Officials in Relation to Maher Arar

FROM:

Canadian Civil Liberties Association
per A. Alan Borovoy, General Counsel

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Introduction

The Canadian Civil Liberties Association (CCLA) is a national organization with the paid support, across the country, of more than 7000 individuals and 50 associated groups which themselves represent several thousands of people, and 8 affiliated chapters. Our membership roster includes a wide variety of callings, constituencies, and interests – lawyers, writers, homemakers, clergy, trade unionists, professors, minority groups, media performers, business executives, and others.

Our objectives include the following:

- to promote legal protections against the unreasonable invasion by public authority of the freedom and dignity of the individual, and
- to promote fair procedures for the resolution and adjudication of conflicts and disputes.

It is not difficult to appreciate the relationship between these objectives and the issue of reviewing the national security activities of the RCMP. The police are one of the few constituencies in our society that are legally empowered to intrude forcibly on the privacy and liberty of the citizen. The viability of our democratic system requires that this power be exercised subject to considerable restraint. The existence of an effective ability to review possible police excess provides an important vehicle of redress. Indeed, it is an indispensable ingredient for maximizing the accountability of those our society entrusts with such awesome power.

The Philosophy of Anti-Terror Enforcement

The Commission has asked how it should define those “RCMP activities” that relate to “national security”. For purposes of what follows, such “activities” refer essentially to the RCMP’s program for preventing and countering serious, unlawful violence that has the intent and capacity to destroy or substantially impair the operations of our government.

A critical factor in regard to these “activities” is the law enforcement policy enunciated by the government of Canada, in the wake of 9/11. Addressing a parliamentary committee that was dealing with legislation proposed then, Anne McLellan, the minister now responsible for the RCMP, made the following statement:

The insidious nature of terrorism has dictated the need for new measures. These measures must have a preventative focus, because punishing terrorist crimes after they occur is not enough. ... we must be able to disable organizations before they are able to put hijackers on planes or threaten our sense of security¹

The animating philosophy of the government’s approach is the old adage that an ounce of prevention is worth a pound of cure. The idea is to head off the potential terrorists before we suffer the damage they can cause. As attractive as this sounds, there are drawbacks. Since the goals of preventive law enforcement include the ability to assess, understand, and predict, there will be pressure to discover almost everything there is to know about our potential adversaries, including their most

intimate habits and beliefs. And, if the idea is to put our adversaries out of commission before they cause us the apprehended harm, there will be pressure on the RCMP to employ countering tactics other than the normal and open processes of arrest and prosecution. In the past, such tactics managed to include a litany of dirty tricks – many of them, surreptitious. In this connection, for example, the RCMP circulated fake materials within the Quebec separatist movement. There is also evidence that the Mounties disseminated some purloined psychiatric reports within the radical left.²

The more preventive the police operations become, the greater will be the risks to civil liberties. Law enforcement activity will rely not only on hard evidence of the past and present but also on soft speculation about the future. Small wonder that RCMP targets in the past included law-abiding, legitimate dissenters. Many Canadians remember with considerable disquiet, for example, the RCMP surveillance of the Parti Québécois and the Waffle faction of the New Democratic Party.³ Such indiscriminate police activity was likely fuelled by the focus on prevention.

A policy of preventive enforcement could also cast a chill over political liberty and personal privacy. At the very least, many people are likely to *feel* that they are the victims of pervasive surveillance and interference. This will particularly apply to those who have unconventional opinions and ideologies. If such people think their organizations are infested with spies, they will not speak freely at their meetings.

If they think they are being followed, they will not attend certain functions. If they anticipate any kind of police interference, they are likely to be commensurately inhibited.

In consequence, there could be a substantial reduction in the enjoyment of fundamental freedoms. A viable state of civil liberties requires not only the reality of their existence, but also the experience of their enjoyment. The increased emphasis on prevention requires, therefore, a particularly adept regime of safeguards regarding the behaviour of the RCMP.

The Current System of Safeguards

The existing safeguards are woefully inadequate.

As helpful as the courts often are in such matters, recourse to them cannot possibly suffice. When the principal law enforcement agencies are emphasizing methods of prevention, many critical issues will never come to court. Even when they do, the judicial response is necessarily a limited one. The courts adjudicate; they rarely investigate. Indeed, they have relatively little capacity to conduct investigations. But what is often most required is the ability to discover – in a welter of secrecy – the true state of the facts. Hence, the importance of investigation.

Although the capacity to investigate is available within the RCMP complaints system, the process also has its defects. Those with grievances against the RCMP are often too intimidated to file complaints. By now, the public record contains a number of stories about people – particularly of Arab origin and Muslim faith – who decided against taking retaliatory action, despite feeling aggrieved.⁴ An exacerbating factor is that, for the most part, the initial investigations of complaints will be handled by the RCMP themselves. Such an arrangement is not likely to command the confidence of those involved in conflict with the RCMP. At the very least, therefore, the initial investigation of complaints should be conducted by the public complaints commission not by the RCMP.

But, despite the admirable performance of the public complaints commission in so many of the cases it has received, even an improved system – so long as it is driven by complaints – could not suffice. In view of the fact that the preventive tactics employed by the RCMP are often likely to be surreptitious, a good number of their targets will simply be unaware that they are being victimized. Since the commission acts primarily on the basis of complaints, it will often, therefore, be rendered powerless. Indeed, it won't even be able to invoke its own power to initiate complaints. Such action will require knowledge that so often neither the complaints commission nor the victims are likely to have.

As for the role of the relevant minister, the current practice would suggest that this too is incapable of providing adequate safeguards. In dealing with criminal investigations with national security implications, one of the Commission's background papers dwells on "the distinction between the ability of the minister to be informed ... as opposed to the ability of the minister to direct such criminal investigations"⁵. At the same time, the Commission's background papers remind us that the minister is supposed to be accountable to Parliament for the behaviour of the RCMP.

This creates a perplexing conundrum. How in the world is the minister supposed to exercise such accountability without effective power to redress any misconduct that has been drawn to her attention? What exactly, then, does the contemplated

accountability entail? At this point, we expect to be reminded that it has long been considered appropriate in this country for the relevant minister to issue broad policy directives to the RCMP. But such prerogatives have co-existed with a taboo on ministerial interference with specific criminal investigations. The fear is that such interference would risk politicizing the police.

To be sure, this is a commendable caution. Suppose, however, the minister were to learn that a particular investigation was targeting someone whom she believed should not be targeted and was employing methods that, in the circumstances, she considered unacceptable? It could well be that a broad policy directive issued thereafter would not be capable of providing sufficient redress. Without the power to order that the police stop what they are doing, the minister's duty of accountability would be largely inadequate. As a result of this non-interference doctrine, Canadians will often not be able to look to the minister for the protection of their civil liberties.

As indicated, a key reason to keep the government out of police operations is to reduce the risk of politicizing the police. Democratic societies do not want the police to perform partisan duties at the behest of any politicians. But why should we assume that only the government has improper political motives? So do some police officials. And what about all the other prejudices that could shape police behaviour? It has been alleged, for example, that certain police operations have been influenced by racism or homophobia within the constabulary. As between the appointed police

and the elected government, why should it be the police who have the right to make the last mistake? Accordingly, the law should clearly empower the minister to direct RCMP operations, at least where national security is concerned.

But, even if the minister's power were broadened – as we believe it should be – the resulting situation could well be insufficient. In the first place, such a change would increase the risk of politicizing the police – a still unacceptable outcome.

In the second place, politicians have demonstrated a particular reluctance to engage in conflict with the police. While the avoidance of unpleasantness may well be a general part of human nature, this tendency is compounded when the police are involved. Conflict with police entails a significant risk of at least social disapproval. As public protectors, the police enjoy considerable popularity. Thus, their civilian masters often shrink into the woodwork when asked to assert their authority. An exacerbating factor here will be the public's inability to learn about whatever police misconduct occurs in the secrecy of national security operations. The consequent absence of public pressure is likely to enhance the inertia of the governing politicians.

The Need for An Additional Safeguard

In order to augment the mechanisms for review and accountability, the Canadian Civil Liberties Association (CCLA) recommends the creation of a system for independently auditing at least the national security activities of the RCMP. An agency, independent of the RCMP, the government, and any potentially affected constituencies, should be given on-going access to RCMP records, facilities, and personnel. This agency should be mandated to conduct self-generated audits of RCMP policies and practices in the area of national security.

Among the matters the agency should probe are the following: as a matter of policy and/or practice, is the RCMP adopting a reasonable approach to the statutory definition of “terrorist activity”? To what extent, if at all, is the Force stretching the definition beyond genuine terrorism? To what extent, if at all, are legitimate dissenters and *non*-terrorist law-breakers being targeted? What kind of treatment are racial, religious, and ethnic minorities receiving? Are the RCMP’s information sharing practices – with foreign and other domestic agencies – within acceptable limits? How far, if at all, are the methods of investigating and countering ethically appropriate?

In order to reduce the risks of politicization, there should be on-going audits of the relationship between the minister and the RCMP. For such purposes, ministerial instructions to the RCMP should be put in writing. By requiring that these

instructions be committed to writing, the law could engulf the relationship in an aura of formality that would tend to discourage impropriety. In any event, written directives would create a paper trail for the outside agency to audit.

The audits should concern themselves with the ethical propriety – not the tactical effectiveness – of the RCMP's activity. The Minister and Members of Parliament will inevitably be concerned with both. So will much of the public. Indeed, much of the public will be *primarily* interested in the effectiveness of the police war on terror. But, as a result of the particular dangers of preventive law enforcement, at least one agency should emphasize civil liberties. Even at that, the audit agency would have to aim at striking the best *balance* between the competing values. Thus, there would be much to gain and little to lose by providing for the audits to monitor primarily for propriety.

The audit agency should acquire no decision-making power over any law enforcement authorities. The role of such an agency would be essentially to disclose, not to decide. To whatever extent it had a power of decision, the audit agency would be at risk of inheriting the general reluctance to take on the police that afflicts so many politicians. But the advantage of such an auditing system is that the auditors would not have to engage with the police the way the politicians do.

As a result of the need for constant collaboration with the police, the politicians often feel especially dependent upon police good will. An audit agency, without a

decision-making role, would be much less susceptible to such pressures. Moreover, the auditors would not attract the level of public disapproval that often accompanies the making of unpopular decisions. Yet, since the agency would not have any other functions to perform, it would have a powerful incentive to be thorough with its discoveries and disclosures. To whatever extent anything was missed, the agency would be vulnerable to embarrassment.

The key to the agency's impact is the report that it ultimately would make. The publicity resulting from an independent audit would operate to increase the pressures on the minister. This is the factor that could produce the needed corrections, changes, and reforms. The upshot of the exercise could be the repeal, amendment, or endorsement of any measures that were identified. Whatever the result in any given situation, an increasing number of decisions would be made subject to the scrutiny and even the participation of a more enlightened public.

Of course, there is one disability that it will be difficult to overcome: the need for secrecy with respect to a certain amount of the relevant material. In this connection, the agency might be explicitly required to ensure that its public reports are cleansed of any subject matter the disclosure of which the agency believes would be detrimental to Canada's national security. It might also help to provide that, before making any part of its report public, the agency should submit it to both the RCMP and the minister to vet for national security problems.

To whatever extent there is a conflict over the public release of any such material, the agency should be empowered to go to court, where the matter would be heard *in camera*. The court should be empowered to permit the public release of any material where it finds no reasonable basis for the government decision to withhold it. As for any material that wound up being withheld, the agency should be allowed to publicize at least the existence of, if not the reasons for, its view that there should have been greater disclosure.

This concept is not new to Canadian law. The Security Intelligence Review Committee (SIRC) already performs such an auditing function with respect to the Canadian Security Intelligence Service (CSIS). CCLA is simply urging that what is now available for security-related intelligence gathering apply as well to security-related law enforcement. Moreover, this country has been making increasing use of independent financial audits of government behaviour. We are asking that the safeguards this country has employed for the public's money be applied also to the people's *freedoms*.

While the auditor general can examine the RCMP, the general focus there is on financial activities, not civil liberties. While the privacy commissioner can perform certain audits of the RCMP, the general focus there is on the handling of information openly acquired rather than on the methods employed for what is secretly obtained. Moreover, the privacy commissioner is allowed – but not required – to perform such audits and, in any event, this office has no function to play regarding issues apart

from privacy. No one is mandated to audit the impact the RCMP may have on freedom of speech, association, and assembly. Nor is the issue of possible RCMP discrimination or harassment the subject of any such auditing.

As for the separation of national security activities from the rest of what the RCMP does, the audit agency should have *access* to everything. While it could well be permissible for the Mounties initially to separate and categorize their own materials, their decisions in this regard should themselves be subject to the audit functions of the independent agency. This additional scrutiny will be necessary to ensure an adequate level of public confidence in the entire arrangement.

We believe that such auditing could be so helpful that it should be applied to all government operations that are involved in national security activity. As is the case with SIRC, the agency (or agencies) should report directly to Parliament and there should be increased security of tenure for those who perform this function.

In addition to the proposed new parliamentary committee and other consultative bodies, the combination of an improved complaints system, enhanced ministerial power, and independent auditing is likely to contribute substantially to the protection of civil liberties in this era of preventive law enforcement.

A Perspective

Few developments have outraged the conscience of civilized society as have the atrocities of 9/11. And few phenomena have the capacity, that terrorism has, to create havoc, produce fear, and devastate our democratic institutions. For all of these reasons, CCLA believes that this country should allocate the resources and energy that are needed to overcome the terrorist threat.

But the desirability of the goal cannot, by itself, create legitimacy for the means. In this regard, the Canadian Civil Liberties Association also believes that vigorous vigilance is required. It is to secure this goal, that we make the foregoing observations and the ensuing recommendations.

Recommendations

The Canadian Civil Liberties Association urges the Arar Commission to recommend the following:

- (1) Provide that the public complaints commission, rather than the RCMP, will typically perform the initial investigation of civilian complaints.
- (2) Provide that the Minister should be able to direct, in writing, RCMP operations at least where national security is concerned.
- (3) Provide, where national security is concerned, an independent agency, with on-going access to RCMP records, facilities, and personnel to conduct self-generated audits of RCMP policies, practices, and relations with the relevant Minister.
- (4) Provide for such independent auditing of all government operations involved in national security.

Notes

1. Testimony of Hon. Anne McLellan before the Standing Committee on Justice and Human Rights on Bill C-36, Thursday, October 18, 2001.
2. For information regarding the RCMP and the Quebec separatists, see McDonald commission, *Freedom and Security Under the Law*, Second Report, Volume 1, pp. 449-457. For information regarding the RCMP's actions dealing with the psychiatric reports, see Ontario, *Report of the Commission of Inquiry into the Confidentiality of Health Information*, Volume II, pp. 38-48; McDonald commission, *Freedom and Security Under the Law*, Second Report, Volume 1, pp. 271-73.
3. For information on the former Waffle faction of the New Democratic Party, see McDonald commission, *Freedom and Security Under the Law*, Second Report, Volume 1, pp. 478-84. For information on the Parti Québécois, see *id.* Pp. 453-65.
4. *Anti-Terrorism and the Security Agenda: Impacts on Rights, Freedoms and Democracy*, Report and Recommendations for Policy Direction of a Public Forum organized by the International Civil Liberties Monitoring Group, 17 February 2004; Hugh Windsor, *Is it time to scale back anti-terrorism laws?*, Globe and Mail, 6 December 2004; Justyna Rechberger, *Arar fund-raiser at Carleton*, The Charlatan, accessed 08/02/05 at www.charlatan.ca/articles/2004/10/07/stories/11726.html.
5. *Police Independence from Governmental/Executive Direction; A Background Paper to the Commission's Consultation Paper*, Commission of Inquiry into the Action of the Canadian Officials in Relation to Maher Arar, Policy Review, 10 December 2004.