May 14, 2001

The Honourable Lowell Murray, P.C.
Chair
Standing Committee on National Finance
Senate of Canada
Ottawa ON K1A 0A4

Dear Senator Murray:

I am writing on behalf of the Canadian Bar Association, to register our opposition to provisions in Bill S-23 which would expand government powers to open and examine mail.

This provision is but one small part of Bill S-23. We regret that the timing of the Senate Committee's review of the bill does not permit a thorough analysis of all its provisions. The one issue we highlight is of grave importance and merits the Senate Committee's attention.

Current Law on Importation of Goods and Mail

Under the *Customs Act*, officers may examine any goods that have been imported and open any package or container of imported goods and take reasonable samples of the goods at any time up to the time of release. Similarly, officers may, at any time up to the time of release, examine any imported mail and may open it if they suspect, on reasonable grounds, that it contains any goods the importation of which is prohibited, controlled or regulated under any Act of Parliament and take samples in reasonable amounts.

However, officers may not open imported mail that weighs 30 grams or less unless the person to whom it is addressed consents or the person who sent it has attached a label in accordance with the Universal Postal Convention. Officers may obtain a warrant to open imported mail under 30 grams. Officers may also cause an item of imported mail that weighs 30 grams or less to be opened in their presence by the person to whom it is addressed or someone authorized by the person.

Current Law on the Exportation of Goods

Officers may examine any goods reported under s. 95 of the *Customs Act* and open any package or container of such goods and take samples in reasonable amounts.

What Does Bill S-23 Propose?

In addition to the power to examine and open imported goods and mail, Bill S-23 proposes to give officers the power to examine mail that is to be **exported** at any time up to the time of exportation. The Bill also proposes to give officers the authority to open any mail items that they suspect on reasonable grounds of containing any goods whose exportation is prohibited, control or regulated under any Act of Parliament and take samples of the same in reasonable amounts. [clause 59(4)]

Under the proposed amendments, an officer could not open any mail, whether imported or to be exported, that weighed 30 grams or less unless the person to whom it is addressed consents or the person who sent it has attached a label in accordance with the Universal Postal Convention. As under the current law, an officer could obtain a warrant to open imported mail or mail to be exported that weighs less than 30 grams. The proposed amendments would allow officers to cause an item of imported mail or mail that is being exported, that weighs 30 grams or less, to be opened in their presence by the person to whom it is addressed, the person who sent it or someone authorized by either of those persons.

Why CBA Opposes the Proposed Change

The Canadian Bar Association is opposed to the proposed changes because they would greatly enhance officers' powers to examine and open international mail while raising serious privacy issues. In particular, the CBA is concerned about how these powers will relate to communication protected by solicitor and client privilege.

1. Reasonable Grounds

In support of various security efforts, including proceeds of crime, drug enforcement and immigration, CCRA officials routinely conduct random checks of imported mail weighing over 30 grams. For instance, in an effort to intercept illegal immigration documents on behalf of Citizenship and Immigration Canada (CIC), envelopes over 30 grams are opened if Canada Customs and Revenue Agency (CCRA) officials detect a solid object or if they originate from a place identified by CIC to be a likely source of fraudulent documents. The contents of the intercepted packages are then provided to CIC. Under the current law, this practice would be legitimate so long as reasonable grounds for suspicion exist. In our view, CCRA's practice of conducting random searches on behalf of CIC does not provide the reasonable grounds necessary for an officer to search mail weighing over 30 grams under the Act. It is in this context that the Senate Committee should consider whether the power to examine mail over 30 grams to be exported should be extended to officers under the Act.

The policy rationale for extending the right to examine and open mail over 30 grams to be exported to officers under the Act is not clear. Indeed, it appears to be contrary to the stated purpose of Bill S-23, namely streamlining the customs processes at Canada's borders. The Honourable Senator Angus put the issue most eloquently during debate of Bill S-23 in the Senate:

> [the Bill] deals with . . . creating or providing seemingly extraordinary and disturbing powers for relatively low-level CCRA officers, . . . and enabling the enactment of a burdensome system of new regulations at a time when we are all advocating caution and moderation in the trend to rule by regulation[1]

2. Solicitor and Client Privilege

The rationale for monitoring mail and goods imported into Canada cannot be said to be the same as that for monitoring that exported from Canada, especially as it relates to communications between a solicitor and client.

The guarantee of security from unreasonable search and seizure under section 8 of the *Charter of Rights and Freedoms* protects an individual's reasonable expectation of privacy. We recognize that the expectation of privacy is lower at customs and immigration controls than elsewhere in Canada because the state has a pressing interest in protecting its borders. Notwithstanding, the CBA takes the position that the existence of a relationship of solicitor and client triggers the application of the *Charter* and any search and seizure of privileged communications are, *prima facie*, a violation of section 8.

Solicitor and client privilege is the highest privilege recognized by the Courts and has evolved from being an evidentiary rule to a substantive right. The conditions precedent to the existence of the right to confidentiality of solicitor-client communications arise where legal advice of any kind is sought from a professional legal adviser in that capacity and the communication relating to that purpose are made in confidence by the client. The Supreme Court has held that when a law gives someone the authority to do something that might interfere with the confidentiality protected by the privilege, the decision to do so and the choice of means of exercising that authority should be determined with the view of not interfering with it except to the extent absolutely necessary in order to obtain the desired end.

The right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege. One exception to the principle of confidentiality of solicitor-client communications is where those communications are criminal or made with a view to obtaining legal advice to facilitate the commission of a crime. Similarly, communications may be disclosed on the basis of public

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[1] Canada, *Debates of the Senate*, 1st Sess., 37th Parl., Vol. 139, Issue 32 (May 3, 2001).

safety where officers are able to demonstrate an imminent risk of serious bodily harm or death to a clearly identifiable group or person. It is the CBA's position that random searches conducted by CCRA on behalf of CIC do not meet any of the exceptions to the right to confidentiality of solicitor client-privilege. The same would be true of Bill S-23.

Recommendation

The CBA strongly recommends that clause 59(4) be removed from Bill S-23.

If the Senate Committee does not see fit to remove the provision, the CBA recommends that the bill be amended to add a provision recognizing the fundamental importance of solicitor-client privilege in the administration of justice. For example:

> No officer shall open, read, listen or otherwise intercept communications between a solicitor and the solicitor's client, unless the officer has reasonable grounds to believe that:
> (a) that the grounds referred to in subsection (xx) exist; and
> (b) that the communications are not or will not be the subject of solicitor-client privilege.

A recent letter from the CBA to the Ministers of National Revenue, Citizenship and Immigration, and Justice, opposing mail opening practices under the current law, is attached for your ease of reference. We trust that the Senate Committee will respect the importance of individual privacy by amending Bill S-23.

Yours very truly,

Daphne E. Dumont, Q.C.