

## ABSTRACT

There exists, at this time, surprisingly little historiography on how civil liberties were shaped and developed in practice throughout Canadian history. An examination of the 1946 Royal Commission on Espionage offers several insights into the nature of Parliamentary supremacy in relation to the immediate post-World War Two civil liberties movement.

The commission was formed in response to the defection of a Russian cipher clerk, Igor Gouzenko, in late 1945. The commission investigated the existence of a Russian-led spy ring that had recruited several Canadian civil servants into disclosing secret information. The commission is unique in Canadian history, dominantly due to the fact that it was empowered under the War Measures Act which granted the commission enormous powers. Everything from a citizen's right to counsel, habeas corpus, protection from state coercion and the right to a fair trial were circumvented.

This work attempts to offer a few answers to some important questions about Canadian civil liberties. What were the consequences of the commission's actions? Does Canadian society accept the need to allow a government to violate individual liberties to protect the integrity of the state? The following article will examine the legal debate surrounding the use of extreme measures by a royal commission empowered under the War Measures Act, Official Secrets Act, and the Public Inquiries Act to circumvent individuals' basic rights in order to satisfy the interests of the government in power. The purpose of this work is to show the enormous potential in which Parliament could act independently in re-defining Canadians' civil liberties while at the same time demonstrating the central role the Royal Commission on Espionage played in stimulating debate over the need to develop greater legal protections for individual rights against state abuse in Canada.

## SHORT BIO:

(Note: I was not sure if you wanted a paragraph on my background or a couple of lines as usually appears in the journal. I opted for the latter but more background info. is available on my website if necessary: [www.rcespionage.com/background.htm](http://www.rcespionage.com/background.htm))

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In Ottawa recently we took two excellent judges from the bench of the Supreme Court of Canada and implored upon them the police task of investigating an illegal seditious conspiracy and of instituting prosecutions against those who appeared to be guilty. Notwithstanding that they were eminent jurists, they walked over civil rights of accused persons as no experienced police officer would dream of doing, and they did things which no good crown attorney would for one moment permit. They became part of proceedings which if brought before them on the bench under normal conditions, I am confident they would soundly denounce.<sup>1</sup>

Quoted in the 30 July 1946 issue of the Toronto Daily Star, Senator Roebuck's comments effectively summarize what was most contentious about the Royal Commission on Espionage<sup>2</sup>. The proceedings of this commission represent one of the most extensive abuses of civil liberties ever embarked upon by a Canadian government in peacetime. Surprisingly, few are aware of its existence. One of the reasons for this lies in the fact that the commission's proceedings have often been overshadowed by the events surrounding the defection of Igor Gouzenko, a Russian cipher clerk in the Embassy of the USSR in Ottawa, on 5 September 1945. The defection coincided with the beginnings of the Cold War and the formation of a bipolar world order. Meanwhile, within Canada a new battle of similar importance was also beginning, namely the struggle for the recognition and institutionalization of civil liberties in Canadian society. In its infancy, the civil liberties movement sought to ensure that the abuse of basic liberties practiced by the government during the Second World War (including limitations on freedoms of expression and association) would not continue into peacetime. As Senator Roebuck's comments indicate, civil libertarians did not have

to wait long to be reminded of the importance of their cause.<sup>3</sup>

The following article will explore the nature of the early post-WWII civil liberties movement by using the Royal Commission on Espionage as a case study<sup>4</sup>. The debate over how best to protect individual rights in Canada had taken on constitutional and political dimensions by 1946, creating divisions within the political elite and legal profession over the nature of Parliamentary supremacy and the role of the courts in defending fundamental freedoms. Traditional legal historiography on civil liberties, including Walter Tarnopolsky's The Canadian Bill of Rights and D.A. Schmeiser's Civil Liberties, have most often presented the development of civil liberties in Canada within the context of the Bill of Rights (1960) and the Charter of Rights and Freedoms (1982)<sup>5</sup>. Sufficient attention has not yet been given to the immediate post-WWII (1946-8) period which witnessed a significant upsurge of interest in civil liberties. One of the most significant developments in this period was the increasing support for a Canadian Bill of Rights by members of the legal profession and leading political figures in the federal government. Developments within Canada coincided with the rising international human rights movement as symbolized in the passing of the Universal Declaration of Human Rights in 1948 by the United Nations. The extensive criticism directed against the Royal Commission on Espionage in 1946 did not result in any major reforms to protect individual rights but, instead, the commission acted as a stimulus for increasing public awareness and discussion on the issue of civil liberties. This article seeks to outline the nature of Parliamentary supremacy in Canada and the role the Royal Commission on Espionage and the spy trials of 1946-8 played in stimulating debate on how to best protect individual rights in post-WWII Canada..

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The commission's formation had its roots in Igor Gouzenko's defection from the Soviet embassy

in Ottawa on 5 September 1945. Surprisingly, he had a difficult time having the authorities take him in. Prime Minister Mackenzie King and his closest advisors, Louis St. Laurent (Minister of Justice) and Norman Robertson (Secretary of State), were wary of offering sanctuary to a Russian defector at a time when relations with the Soviet Union were, at best, tense. In fact, King was more inclined to wait until Gouzenko committed suicide so the RCMP could grab the stolen embassy documents from his dead body!<sup>6</sup> Eventually Gouzenko was brought to Camp David where he was secretly interviewed by the RCMP.<sup>7</sup> In the following weeks, Gouzenko revealed the existence of an elaborate spy ring consisting of civil servants who were passing on classified documents to the Soviets.

With the declassification of government files throughout the past ten years and the increasing availability of prime ministers' papers (particularly those of Mackenzie King, Louis St. Laurent and John Diefenbaker), a clearer picture of the events following the defection has emerged. As legal advisor to the government, E.K. Williams (President of the Canadian Bar Association) recommended that a Royal Commission, with less stringent regulations for the admittance of evidence than a court of law, would have a better chance at gaining confessions from the suspected spies<sup>8</sup>. In a secret memo to Mackenzie King dated 5 December 1945, Williams warned the government that "criminal proceedings at this stage are not advisable. No prosecution with the evidence now available could succeed except one of Back, Badeau, Nora, and Grey."<sup>9</sup> He believed the state would be unable to convict those accused of espionage if the government proceeded with a police investigation. Williams recommended a Royal Commission because "it need not be bound by the ordinary rules of evidence if it considers it desirable to disregard them. It need not permit counsel to appear for those to be interrogated by or before it."<sup>10</sup> As charges of espionage were extremely difficult to uphold in court (there was rarely any concrete evidence and almost always no

witnesses), Williams believed a commission could gain sufficient information from the suspects to assure more convictions at trial<sup>11</sup>.

King chose to ignore Williams' recommendations in early December and allowed the RCMP to continue holding Gouzenko in secret. Unfortunately, his hand was forced on 4 February 1946, when Gouzenko's defection was made public by an American radio announcer, Drew Pearson. In response, King formed a Royal Commission the following day to investigate the possibility of Canadian citizens spying for the Soviets. The commission was chaired by two judges of the Supreme Court of Canada, Robert Taschereau and R.L. Kellock.

Although King had been hesitant to make the defection public before Pearson's announcement in February, an official investigation had already been secretly underway for months. On 6 October 1945, Mackenzie King, Louis St. Laurent and the Minister of Finance, J.L. Hilsley had passed a top-secret Order-in-Council under the War Measures Act which directed the Minister of Justice (St. Laurent) to investigate allegations of espionage (PC6444). The War Measures Act was discontinued in January, 1946, but many of its powers were extended into peacetime through the National Emergency Transition Powers Act<sup>12</sup>. Since PC6444 was still secret when the latter Act was passed in December 1945, Parliament had no idea it was allowing the extension of an Order-in-Council granting the cabinet extensive powers of arrest and detention. PC6444 was remarkably controversial because it gave a Royal Commission wartime powers almost one year after the end of WWII and two months after the War Measures Act had ceased functioning.

What King failed to anticipate was the lengths the commissioners were willing to go in their interrogation of suspected communist spies. The RCMP detained thirteen people in the RCMP's Rockcliffe barracks after their apprehension on 15 February 1946. The suspects were held without charges and with

no access to family or counsel; in some cases the detainees were held for up to five weeks. Initially, they were interrogated by RCMP officers who pressured them to confess in a series of individual interviews. After several sessions they were brought before the Royal Commission and advised that it would be in their best interests to testify before the commission. The suspects were threatened by the commissioners with six months in prison for contempt if they failed to testify<sup>13</sup>. Furthermore, the commissioners informed the detainees that the law required them to speak before the commission and that they were not charged with a crime, but only being brought before an inquiry. In those cases where the suspects refused to speak before the commission, they were returned to their cell until they became more compliant<sup>14</sup>.

One can only imagine the immense pressure the detainees were under after weeks of solitary confinement. Only those suspects who submitted to the commission and answered their questions were granted an early release. Given the stress of the situation and the detainees' confusion concerning their legal rights as they were refused access to counsel, it is not surprising that several people soon confessed. Those who were particularly stubborn were only allowed access to legal counsel after a few weeks and eventually released. This was likely a result of increasing criticism in the press, particularly after the publication of the first interim report on 2 March 1946, which revealed that the government had continued to hold people incommunicado and without charges since 15 February 1946. The decision to hold suspects for a considerable period of time partly explains why many prominent figures such as Senator Roebuck were critical of the commission's investigation.

Emma Woikin was one of the first to be targeted for interrogation and was released by the commission with three others on 2 March 1946. At her bail hearing she made no attempt to defend herself and offered a guilty plea while refusing access to legal counsel. While there is no evidence of physical

intimidation on the part of the RCMP, Woikin's mental state at the bail hearing suggests that the police employed a degree of psychological coercion. A report on the commission's activities prepared by the Ottawa Civil Liberties Association described her behaviour as follows:

She wore no hat and her hair looked as if it had not been combed for days. I can only describe her in one way. Recently a friend of mine was in a terrible motor accident and when I saw her in hospital she was in a state of shock. Emma Woikin looked and acted in the same way- she was 'in shock.' The first charge against her was read. In a flat, unnatural monotone, Mrs. Woikin said 'I did it.' The magistrate interrupted to ask her if she wished to be represented by counsel. She merely shook her head and repeated over and over, 'I did it.' He asked her if she understood what had been said. He told her this was a serious charge and she was entitled to have lawyer or ask for a remand. She shook her head and said, 'I did it' to everything that was said to her. The clerk asked her to plead guilty or not guilty. She replied: 'I did it.' The magistrate tried to explain that she would have to offer a plea one way or another. She kept on repeating the same three words. Finally he was able to get through to her, and she said, in a voice that scarcely be heard: 'I did it. I'm guilty.'<sup>15</sup>

As Woikin's behaviour indicates, the suspects were held under extremely stressful conditions. Throughout their imprisonment, the detainees were refused access to families and spouses and their correspondence was impounded by the RCMP. There is also evidence to suggest that the RCMP colluded with the commissioners to ensure the suspects were properly conditioned before being questioned before

the commission (the commission had the disadvantage of having a stenographer present at all times and statements were made on the record, whereas the RCMP interrogations were held in secret and allowed the officers to use whatever methods of psychological intimidation they deemed necessary). It is difficult to establish the precise nature of the RCMP's involvement with the commission's proceedings because RCMP interrogation reports remain one of the few sources of documentation that are still restricted and inaccessible to researchers at this time. The commission's transcripts, however, include references by E.K. Williams to a suspect's comments offered during one of the RCMP's interrogation sessions, suggesting that the RCMP worked with the commission to ensure the suspects were responsive when questioned on the record.<sup>16</sup> Another detainee, Gordon Lunan, who was released with Woikin on 2 March 1946, stated at his preliminary hearing two days later that Inspector Leopold (his interrogator) was present throughout his questioning before the commissioners and whispered advice to Williams the entire time.<sup>17</sup> These tactics were clearly dependent on the fact that the suspects were deprived of legal counsel; a lawyer, presumably, would have demanded protection from self-incrimination under the Canada Evidence Act<sup>18</sup> for their client and, in the process, eliminated the possibility of using the commission's transcripts against the individual in court.

Nine suspects remained interned in the Rockcliffe Barracks throughout Lunan and Woikin's preliminary hearings. One of these detainees, David Shugar, wrote several letters to Members of Parliament describing the conditions of his imprisonment. He claimed to have been threatened with punishment if he did not testify before the commission and he had no access to counsel; he was also kept in a small room about 9' X 8' with his windows open only three feet wide and with 100 watt light bulbs shining twenty-four hours day. There was an RCMP officer in his cell at all times offering Shugar no privacy in the weeks he

was imprisoned<sup>19</sup>. After a failed hunger strike, Shugar wrote a letter to Louis St. Laurent (Minister of Justice) on 9 March 1946, arguing that “if I am to judge by the treatment accorded to me yesterday afternoon before your Royal Commission, I can only come to the conclusion that, as a Canadian citizen, I have been completely stripped of all my rights before the law.”<sup>20</sup> As Shugar and his fellow suspects were held incommunicado, they had no idea that the government had passed an Order-in-Council legalizing their detention.

Several publications of the Canadian legal press was quick to attack the commission’s methods. One article in the Dalhousie Law Review demanded that “the conduct of the commission be examined by Parliament, injustices corrected, the commissioners and their counsel rebuked, and the names of those unjustifiably attacked, exonerated.”<sup>21</sup> The official journal of the Canadian Bar Association, The Canadian Bar Review, printed a scathing article on the commission’s suspension of basic liberties by a member of the Association’s civil liberties sub-committee, M.H. Fyfe. Fyfe was primarily concerned with how the commission had interpreted certain statutes and contended that “the commissioners decided to do the work of the magistrate and the grand jury, or at least the Crown attorney, and in doing so used their powers under the Inquiries Act in a way that Parliament ever intended.”<sup>22</sup> The editor of the Fortnightly Law Journal, W.H.M. Chitty, attacked the commission’s abuse of individual rights on the journal’s front page for several months and produced an article entitled “Alarm at the Growth of Totalitarianism Abuses of Power” which was subsequently quoted in several daily papers and in the debates of the House of Commons. Several non-legal journals chose to voice similar concerns about the commission’s abuse of the suspects’ individual rights, including Saturday Night, Canadian Forum and Queen’s Quarterly.<sup>23</sup> *Maclean’s Magazine* joined this chorus of criticism and published several stories on the commission, including articles entitled “Civil

Liberties Abused” and “Spy Trials Unjustified.”<sup>24</sup> Daily papers also entered the fray with rigorous support or criticism of the commission; editors for the Halifax Herald and the Montreal Gazette favoured the strong-arm tactics while editorials in the Vancouver Sun, Evening Citizen, Globe and Mail and the Winnipeg Free Press condemned the commission’s actions.<sup>25</sup>

As the press coverage suggests, the commission was, at the very least, an important catalyst in stimulating discussion and awareness over individual rights issues in Canada. When the Toronto Daily Star conducted a poll in March 1946, it concluded that 95% of those asked had heard of the Gouzenko affair and the Royal Commission on Espionage and 35% opposed the government’s actions.<sup>26</sup>

By March 1946, the Royal Commission on Espionage had embroiled the King government in a heated civil liberties debate. The circumstances through which the suspects were detained and interrogated brought into question the adequacy of Canada’s legal system to protect individual rights. Civil libertarians were obviously shocked at the measures taken by the government and the commission. It was one thing to overlook civil liberties during wartime, but Canada had been at peace for almost a year. In order to appreciate fully the concerns of civil libertarians of the time, it is critical to understand how civil liberties were defined in Canada. By 1946, the debate over how best to protect fundamental freedoms in Canada had taken on constitutional and political dimensions. These issues went to the heart of the post-WWII civil liberties movement.

By the period of the Second World War, many years of common law and constitutional tradition placed the responsibility for protecting fundamental freedoms primarily in Parliament rather than the courts or provincial legislatures. When the Dominion of Canada was created under the British North American (BNA) Act of 1867, the preamble stated that the Constitution would be ‘similar in principle to that of the

United Kingdom.’ The Supreme Court consistently interpreted this clause to mean that Canadians inherited the tradition of rights entrenched in such British statutes as the Magna Carta and the Habeas Corpus Act<sup>27</sup>. Unlike the American system of constitutionally entrenched individual rights, liberties defined under such statutes as the Habeas Corpus Act were not inviolable. The courts in the United States were designed to be a check on the powers of the people’s elected representatives while Parliament reigned supreme in the British system. Since the British tradition of rights was based on court rulings (common law) and statutes passed by Parliament, the federal government in Canada could pass new legislation eliminating or circumventing such rights at any time. Unlike England, however, Canada had its own constitution, but the BNA Act was vague on the issue of individual rights except for section 92 (1) which allocated the responsibility for ‘Property and Civil Rights’ to the provinces.

The circumvention of individual rights by Parliament or provincial legislatures was hardly a new phenomenon in 1939. Thomas Berger, who is predominantly concerned with the plight of minorities, has argued that the Acadians and Métis were victims of early state assimilationist policies. In the case of the former, the forced deportation by the British in 1755 and New Brunswick’s 1871 Common Schools Act that denied funds to denominational schools are merely two examples of policies designed to eliminate Acadians as a unique cultural group.<sup>28</sup> The 1919 amendment to section 98 of the Criminal Code (s. 98 was repealed in 1936) exemplifies a vicious attack on fundamental freedoms by the state before World War Two. Section 98 was introduced by Arthur Meighen during the Winnipeg General Strike in a fit of anti-communist hysteria and included the following provision:

Any association...whose professed purpose...is to bring about any governmental, industrial or economic change within Canada by use of force, violence or physical injury to person or

property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property...in order to accomplish such change, or for any other purpose, or which shall by any means persecute or pursue such purpose...or shall so teach, advocate, advise or defend, shall be an unlawful association.<sup>29</sup>

The amendment was directed towards eliminating subversive organizations but was so vague that it represented a general threat to freedom of association of any kind. Inspired by Section 98, Maurice Duplessis, Premier of Québec, introduced the Communist Propaganda Act in 1938. The Act empowered local sheriffs under the authority of the provincial Attorney-General (Duplessis) to close down meeting places that were suspected of housing subversives. It was left up to the discretion of Duplessis to define 'subversives' and he chose to target any groups whom he perceived as a threat to traditional French-Canadian cultural, social or political values. The Padlock Act, as it soon became known (referring to the use of a padlock placed on the doorway to shut down a meeting place), gave the Attorney-General of Québec such widespread powers that it was used to persecute Jehovah's Witnesses, Jews, communists and various other suspected 'subversives.' The Act survived until 1957 when it was successfully challenged in the Supreme Court and found to be ultra vires.<sup>30</sup>

The meaning of 'civil rights' was a topic of debate between the federal and provincial governments, and it eventually fell to the Supreme Court of Canada to decide jurisdiction over fundamental freedoms. One of the landmark decisions establishing the Supreme Court's position on fundamental rights was the case of the Alberta Press Act. The Act was passed in 1937, by the Social Credit government of Alberta and one of its provisions stipulated that the press could not publish anything in Alberta without the provincial

legislature's approval. The federal government reacted by challenging the Province's right to pass such legislation, arguing that only Parliament could pass laws dealing with freedom of the press<sup>31</sup>. The Supreme Court unanimously concluded that the legislation was ultra vires and the Act was held invalid.<sup>32</sup>

Of the five judges commenting on the case, only Chief Justice Duff (writing for Davies) and Justice Cannon commented on the possible implications of the bill (the other two, Kerwin and Crockett, preferred to simply declare the legislation beyond provincial jurisdiction). Their comments provide a unique insight into how the judiciary perceived the nature of civil liberties in Canada at this time. Both Duff and Cannon agreed that the ability to legislate against freedom of the press did not fall under provincial jurisdiction as defined in Section 91 of the BNA Act as 'Property and Civil Rights.'<sup>33</sup> They made a clear distinction between 'fundamental' and 'local' rights, the former falling under the jurisdiction on Parliament alone. According to Justice Cannon, "the federal government has the sole authority to curtail, if deemed expedient, and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the dominion."<sup>34</sup> The case further demonstrated the limitations of the Supreme Court. Chief Justice Duff pointed out in his decision that "as judges, we do not and cannot intimate any opinion upon the merits of the legislative proposals embodied in them, as to their practicability or in any other respect."<sup>35</sup> Clearly, the role of the judiciary in Canada was not to rule on the morality of legislation, such as limiting people's right to express themselves, but only to decide if the legislation was legally passed and if it fell under the proper jurisdiction.

The case of the Alberta Social Credit Act set an important precedent in limiting the provincial governments' power to circumvent civil liberties. It represented the only case to deal with civil liberties in Canada prior to WWII and would remain the leading precedent on freedom of the press until the Padlock

case of 1954.<sup>36</sup> Although freedom of the press was the only specific reference to fundamental freedoms by the judges of the Supreme Court in this case, the decision helped establish Parliament's supremacy in the field of fundamental freedoms by distinguishing between fundamental and local rights. Justice Cannon and Duff's comments, however, suggested that the concept of fundamental freedoms was to be construed narrowly, and provinces were only limited against passing legislation that could violate the rights of all Canadians. The decision suggested that both Parliament and the provincial governments had the potential to pass legislation protecting civil liberties within their own particular spheres of influence (in fact, it was the Province of Saskatchewan that passed the first Bill of Rights in Canada in 1947)<sup>37</sup>. In the case of the federal government, this included all matters relating to criminal law and, as established by the case of the Alberta Social Credit Act, freedom of expression. These decisions were consistent with the principles of Parliamentary supremacy.

Almost ten years after the case of the Alberta Social Credit Act, the spy trials of 1946-9 would demonstrate that the judiciary's role remained unchanged: judges were not to rule over the propriety of legislative or parliamentary action from a rights point of view. If civil libertarians were hoping that the judiciary would refuse to admit the evidence presented before the commission because of the methods employed in coercing testimony, they would have been disappointed. Attempts by various defence lawyers to condemn the commission's tactics as an abuse of individual rights received little sympathy from the judiciary. As an examination of the decisions handed down in the 'spy trials' of 1946-8 reveals, civil libertarians who advocated the creation of a constitutionally entrenched Bill of Rights not only faced the challenge of gaining the support of members of the press, legal profession and federal politics, but were additionally confronting the basic tenets of Canadian jurisprudence.

The most contentious issue was the admissibility of the commission's transcripts in court. Defence counsels argued that admitting the transcripts was tantamount to violating their clients' right against self-incrimination. Judge Chalmers McRuer was the first judge to reject a motion to have the transcripts ruled inadmissible in *Rex v Mazerall*; he concluded that witnesses should specifically demand protection under the Canada Evidence Act in order to avoid self-incrimination. He argued that the purpose of the statute was to ensure statements made before a government tribunal or court were truthful; if the witness failed to request privilege, it could be assumed that their statements were voluntary and true. Ignorance of the law, McRuer pointed out, was not a defence<sup>38</sup>. The Ontario Court of Appeal upheld McRuer's decision and concluded that truthfulness was a matter for the jury to decide. This decision was then cited by judges who came to similar conclusions in the trials of Gordon Lunan, Raymond Boyer and Durnford Smith.<sup>39</sup>

The issue of self-incrimination was only one of many attempts by defence lawyers to use the commission's procedures as a basis for keeping the transcripts out of court. J.L. Cohen, a defence attorney for several of the accused, including Matt Nightingale and Gordon Lunan, presented several complaints to the presiding judges. His criticism of the commission included the refusal to grant access to counsel, not permitting the witnesses to be cross-examined and the role of the RCMP in coaching the suspects testimony. Cohen further criticized the RCMP's presence during the commission's proceedings and the commissioner's habit of leading the witnesses with their questions. Other lawyers contended that Gouzenko's documents were protected under diplomatic immunity and could not be admitted at trial<sup>40</sup>. Several lawyers suggested that there was no direct evidence linking their clients to a conspiracy and that the transcripts were nothing more than hearsay evidence<sup>41</sup>. There were also several efforts to undermine the indictment itself because it was too vague<sup>42</sup>. Mazerall's lawyer even attempted to dispute the legality of

the commission and Eric Adam's counsel submitted a motion for a change of venue because the extensive press coverage on the commission could prejudice a jury.<sup>43</sup> In each case, the judges quashed the motions.

Many of the issues cited above had never before been dealt with in a Canadian court and they all ended in favour of the prosecution<sup>44</sup>. The trials reaffirmed the traditional role of the judiciary in cases where defendants felt their rights were abused by the federal government. When one of the defence lawyers questioned the commission's jurisdiction in conducting a criminal investigation, Judge McRuer concluded that he was "not at all clear that this court has, in these proceedings, any jurisdiction to review the conduct of the commission or to decide that a commission acting with apparent lawful jurisdiction has at any time by its conduct deprived itself of jurisdiction."<sup>45</sup> In a later trial, Judge Robertson (Ontario Court of Appeals) argued that "it is not necessary for the disposition of this appeal that we should consider, or have any opinion upon, the wisdom or propriety of the action of the Government of Canada in passing the Order-in-Council authorizing the detention of the appellant and others suspected of like misconduct, nor of what was done under the authority of the Order-in-Council."<sup>46</sup> Judge Lazure of the Québec Court of King's Bench echoed his colleagues sentiments when he stated that "another reason for rejecting the objection is that the espionage activities laid open in this case by the witness Gouzenko directly concern the welfare and the security of Canada, and I think that in that case it supercedes to some extent any diplomatic immunity."<sup>47</sup> Finally, in handing down his judgement for Raymond Boyer, Judge McDougall made the following statement:

It may not be amiss here to stress the unusual features of the present case. The events took place at a time when this country was in the throes of a war of extermination, the issue

whereof was still in doubt. In such situation, speaking for myself alone, I believe that the normal and salutary safeguards surrounding the admissibility of evidence against an accused charged with dereliction of his duty as a citizen, are not to be stringently applied, with the result that the range of admissibility is inevitably enlarged or widened. The rules of evidence in such cases lose, in part, some of their ordinary potency in the face of national necessity. War time emergency sets a pattern of conduct alien to the usual amenities of peaceful existence, which may impinge upon the common rights and liberties of the subject. It can scarcely be otherwise when the very life of the nation is in jeopardy.<sup>48</sup>

The judges who presided over the spy trials were unanimous in their belief that an emergency justified circumventing certain aspects of the legal process. While this was consistent with the court's practice during the war, it is significant that they chose to extend the same principle to a commission that had elicited confessions from suspects detained by the government in peacetime.

The position of the lower court judges was not surprising. There were no legal precedents by 1946 that would have supported an appeal on the grounds that the commission's actions violated the suspects' individual rights. The spy trials that followed the investigation of the Royal Commission on Espionage were proof of the obstacles facing civil libertarians in post-WWII Canada. According to renowned British legal philosopher A.V. Dicey, the principle of Parliamentary supremacy was based on the belief that the role of the judiciary was to enforce the will of the people's elected representatives and that, at no time, could any institution override the will of Parliament<sup>49</sup>. Unlike Britain, however, the Canadian Parliament was limited by the provisions of the BritishNorthAmerica Act which stated that Canada's constitution was to be similar

'in principle' to that of the United Kingdom. In their interpretation of the preamble, the Judicial Committee of the Privy Council argued that Canadians inherited the traditional freedoms enjoyed by all British subjects under the Magna Carta and the Habeas Corpus Bill<sup>50</sup>. Legal historian Walter Tarnopolsky has contended that "as far as any judicial restraint on legislation is concerned, the Privy Council always asserted that the judiciary should not be concerned with the policy of the legislation, with its wisdom or justice, but merely with its constitutional validity on the basis of jurisdiction."<sup>51</sup> The history of Canadian constitutional jurisprudence, as demonstrated in the case of the Alberta Press Bill, was focussed solely on determining the proper jurisdiction of legislation. This was the philosophy that informed the decisions of the judges presiding over the spy trials and explains why the government's handling of individual rights was not challenged by the courts. In demanding a constitutionally entrenched Bill of Rights that would empower the courts to rule on the morality of government legislation, civil libertarians were confronting the fundamental precepts of Canadian jurisprudence.

While the judges of the appellate and lower courts handed down decisions on the admissibility of the commission's transcripts, the suspects continued to struggle over the implications of testifying before the commission. Eric Adams, Gordon Lunan, Matt S. Nightingale, and Harold Gerson were so disconcerted with the manner in which information was elicited from them by the RCMP and commissioners that they refused to speak when called as witnesses at trial, even though the judge had granted them immunity from self-incrimination. In the case of Adams and Lunan, both were sentenced to six months in jail for contempt of court as a result of their refusal to testify. When the wives of these two men appealed to Minister of Justice with the aide of Senator Roebuck to release their husbands so they could assist counsel in preparing a defence, St. Laurent responded with the following comment: "You do appreciate, of course, that it is

rather a delicate matter to attempt to interfere with sentences for contempt of Court, but we are giving the matter careful consideration.’<sup>52</sup> In the end he chose to do nothing.

The refusal of several suspects to testify in court had a further impact when Fred Rose, the federal Member of Parliament implicated in the espionage affair, was brought to trial. Despite the fact that none of his co-conspirators ever testified against him, the jury found Rose guilty. When questioned after the trial, one juror admitted that “it was not until those four Commies refused to answer questions that we made up our minds and agreed. We knew then that Rose was guilty, and we would have said so had you stopped the trial right then.”<sup>53</sup> Consequently, on 17 April 1947, Fred Rose was sentenced to six years in jail.

With the conviction of Fred Rose in April 1947, the proceedings of the Royal Commission on Espionage and the following ‘spy trials’ were finished<sup>54</sup>. The only possible conclusion was that a Royal Commission had been created to do what the judicial process was not capable of accomplishing. Only in those cases where witnesses were coerced into confessing and the transcripts admitted in court were the accused found guilty. Thirteen people initially arrested by the RCMP on 15 February 1946, and ten others were accused by the commission of having violated the Official Secrets Act, but only eleven people were successfully prosecuted. It is no coincidence that the suspects who were the last to be released were mainly acquitted; they refused to testify before the commission and gave the government no evidence to prosecute them with. As the British High Commissioner surmised at the time, “it is not only a commission appointed to report to Parliament on a general question, but also it inevitably constituted itself a judicial tribunal, in effect, to try certain persons of suspected illegal activities, without any actual charge being laid against them.”<sup>55</sup>

The courtroom was not the only venue where the Royal Commission on Espionage sparked

discussion on the vulnerability of civil liberties in Canada. The debate within the ranks of the Canadian Bar Association was indicative of the expanding support in Canada for creating greater protections for civil liberties. When the members of the Canadian Bar Association met in Winnipeg for their twenty-eight annual meeting in October 1946, they were divided over what position to take on the commission. The side that advocated officially condemning the government's decision to implement a Royal Commission was represented by W.M.H. Fyfe and R.W.M. Chitty<sup>56</sup>. Those who opposed such a move included members who had been directly involved in the commission and the spy trials such as Judge Chalmers McRuer, E.K. Williams, Philippe Brais, assistant to J. Cartwright as lead prosecutor in the spy trials, and Gerald Fauteux who worked with Williams in assisting the commission<sup>57</sup>. A compromise was reached wherein the Association passed a motion criticizing the use of judges on Royal Commissions and recommended an amendment to the Inquiries Act to guarantee witnesses access to legal counsel.

The October debate was notable in that there was discussion over the role of the judiciary in protecting civil liberties within a system of Parliamentary supremacy. Some members advocated an American-style approach which favoured a constitutional amendment while others preferred the status quo. The debates at the CBA's general meeting coincided with renewed interest on issues of individual rights in the Canadian Bar Review. Compared to previous years, 1946-9 was a high point in the number of articles and commentaries published in the journal on topics relating to civil liberties in Canada (see Appendix A for details). Although the information available on the CBA's 1946 general meeting does not suggest that any particular view dominated the discussion, the creation of a permanent civil liberties section signalled a recognition by leading members of the Canadian legal profession of the increasing role civil liberties issues were playing in post-WWII Canadian jurisprudence.

It was inevitable that the legal profession would become embroiled in a debate over how best to protect individual rights given the potential impact of a Bill of Rights on Canada's political and justice systems. The Canadian Bar Association's refusal officially to condemn the commission emphasized the divisions within the legal profession on the question of how far the state could go in circumventing fundamental freedoms<sup>58</sup>. Similar concerns became an issue for Canada's political leadership when confronted with demands for greater legal protections of fundamental liberties following the commission's investigation.

Mackenzie King and the Liberals were fully aware of the public accusations of abusive tactics. When the House of Commons convened again in July 1947, the new Minister of Justice, J.L. Ilesley, was confronted with the same criticisms that St. Laurent had faced a year earlier. Ilesley defended the government's actions by invoking the concept of Parliamentary supremacy as had many members of the Canadian Bar Association in their October meeting eight months earlier. He argued that, whereas it was the government's duty to uphold civil liberties, some situations made it necessary to override these rights. The Minister declared that "those principles resulting from Magna Carta, from the Petition of Rights, the Bill of Settlement and Habeas Corpus Act, are great and glorious privileges; but they are privileges which can be and which unfortunately sometimes have to be interfered with by the actions of Parliament or actions under the authority of Parliament."<sup>59</sup> Temporarily suspending certain legal rights during a crisis was therefore, from the Liberal's perspective, easily justifiable.

The debates on civil liberties in the House of Commons (which began in March 1946, and continued throughout July 1947) often boiled down to whether or not the situation could be legitimately labelled a 'crisis'. For King and his inner circle, there was no question that the government had every right to employ

extreme methods to deal with a threat to the state. In fact, the proceedings of the Royal Commission on Espionage pale in comparison with the censorship of over 300 newspapers and periodicals during WWII and the internment of thousands of Japanese Canadians. The Official Secrets Act also received a great deal of criticism because of its broad definitions of guilt, but it had been law in England since 1889 and copied almost verbatim into Canadian law in 1890<sup>60</sup>. Despite widespread criticism in the press and amongst civil libertarians, Mackenzie King never did anything that Parliament, in passing the *War Measure Act* and the Official Secrets Act, had not previously deemed legal. The government's actions were thus legal and within the scope of the powers granted by federal legislation.

The conception of Parliamentary supremacy held by King and St. Laurent in the area of civil liberties was not shared by all members of Parliament. Many of those who challenged the federal government's right to circumvent individual rights in order to root out a handful of individuals accused of espionage would become important figures in the post-WWII civil liberties movement. One of the government's detractors was a Liberal Senator from Toronto, Arthur Roebuck, who was highly critical of the commission in the press (see quotation on page one). In August 1946, he petitioned the Minister of Justice on behalf of the wives of two suspects who had been imprisoned for refusing to testify in court against Fred Rose (the suspects feared that they would be pressured once again into providing self-incriminating testimony)<sup>61</sup>. Furthermore, in January 1947, Roebuck advocated the creation of a Canadian Bill of Rights in a speech before a civil rights rally in Toronto. The central premise of his argument was the need to avoid any future Royal Commission on Espionage.<sup>62</sup> The Senator also became involved in various civil liberties groups and chaired several committees, including the Senate Committee on Human Rights and Fundamental Freedoms in 1950 which heard testimony from a number of organizations from across Canada

demanding a Bill of Rights. Roebuck's comments in the press and speeches before various civil liberties associations would ensure that people did not soon forget the government's actions in the espionage affair.

Another federal politician, John Diefenbaker, took the lead for the Conservative party and advocated a repeal of the War Measures Act, a amendment of the Public Inquiries Act to guarantee witnesses access to counsel, and a revision of the Official Secrets Act to remove the presumption of guilt<sup>63</sup>. Furthermore, Diefenbaker echoed Roebuck's cries to entrench individual rights in the constitution. Several other members of Parliament supported the idea of creating a Canadian Bill of Rights, including Davie Fulton of the Conservative Party and M.J. Coldwell, Arthur Smith, Stanley Knowles and Allistair Stewart of the CCF<sup>64</sup>. Diefenbaker (who would lead passage of a Bill of Rights as a federal statute in 1960), cited the commission as the basis for his failed motion to amend the proposed Citizenship Act in 1947. Among other things, the amendment was designed to include in the proposed Act a statement reaffirming Canadians' basic freedoms.<sup>65</sup>

The debates in the House of Commons and the press on civil liberties between 1946-8 were further supported by an emerging international human rights movement centred mainly around the United Nations. Several organizations present during the Roebuck Commission's proceedings (1950) pointed out that Canada was a member of the United Nations whose charter included promoting respect for individual rights as one of the organization's basic aims. A Canadian, John Humphrey, drafted the first version of the Universal Declaration of Human Rights, which was passed by the U.N. General Assembly in 1948. In a 1949 speech before the Institute for International Relations, Humphrey contended that the universal nature of human rights over state sovereignty explained its attraction to most Canadians and pointed out that the Declaration had already been cited by the Ontario Supreme Court<sup>66</sup>. Only two years earlier, Eleanor

Roosevelt had appeared in the Montreal Forum to give a speech on human rights before 8,000 people.<sup>67</sup> Both internationally and domestically, individual rights were becoming an increasingly popular topic of discussion.

The King government ignored demands to reform existing statutes, but the late 1940s were not without some response by the Liberal Party to the rising interest in civil liberties amongst Canadians. The Liberals established a Joint Parliamentary Committees on Human Rights and Fundamental Freedoms in 1947 and 1948, to determine if the federal government had the power to implement a Bill of Rights. A Senate committee, led by Senator Roebuck as noted, was also formed in 1950, to examine the possible contents of a Canadian Bill of Rights. In all three cases, the commissions favoured the creation of a Bill of Rights but not until the federal and provincial governments could agree on an amending formula for the constitution. Although the federal government could have circumvented the provinces and petitioned the Imperial Parliament in England to amend the constitution, as the Roebuck Commission's report stated in 1950, such a move would "have the appearance at least of a loss of sovereignty."<sup>68</sup> By 1951, no major statutory or constitutional changes had been implemented to protect civil liberties. Instead, the creation of two Parliamentary Committees (1947 and 1948) and one Senate Committee (1950) to investigate the viability of a Canadian Bill of Rights, as well as the debates in the House of Commons, the Canadian Bar Association and the press signalled the beginning of an important dialogue in Canada on the future of civil liberties and the government's responsibility in protecting them.

By 1946, the lines had been drawn and the battle over how to protect civil liberties effectively in Canada began in earnest. The Royal Commission on Espionage would not only stimulate an interest in civil

liberties across Canada, but would emphasize how divided federal politics had become on the issue. At the same time, the Canadian judiciary was unaccustomed to confronting the government on civil liberties' violations, and the spy trials would produce no precedent for appealing any suspension of basic liberties by the federal government. The Liberal party would prove unresponsive to demands for a constitutionally entrenched Bill of Rights throughout the 1950s despite several commissions and the increasing number of grassroots level civil liberties associations. Demands for the patriation of the British North America Act and a constitutional amendment would be realized only in 1982, with the Charter of Rights and Freedoms implemented under Pierre Elliot Trudeau and a very different Liberal party.

#### APPENDIX A

The following is a survey of the Canadian Bar Review from its inception in 1923 to 1970. The roman numerals indicate the number of stories appearing in each volume that deal with issues of civil liberties and due process of law. Civil liberties in this context does not simply refer to legal rights, but everything from language, race, gender and other rights which may fall under this category. The numbers in parentheses () indicate stories which specifically use the term civil liberties, civil rights or human rights. They are also separated into different categories. Articles (Ar.) refer to full length articles and Case & Comments (Cc.) is a section of the CBR which is usually a one-tow page commentary on a particular issue.

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Vol. 1: 1923- IV	Vol.25: 1947- V (3,Cc.)
Vol. 2: 1924- 0	Vol.26: 1948- IV
Vol. 3: 1925- I	Vol.27: 1949- V (1,Ar.-1,Cc.)
Vol. 4: 1926- II	Vol.28: 1950- II
Vol. 5: 1927- I	Vol.29: 1951- III (1,Cc.)
Vol. 6: 1928- I	Vol.30: 1952- III
Vol. 7: 1929- IV	Vol.31: 1953- I (1,Ar.)
Vol. 8: 1930- (none)	Vol.32: 1954- II
Vol. 9: 1931- I	Vol.33: 1955- (none)
Vol. 10: 1932- (none)	Vol.34: 1956- I
Vol. 11: 1933- I	Vol.35: 1957- (none)
Vol. 12: 1934- (none)	Vol.36: 1958- (none)
Vol. 13: 1935- (none)	Vol.37: 1959- XII (9,Ar.-3,Cc.)
Vol. 14: 1936- IV	Vol.38: 1960- (none)
Vol. 15: 1937- (none)	Vol.39: 1961- (none)
Vol. 16: 1938- I	Vol.40: 1962- (none)
Vol. 17: 1939- IV	Vol.41: 1963- ?
Vol. 18: 1940- II (1,Cc.)	Vol.42: 1964- ?
Vol. 19: 1941- II*(1,Ar.)	Vol.43: 1965- ?
Vol. 20: 1942- I (1,Ar.)	Vol.44: 1966- (none)
Vol. 21: 1943- III (1,Ar.)	Vol.45: 1967- ?
Vol. 22: 1944- II (1,Ar.-1,Cc.)	Vol.46: 1968- V (3,Ar.-1Cc.)
Vol. 23: 1945- (none)	Vol.47: 1969- ?
Vol. 24: 1946- II	Vol.48: 1970- I (1,Ar.)

A few of things to note about the Canadian Bar Review. In 1923, 1949 and 1954 the dominant issue is race. Some of the key figures involved in the Royal Commission on Espionage were at one time or another executive members of the Canadian Bar Association including E.K. Williams, Judge McRuer and Gerald Fauteux. Women's rights are rarely the subject of written work in the CBR whereas Habeas Corpus is the most common topic. While the journal attempts to be national in scope, it is dominantly an English-Canadian periodical; it is rare to have more than a few articles in French in any one year. The CBR also has several stories on international issues in addition to domestic concern.

1. Senator Arthur Roebuck, Toronto Daily Star, 30 July 1946. Senator Roebuck, a Liberal appointee, was a well-known advocate for civil liberties by the late 1940s. In 1950, he chaired a Senate committee on human rights which dealt with controversial issues such as legal, religious, educational and language rights.

2. Special thanks are extended to Dr. George Egerton who supervised the production of this work at the University of British Columbia and to Tara Roy-DiClimente for her excellent editing skills. Reg Whitaker

and Ross Lambertson also provided invaluable feedback on the final draft of this piece.

3. In this particular context, the term ‘civil liberties’ refers to specific rights. After WWII, both Canadian and American statesmen were primarily concerned with political and civil rights instead of economic and social rights. In this case, the commission questioned those legal rights (under common law) designed to protect people from police harassment and to ensure individuals’ access to a fair trial. These included the right to legal counsel, the right to remain silent and the right to be brought before a magistrate within a reasonable length of time (*habeas corpus*). The other terms often used in *rights* discourse are ‘civil rights’ and ‘human rights.’ These terms are problematic because the former is included in the British North America Act (under Section 92 of the BNA, ‘Property and Civil Rights’ are placed under provincial jurisdiction) and there is some debate as to its true meaning; the latter is a term popularized after the commission completed its investigation. Consequently, in this examination of individual’s legal rights, the term ‘civil liberties’ will be employed to provide greater clarity and consistency.

4. The commission’s official name was the Royal Commission to Investigate Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power. However, it is more commonly referred to as the Royal Commission on Espionage.

5. D.A. Schmeiser, Civil Liberties in Canada (Toronto 1964); Tarnopolsky, Walter Surma, The Canadian Bill of Rights 2<sup>nd</sup> ed. (Toronto 1978).

6. National Archives of Canada [NAC], Mackenzie King Diaries, 5 September 1945.

7. Camp X was a military training facility in Ontario operated jointly by the British and Canadian governments. For details on Gouzenko’s experience at Camp X see: David Stafford, Camp X, (Toronto 1986).

8. It is interesting to note that the Royal Commission on Espionage proved a remarkable career boost for those who participated on behalf of the government. No less than three of the lawyers involved were appointed to the bench of a Supreme Court. E.K. Williams became a justice of the Supreme Court of Manitoba and J.C. Cartwright, the lead crown prosecutor, and Gerald Fauteux, one of the three legal advisors, both went to the Supreme Court of Canada. Chief Justice Chalmers McRuer of the Ontario High Court presided over four of the espionage trials and established several precedents for the following trials. He was soon appointed to the Ontario Court of Appeals as Chief Justice (highest ranking judge in Ontario) and later led the Royal Commission on Civil Rights (1967) in Ontario. David Mundell, the third legal advisor to the commission, served as assistant to the Attorney General of Ontario and was appointed to the McRuer commission on civil rights. All five men were also members of the Canadian Bar Association and had served on the executive board. Finally, the lead RCMP investigator, C.W. Harvison, was later appointed RCMP Commissioner in 1960.

9. These were some of the code names assigned by the Russians. Source: NAC, top-secret memorandum from E.K. Williams to Mackenzie King, Records of the Department of Justice, v.2119, 2121, 5 December 1945.

10. NAC, top-secret memorandum from E.K. Williams to Mackenzie King, Records of the Department of Justice, v.2119, 2121, 5 December 1945.

11. Gouzenko's documents alone were fairly useless as evidence because no specific names were mentioned; everyone had been given a code name. While Gouzenko knew the identities for most of the individuals targeted by the Russians, a court of law required more evidence than the testimony of someone who, as member of the Russian embassy, was technically a co-conspirator. As a result, the commissioners desperately sought confessions.

12. Canada, Statutes of Canada, An Act To Confer Certain Emergency Powers Upon the Governor in Council, R.S. 1952, c. 93.

13. The commissioners provide a description of their procedures in the commission's final report. Refer to: Canada. 1946. Report of the Royal Commission to Investigate the Disclosures of Secret and Confidential Information to Unauthorized Persons, Sections 2 and 11. [Report]

14. Details on the treatment of the suspects may be found in: June Callwood, Emma (Toronto 1988); Gordon Lunan, The Making of a Spy (Toronto 1995); Marcuse and Whitaker, Cold War Canada.

15. NAC, J. King Gordon Papers, v.19, f.15, Report of a Fact-Finding Committee (report produced by the Ottawa Civil Liberties Association), 1946..

16. Report, p.235.

17. NAC, J.L. Cohen Papers, v.45, f. 3156, personal notes of J.L. Cohen taken during trial of Gordon Lunan.

18. Section 5 of the Canada Evidence Act states that a witness' testimony before a court of government tribunal may not be used against them in court if they specifically request and are granted protection under the Act by the presiding magistrate. See: Canada, Statutes of Canada, An Act Respecting Witnesses and Evidence, R.S. 1927, c. 59.

19. NAC, John Diefenbaker Papers, v. 82, p.65334, Letter from David Shugar to John Diefenbaker, 9 March 1946.

20. The Diefenbaker papers contain copies of letters sent from Shugar to St. Laurent complaining about the conditions of his imprisonment and letters to Diefenbaker requesting that Diefenbaker bring his case before the House of Commons. NAC, John Diefenbaker Papers, v. 82, p.65326, Letter from David Shugar to John Diefenbaker, 9 March 1946.

21. W. Eggleston, "Topics of the Day," Dalhousie Review, v.26: 96-98, (April 1946); M.H. Fyfe, "Some Legal Aspects of the Report of the Royal Commission on Espionage," Canadian Bar Review, v.43, no.5, (September 1946); R.W.M. Chitty, "The Spy Inquisition and the Canadian Bar Association," Fortnightly Law Journal, (15 June 1946),17-22.

22. M.H. Fyfe, "Some Legal Aspects of the Report of the Royal Commission on Espionage," Canadian Bar Review 43 (September 1946).

23. Articles that criticized the commission are available in the following non-legal journals: Saturday Night (23 February 1946, 16 February 1946, 23 March 1946, 6 April 1946, 29 June 1946); Canadian Forum 25 (nos.308, 311) ; W. Eggleston, "The Report on the Royal Commission on Espionage," Queen's Quarterly 53 (Autumn 1946):369-378; No Author, "Civil Liberties Abused," Maclean's Magazine (1 April 1946).

24. No Author, "Civil Liberties Abused," Maclean's Magazine (1 April 1946); No Author, "Spy Trials Unjustified," Maclean's Magazine (1 September 1946).

25. The following newspapers were examined and each provided extensive coverage of the Royal Commission on Espionage within a two month period: Evening Citizen (Ottawa), 47 stories; Globe and Mail (Toronto), 44 stories; Vancouver Sun, 44 stories; Winnipeg Free Press, 42 stories; Halifax Herald, 43 stories; Montreal Gazette, 43 stories. 263 stories divided by 6 papers totals 44. As a result, each paper produced forty-seven newspapers between 16 February 1946- 16 April 1946 and a story on the commission appeared, on average, in forty-four of these papers. In respect to the editorial coverage of the commission, combined the papers produced an average of eight editorials each during this time frame. For more details see: <http://www.rcespionage.com/surveys.main.htm>

26. Poll published by: Toronto Daily Star, 16 April 1946.

27. Examples of cases in which the Supreme Court of Canada interpreted the preamble in the BNA Act to include fundamental freedoms include: Roncarelli v. Dupleisse, 102 Supreme Court Reports [SCR] 122-186 (Supreme Court of Canada [S.C.] 1953); Alberta Press Bill, 102 SCR 100-163 SCR (S.C. Canada 1938); Saumur v. Cité of Québec, 86 SCR 299-389 (S.C. Canada 1953).

28. Thomas Berger, Fragile Freedoms: Human Rights and Dissent in Canada, 2<sup>nd</sup> ed. ( Toronto 1982), p.14, 20. Section 93(1) of the BNA Act guaranteed the right to denominational schools throughout the Dominion.

29. As quoted in Berger, p.133. Section 98 is also discussed in Marcuse and Whitaker, p.10, pp.190-1; Schmeiser, pp.217-8.

30. The Supreme Court of Canada ruled the Act to be ultra vires (beyond provincial jurisdiction) because it infringed upon the federal government's jurisdiction over criminal law. Switzman v. Elbling and Attorney-General of Québec (Padlock), 111 SCR [S.C. Canada 1957]. The trial is discussed briefly in the following

works: William Kaplan, State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights, (Toronto 1989); Frank Scott, Essays on the Constitution: Aspects of Canadian Law and Politics, (Toronto 1977).

31. Alberta Social Credit Act, 102 S.C.R. (S.C. Canada 1937).

32. A ruling of ultra vires on provincial legislation means that it does not fall under Section 92 of the BNA Act and is thus within the jurisdiction of the federal government.

33. Alberta Social Credit Act, 102 S.C.R. 115 (S.C. Canada 1937) (Duff); SCR 144-5 (Cannon).

34. Alberta Social Credit Act, 102 S.C.R.146 (S.C. Canada 1937).

35. Alberta Social Credit Act, 102 S.C.R. 107 (S.C. Canada 1937).

36. Unlike the Alberta Social Credit Act, the federal government did not challenge the Padlock Act in the Supreme Court of Canada. The issue of the legality of the Padlock Act was finally brought before the Supreme Court in 1954 by an individual who had been penalized under the Act. The Court ruled the Act ultra vires because it violated the federal government's jurisdiction over criminal law. Tarnopolsky, pp.37-8.

37. Another alternative to Parliament and each province passing their own legislation was to entrench a Bill of Rights within the BNA Act which would apply all levels of government equally. However, as Parliament and the provinces had not agreed to an amending formula to the constitution by 1946, only the Imperial Parliament in England had the power to change the constitution.

38. Rex v. Mazerall, 2 Criminal Reports [CR] 8 (Ontario High Court [OHC] 1946).

39. Rex v. Lunan, 3 CR 210 (Ontario Court of Appeals [OCA] 1947); Boyer v. The King, 7 CR 183 (Québec Court of King's Bench-Appeal Side [Q.C.K.B.-A 1948); Rex v. Smith, 4 CR 108 (O.H.C. 1947).

40. Rex v. Lunan, 3 CR 56 (O.C.A. 1947); Rex v. Rose, 3 CR 284 (Q.C.K.B.-A 1948); Rex v. Gerson, 3 CR 236 (O.C.A. 1946).

41. Rex v. Rose, 3 CR 282 (Québec Court of King's Bench [Q.C.K.B.] 1946); Rex v. Boyer, 7 CR 119 (Q.C.K.B.-A 1948).

42. Rex v. Mazerall, 2 CR 15 (O.H.C. 1946); Rex v. Rose, 3 CR 219 (Q.C.K.B. 1946); Rex v. Smith, 4 CR 101 (O.H.C. 1947); Rex v. Boyer, 7 CR 178 Q.C.K.B.-A 1948).

43. Rex v. Mazerall, 2 CR 9 (O.H.C. 1946); Rex v. Adams, 2 CR 53 (O.H.C 1946).

44. Judge Robertson of the Ontario Appeals Court commented in Criminal Reports that many of the issues brought forth during the appeal of Gordon Lunan's guilty verdict were without precedence. Rex v. Lunan, 3 CR 202 (O.C.A. 1947).

45. Rex v. Mazerall, 2 CR 11 (O.H.C. 1946).

46. Rex v. Mazerall, 2 CR 276 (O.H.C. 1946).

47. Rex v. Rose, 2 CR 109 (Q.C.K.B. 1946).

48. Rex v. Boyer, 7 CR 295 (Q.C.K.B. 1948).

49. Tarnopolsky, p.94.

50. Tarnopolsky, pp.109-110.

51. Tarnopolsky, p.21.

52. NAC, Arthur Roebuck Papers, v. 4, f.11, letter from Arthur Roebuck to Louis St. Laurent, 1 August 1946.

53. C.W. Harvison, The Horsemen (Toronto 1967), p.165, quoting an unnamed juror in the Fred Rose trial.

54. There would be one more 'spy trial' three years later in April 1949, following the capture of Sam Carr who had escaped to New York and avoided capture by the RCMP during the initial raids on 15 February 1946. Carr was also accused of violating the Official Secrets Act in the commission's report and was sentenced to six years in jail.

55. Montgomery Hyde, The Atom Bomb Spies (Don Mills 1980), quoting Sir Alexander Clutterbruck, British High Commissioner, who commented on the commission on 22 August 1946.

56. By this time Fyfe was a member of the newly-formed Ottawa Civil Liberties Association; Chitty had been chair of the CBA's temporary civil liberties committee for 1944-5.

57. Samuel Freedman, "Twenty-Eighth Annual Meeting of the CBA," Canadian Bar Review (October 1946).

58. In addition to the Canadian Bar Association's 1946 meeting, the annual meetings in 1944, 1945 and 1947 also discussed concerns over civil liberties' violations by the federal government during and after the war. It was in the 1944 meeting when the temporary civil liberties section of the Association, chaired by Chitty, recommended that the Association take a more active stance in lobbying the government for a Bill of Rights. See: Gustav Monette, "Report of the [CBA] Committee on Civil Liberties," Canadian Bar Review 22 (August-September 1944).

59. NAC, John Diefenbaker Papers, series 3, v.82, p.65434, copy of St. Laurent speech before House of Commons, 1947.

60. Section 3 (1) of the Official Secrets Act states the following as the basis for determining someone guilty of violating the Act: “If any person for any purpose prejudicial to the safety or interest of the State, approaches, inspects, passes over, or is in the neighborhood of, or enters any prohibited place; he shall be guilty of an offence under this Act.” The language is broad enough that someone could be found guilty if they were caught at the same cocktail party with another person convicted of spying against the state. Source: Canada, Statutes of Canada, An Act Respecting Official Secrets, R.S.C. 1939, c.49.

61. NAC, Arthur Roebuck Papers, v.4, f.11, letter from Arthur Roebuck to Louis St. Laurent, 30 July 1946.

62. NAC, Arthur Roebuck Papers, v.4, f.11, speech by Arthur Roebuck to civil rights rally in Toronto, 27 January 1947.

63. Canada. Hansard Parliamentary Debates, 1<sup>st</sup> ser., v.4 (1947), col.3187.

64. Fulton, Smith, Stewart and Coldwell express their support for a Bill of Rights in the 1946 debate on the Citizenship Act ( Canada. Hansard Parliamentary Debates, 1<sup>st</sup> ser., v.2 [1946], cols.1306-44.). Church, Knowles and Tucker add their support in the 1947 debate on forming a Joint Parliamentary Committee to investigate the creation of a Canadian Bill of Rights (Canada. Hansard Parliamentary Debates, 1<sup>st</sup> ser., v. 3 [1947], cols.3179-3205.).

65. Diefenbaker’s proposed amendment was to include a Bill of Rights in the Citizenship Act with the following points (abbreviated): 1) freedom of religion, speech and assembly assured; 2) Habeas Corpus can only be suspended by Parliament; 3) no individual can be brought before a government tribunal without access to counsel or other constitutional safeguards. Canada, Hansard Parliamentary Debates, 1<sup>st</sup> ser., v. 11 (1947), cols.1214-5.

66. NAC, J. King Gordon Papers, v.23, f.15, John Humphrey’s untitled speech presented at the annual dinner of the Canadian Institute for International Affairs, 4 June 1949.

67. The speech was given on 8 January 1947. A.J. Hobbins, “Eleanor Roosevelt, John Humphrey and the Canadian Opposition to the Declaration of Human Rights: looking back on the 50<sup>th</sup> Anniversary of UNDHR.” International Journal (Spring 1998): 330.

68. Canada. 1950. Report on the Proceedings of the Special Committee on Human Rights and Fundamental Freedoms, vols. 1-8 + Final Report.