THE LAWFUL ACCESS PROPOSALS: WHY CANADIANS SHOULD SAY "NO" TO EXPANDED ELECTRONIC SURVEILLANCE BY POLICE

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The BC Freedom of Information and Privacy Association ("FIPA") is a non-profit society devoted to the protection of Canadians' rights of privacy and access to information. We welcome the opportunity to comment on the federal government proposals set out in the *Lawful Access Consultation Document* ("Consultation Document").

It's worth noting that the government has created more opportunity for the public to debate and comment on these proposals than any of the four or five other initiatives they have launched which seriously threaten our privacy rights. My group was commissioned by Justice Canada to help stage a consultation and workshop in Vancouver on the lawful access proposals, and we have welcomed their invitation to be involved.

In the context of telecommunications, "lawful access" is the interception of communications and the search and seizure of information, carried out pursuant to legal authority as provided in Canadian law.

As usual, the debate over extending lawful access is a question of balance, of where to draw the line on infringing on personal privacy and other civil liberties in order to prevent crime or improve security.

The federal government proposes legislative amendments which are said, in part, to be required to ratify the Council of Europe *Convention on Cyber-Crime*, but it is interesting to note that several of the proposals either are not part of that convention, or exceed its requirements. This is a demonstration of the fact that law enforcement officials never sleep in their quest for more powers of search and seizure, and their thirst for additional power is limitless.

FIPA's view in a nutshell is that we have no objection if the State has the same ability to intercept and monitor email and wireless communication that it currently has to intercept and monitor letter mail and conventional telephone communication. But the Consultation Document goes far beyond this to propose

much greater license to intercept and monitor, and with a lower standard of judicial supervision.

We are opposed to the proposals because, in our opinion, they unjustifiably intrude upon the privacy rights of Canadian citizens.

THE RIGHT TO PRIVACY

In analyzing proposals for access to information that intrude upon citizens' rights to privacy, we as Canadians start with Constitutional principles set out in the *Charter of Rights and Freedoms* ("The *Charter*").

The right to privacy has long been recognized as one of the interests protected by s.8 of the Charter, which guarantees everyone the right to be secure against unreasonable search or seizure, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I hope you'll forgive me if I quote some rulings of the Supreme Court in laying out our privacy rights. I think these are very important for Canadians to hear.

The right to privacy is important to our personal autonomy and the foundation of our democratic nation. A decision of the Supreme Court states:

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.[1]

In assessing proposals for electronic surveillance such as are proposed in the Consultation Document, there is another ruling that gives some insight, and I quote:

> [O]ne can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s.8 should be more directly aimed…The reason for this protection [regulating the power of the state to record communications] is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our

[1] *R. v. Dyment* [1998] (S.C.C.)

> words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning."[2]

Another decision gives some guidance on the application of the Charter to legislation that would expand surveillance, and I quote:

> (1) The objective of the legislation must be sufficiently important, pressing and substantial, "to warrant overriding a constitutionally-protected right"; and
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> (2) The means chosen must be reasonable, demonstrably justified, and proportional, balancing the interests of society with those of the individuals. With respect to proportionality, the measures must be "rationally connected to the objective", and impair the right "as little as possible". Further, "there must be a proportionality between the effects of the measures… and the objective".[3]

The Privacy Commissioner of Canada has codified these principles into a four-part test which in brief states that proposals that limit privacy must be demonstrably necessary, demonstrably likely to be effective, proportional to the security benefit to be derived; and that no other, less privacy-intrusive measure would suffice to achieve the same purpose.[4]

SUMMARY OF CONCERNS AND RECOMMENDATIONS

Our concerns with the proposals contained in the *Lawful Access Consultation Document* can be summarized as follows:

1. The federal government seeks clarification with respect to the "private" status of e-mail, and suggests that "...[O]ne could argue that e-mail communications, as they are in writing, would not come within the 'private communication' definition."

   We fundamentally disagree. We submit that e-mail is akin to a private oral communication. There is a high expectation of privacy in e-mail, and access to it should be obtained only under the high standard required for current lawful interception orders.

   The future would be bleak indeed if Canadians had to communicate with the awareness that virtually any electronic conversation could be

[2] *R. v. Duarte* [1990] 1 S.C.R. 30
[3] *R. v. Oakes* [1986] 1 S.C.R. 103
[4] Letter to the Ministers responsible for the "Lawful Access" proposals, November 25, 2002. http://privcom.gc.ca/media/le_021125_e.asp

monitored and scrutinized by unseen government officials. Not only would our privacy rights be severely diminished, but our rights of freedom of expression as well.

2. The Consultation Document states that "The public policy objectives of this process are to maintain access capabilities for law enforcement and national security agencies in the face of new technologies and to preserve and protect the privacy and other rights and freedoms of all people in Canada."

   However, the federal government proposals go beyond maintaining powers for new technology. The proposals greatly increase the breadth and depth of law enforcement agencies' powers to intercept, search and seize the private electronic communications and records of Canadian citizens. In many cases, the powers proposed are unprecedented. In others, the powers proposed would substantially lower the threshold that is already required by Canadian law to obtain this information.

3. The Consultation Document states that "These rapidly evolving technologies pose a significant challenge to law enforcement and national security agencies...as [they] can make it more difficult to gather the information required to carry out effective investigations." However, there is a lack of any empirical or other data that would demonstrate a pressing and substantial need for further law enforcement agency access to private electronic communications and records. There is little if any satisfactory justification given for the new powers proposed.

4. It is doubtful that the new powers proposed would be effective in enabling law enforcement and security agencies to keep up with technological innovations that are constantly being created. Lawbreakers will continue to find new avenues and methods of communication.

   If Canadians yield to what in fact are endless pressures to increase law enforcement surveillance powers, the result would be a huge loss of privacy in exchange for very little gain in safety and security. In our opinion, we have a great deal to lose and not much to gain from the proposals.

5. Lastly, the proposals in the Consultation Document are so vague in some instances that it is difficult to know what is being proposed. They need elaboration, justification, thought and debate. The government has simply not made its case.

THE BIG PICTURE — AN EXPANDING DRAGNET OF SURVEILLANCE

Finally, it is important to view the proposals in the Consultation Document in the context of other legislation that is proposed or has recently been enacted. Privacy rights in Canada are continually under assault, and there has been An Unprecedented assault on these rights in the post-9/11 world.

The recent anti-terrorist legislation and Canada Customs and Revenue Agency's program to create a national database on people entering and leaving the country are two recent examples of this disturbing trend.

The proposal for a national ID Card is another ominous threat to privacy. It would be a dream come true for many government bureaucrats, but a huge danger to civil liberties.

Canadians, all of us, have a personal responsibility to be vigilant and protective of our very hard-won rights and freedoms.

We must ensure that our right to privacy is only limited by such measures that are truly required, reasonable, demonstrably justified, effective and proportionate to the ends to be achieved. The proposals in the Consultation Document do not meet these standards.

Let us not allow ourselves to be forced to change our laws by the political pressures, or the fear and hysteria that currently grip our neighbour to the south. The US has entered into a very dark era in its history, and embarked on a course I think they will come to regret.

There has never been a more crucial time for Canada to be what George Bush senior described as a "kinder, gentler nation". (He was speaking of a vision for the United States, and if I remember correctly, this was right after the first Gulf war, and he lost the election he was campaigning to win, but I digress… I think Canada is the actual realization of those words.

If you think the Patriot Act number one is severe in the way it has suspended civil liberties and eroded privacy rights, wait til you see Patriot Act two, which is waiting in the wings.

Canada should not copy the excesses of the US, and I am optimistic that, in the end, we won't go there. I hope that we will all demand and participate in an informed debate about the lawful access proposals.

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