

"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.

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>3</sup> An analysis of the debates surrounding the

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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*

commission's investigation will reveal that an organized civil liberties movement had emerged in Canada by 1946. Furthermore, 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 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>4</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. The emergence of a reinvigorated civil liberties movement in Canada manifested itself in the form of new civil liberties organizations and widespread criticisms in the press of the government's abuses. Above all, the most significant development 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 public backlash against the Royal Commission on Espionage 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 the civil liberties movement in post-WWII Canada and the role played by the Royal Commission on Espionage in its development.

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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>5</sup> Eventually Gouzenko was picked up after a couple of days of running around Ottawa seeking shelter and was secretly interviewed by the RCMP. In the following weeks, Gouzenko revealed the

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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.

<sup>4</sup> Schmeiser, D.A., Civil Liberties in Canada, Toronto: Oxford University Press, 1964; Tarnopolsky, Walter Surma, The Canadian Bill of Rights, 2<sup>nd</sup> ed. Toronto: McClelland and Stewart Limited, 1978.

<sup>5</sup> National Archives of Canada [NAC], Mackenzie King Diaries, 5 September 1945.

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>6</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>7</sup> He believed the state would be unable to convict the spies 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>8</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>9</sup>

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<sup>6</sup> 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.

<sup>7</sup> These were some of the code names assigned by the Russians for their spies.  
Source: NAC, Records of the Department of Justice, RG 13, Vol.2119, 2121.

<sup>8</sup> NAC, top-secret memorandum from E.K. Williams to Mackenzie King on 5 December 1945, Records of the Department of Justice, RG 13, Vol.2119, 2121.

<sup>9</sup> 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 spies, 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

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. Iles 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).<sup>10</sup> 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>11</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 spies were held without charges and with no access to family or counsel; in some cases the prisoners 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>12</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

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confessions.

<sup>10</sup> Marcuse, Gary and Whitaker, Reg, Cold War Canada: The Making of a National Insecurity State: 1945-1957, Toronto: University of Toronto Press, 1994, pp.30-1.

<sup>11</sup> Canada, Statutes of Canada, *An Act To Confer Certain Emergency Powers Upon the Governor in Council*, R.S. 1952, c. 93.

<sup>12</sup> 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]

before the commission, they were returned to their cell until they became more compliant.<sup>13</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 prisoners' confusion concerning their legal rights as they were refused access to counsel, it is not surprising that several people soon confessed. The prisoners 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>14</sup>

As Woikin's behaviour indicates, the suspects were held under extremely stressful conditions. Throughout their imprisonment, the prisoners were refused access to families and wives and their

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<sup>13</sup> Details on the treatment of the suspects may be found in: Callwood, June, Emma, Toronto: University of Toronto Press, 1988; Lunan, Gordon, The Making of a Spy, Toronto: Robert Davies Publishing, 1995; Marcuse, Gary and Whitaker, Reg, Cold War Canada: The Making of a National Insecurity State: 1945-1957, Toronto: University of Toronto Press, 1994.

<sup>14</sup> NAC, Report of a Fact-Finding Committee (report produced by the Ottawa Civil Liberties Association in 1946), J. King Gordon Papers, MG 30, C241, Vol.19/15.

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>15</sup> Another prisoner, 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>16</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>17</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 prisoners, 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>18</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

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<sup>15</sup> Report, p.235.

<sup>16</sup> NAC, personal notes of J.L. Cohen taken during trial of Gordon Lunan, J.L. Cohen Papers, MG 30 A, Vol.45, file 3156.

<sup>17</sup> 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.

<sup>18</sup> NAC, Letter from David Shugar to John Diefenbaker on 9 March 1946, John Diefenbaker Papers, Vol. 82, p.65334.

Canadian citizen, I have been completely stripped of all my rights before the law.”<sup>19</sup> As Shugar and his fellow prisoners were held incommunicado, they had no idea that the government had passed an Order-in-Council legalizing their detention.

The press became increasingly critical of the government’s tactics following the publication of the first interim report on 2 March 1946, which revealed that Shugar and eight other suspects remained interned in the Rockcliffe barracks.<sup>20</sup> With the realization that the government continued to hold nine people without access to family and counsel, the press quickly focussed on the issue of the suspects’ individual rights. A study of six English daily papers (*Evening Citizen*, *Halifax Herald*, *Montreal Gazette*, *Winnipeg Free Press*, *Globe and Mail* and the *Vancouver Sun*) and two French dailies (*Le Devoir* and *Action Catholique*) reveals a divided reaction amongst the press to the commission’s tactics.

The editor of the *Winnipeg Free Press*, George Ferguson, was particularly disgusted by the commission but conceded that the government was forced to act under extreme circumstances. Despite his sympathy with the government’s situation, however, Ferguson contended that people disliked the thought of citizens held incommunicado, even if they represented a threat to the state.<sup>21</sup> He suggested that, as a result of the commission’s extraordinary tactics, the press had become more concerned with the commission’s actions rather than the crime itself. This became more pronounced after the second interim report when it was revealed that the commission continued to hold five people who had not been charged or been given access to counsel for over a month.<sup>22</sup> As a writer for *Saturday Night* proposed, “public interest, which should have been vividly focussed on a single point, was diverted from the central drama and led off in another direction, so that while half the audience was attempting to follow the spy narrative, the other half was trying to track down the civil rights of the suspect.”<sup>23</sup>

Harold Pritchett, a member of the Vancouver Civil Liberties Union and writing for the *Vancouver Sun*, voiced concerns over the powers granted to the commission under PC6444 and argued that “it [PC6444] is more offensive to the Canadian sense of justice than is necessary, and is a greater potential source of evil than its creators likely considered.”<sup>24</sup> Even the normally conservative *Globe and Mail* felt

<sup>19</sup> NAC, Letter from David Shugar to John Diefenbaker on 9 March 1946, John Diefenbaker Papers, Vol. 82, p.65326.

<sup>20</sup> Prime Minister King pressured the commission to release several interim reports on their progress after continued criticism in the press of the government’s secrecy. Interim reports were released on 2 March, 14 March and 28 March 1946.

<sup>21</sup> Ferguson, George, “The Use of Arbitrary Power,” *Winnipeg Free Press*. 11 March 1946.

<sup>22</sup> Ferguson, George, “The Use of Arbitrary Power,” *Winnipeg Free Press*, 11 March 1946.

<sup>23</sup> Ross, Margaret, “The Great Canadian Spy Scare Isn’t Very Good Hitchcock,” *Saturday Night*, (6 April 1946):10.

<sup>24</sup> Harold Pritchett, “Dangerous Precedent,” *Vancouver Sun*, 19 March 1946.

the government had overreached its authority. In reaction to the commission's first interim report, A.A. McIntosh wrote in an editorial:

“Here the suspects have been imprisoned without charge, held incommunicado for long periods pending their examination, under extreme powers of the *War Measures Act* and its peacetime substitution the *National Emergency Transition Powers Act*... It might be argued that without the secrecy preserved in Ottawa there would have been no discovery of all who may be involved. Of itself, so important an objective does not excuse the adoption of so vicious an instrument [commission]...All the rules of freedom, the basic liberties of the individual, must, we all know, be subordinate on occasion to the safety of the state. But there is nothing in the acceptance of this which licenses the Government to suspend all the judicial safeguards in order to facilitate police work or make easier the conduct of an official inquiry.”<sup>25</sup>

Not every editor perceived the commission's actions as an unnecessary violation of individual rights. The editor of the *Montreal Gazette* wrote that “the fact that we were so co-operative to let these persons into our confidence is no reason why we should be so cooperative as to aid them in concealing their tracks. As it is, the investigation will not be easy for us, we should not, by untimely constitutional pedantry, make it easy for those we pursue.”<sup>26</sup> The editor of the *Halifax Herald* similarly believed that the circumstances of the case justified the commission's methods, and no less than fifteen editorials appeared between February and April in the *Halifax Herald* criticizing members of the press for raising the issue of civil liberties.

Between 16 February 1946, and 16 April 1946, press coverage of the commission and the spy trials was extensive. An analysis of six English language newspapers suggests that each paper carried a story on the commission almost every day between 16 February- 16 April.<sup>27</sup> A significant percentage of these stories appeared on the front page of the newspaper (on average, thirty-six out of forty-seven newspapers printed during this time period featured a headline on the espionage affair). The issue of the suspects' civil liberties was a common theme, particularly after 2 March 1946 when the first interim report was released by the commission. Articles included interviews by family members attempting to contact the suspects interned in the Rockliff barracks, statements by lawyers who could not speak with their clients, and failed attempts by relatives of Matt Nightingale and Fred Poland to ask the courts to issue writs of

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<sup>25</sup> McIntosh, A.A., “Totalitarian Procedure,” *Globe and Mail* (Toronto), 6 March 1946.

<sup>26</sup> No Author, “Espionage Investigation,” *Montreal Gazette*, 16 March 1946.

<sup>27</sup> Averages are determined as follows: *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.

*habeas corpus* to force the commission to release its prisoners.

Individual commentary was no less numerous. All six English papers printed between 10-15 different editorials on the espionage affair alone within a two-month period. While editors for the *Montreal Gazette* and *Halifax Herald* were quick to support the government's actions, editors for the *Winnipeg Free Press*, *Vancouver Sun*, *Evening Citizen* and the *Globe and Mail* were critical of the commission's extreme tactics. Of the forty-seven papers published between 16 February and 16 April by each paper, an average of eight different editorials specifically discussed the issue of civil liberties. In contrast, the espionage affair received limited attention in the French-language papers. *Le Devoir* provided some coverage of the commission and the spy trials, but only fifteen of forty-seven papers carried headlines, and the question of the suspects' individual rights was rarely mentioned. For another popular French language newspaper, *Action Catholique*, the espionage affair and the civil liberties abuses were a non-issue. The only story that dealt with the commission was an editorial that pointed to the defections as an example of French-Canadian moral superiority (all of the spies were anglophones).<sup>28</sup>

Despite the apparent disinterest by French-language papers in discussing the issue of the spies' civil liberties, the debate spawned in the English papers was reproduced in popular journals and magazines. Several legal journals printed articles that were critical of 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>29</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

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<sup>28</sup> The only person writing for *Action Catholique* who chose to comment on the espionage affair was George-Henri Dangneau. He suggested that the following lesson could be learned from the events surrounding the disclosure of top-secret information by civil servants in Ottawa: "...on peut tout de même constater que jusqu'ici aucun compatriote de notre langue n'est tombé dans les filets de l'attaché militaire russe...pourquoi, à Ottawa, s'acharne-t-on à l'aisser de coté des Canadiens français, qui ne parlent peut-être pas l'anglais avec l'accent d'Oxford ou de Cambridge, mais qui en plus d'avoir du talent, jouissent d'un équilibre moral et mental qui prévient toute espèce de compromissions, même en pensée? La leçon profitera-t-elle?" Dangneau, George-Henri, (untitled editorial), *Action Catholique* (Québec) 5 March 1946.

<sup>29</sup> Eggleston, W., "Topics of the Day," *Dalhousie Review*, Vol.26: 96-98, (April 1946); Fyfe, M.H., "Some Legal Aspects of the Report of the Royal Commission on Espionage," *Canadian Bar Review*, Vol.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.

under the *Inquiries Act* in a way that Parliament ever intended.”<sup>30</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>31</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>32</sup>

The press coverage clearly demonstrates that, at the very least, the commission was 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>33</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*

<sup>30</sup> Fyfe, M.H., "Some Legal Aspects of the Report of the Royal Commission on Espionage," *Canadian Bar Review* 43 (September 1946).

<sup>31</sup> 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) ; Eggleston, W., "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).

<sup>32</sup> No Author, "Civil Liberties Abused," *Maclean’s Magazine* (1 April 1946); No Author, "Spy Trials Unjustified," *Maclean’s Magazine* (1 September 1946).

<sup>33</sup> Poll published by: *Toronto Daily Star*, 16 April 1946.

Act.<sup>34</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 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 Social Credit 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>35</sup> The Supreme Court unanimously concluded that the legislation was *ultra vires* and the Act was held invalid.<sup>36</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>37</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>38</sup> The case further demonstrated the limitations of the

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<sup>34</sup> Examples of cases in which the Supreme Court of Canada interpreted the preamble in the BNA Act to include fundamental freedoms include: *Roncarelli v. Duplessis*, 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).

<sup>35</sup> *Alberta Social Credit Act*, 102 S.C.R. (S.C. Canada 1937).

<sup>36</sup> 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.

<sup>37</sup> *Alberta Social Credit Act*, 102 S.C.R. 115 (S.C. Canada 1937) (Duff); SCR 144-5 (Cannon).

<sup>38</sup> *Alberta Social Credit Act*, 102 S.C.R.146 (S.C. Canada 1937).

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>39</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>40</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>41</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

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<sup>39</sup> *Alberta Social Credit Act*, 102 S.C.R. 107 (S.C. Canada 1937).

<sup>40</sup> Tarnopolsky, pp.37-8.

<sup>41</sup> 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.

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>42</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>43</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>44</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>45</sup> There were also several efforts to undermine the indictment itself because it was too vague.<sup>46</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>47</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

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<sup>42</sup> *Rex v. Mazerall*, 2 Criminal Reports [CR] 8 (Ontario High Court [OHC] 1946).

<sup>43</sup> *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).

<sup>44</sup> *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).

<sup>45</sup> *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).

<sup>46</sup> *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).

<sup>47</sup> *Rex v. Mazerall*, 2 CR 9 (O.H.C. 1946); *Rex v. Adams*, 2 CR 53 (O.H.C 1946).

ended in favour of the prosecution.<sup>48</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>49</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>50</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>51</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>52</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

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<sup>48</sup> 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).

<sup>49</sup> *Rex v. Mazerall*, 2 CR 11 (O.H.C. 1946).

<sup>50</sup> *Rex v. Mazerall*, 2 CR 276 (O.H.C. 1946).

<sup>51</sup> *Rex v. Rose*, 2 CR 109 (Q.C.K.B. 1946).

<sup>52</sup> *Rex v. Boyer*, 7 CR 295 (Q.C.K.B. 1948).

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>53</sup> Unlike Britain, however, the Canadian Parliament was limited by the provisions of the British North America 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>54</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>55</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 and David Shugar were so disconcerted with the manner in which their confessions were elicited 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

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<sup>53</sup> Tarnopolsky, p.94.

<sup>54</sup> Tarnopolsky, pp.109-110.

<sup>55</sup> Tarnopolsky, p.21.

consideration.”<sup>56</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>57</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>58</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>59</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 who were both members of civil liberties associations.

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<sup>56</sup> NAC, letter from Arthur Roebuck to Louis St.Laurent dated 1 August 1946, Arthur Roebuck Papers, MC 32 C68, Vol. 4/11.

<sup>57</sup> Harvison, C.W., The Horsemen, Toronto: McClelland and Steward, 1967, p.165, quoting an unnamed juror in the Fred Rose trial.

<sup>58</sup> 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.

<sup>59</sup> Hyde, Montgomery, The Atom Bomb Spies, Don Mills: Harford Production Ltd., 1980, quoting Sir Alexander Utterbruck, British High Commissioner, who commented on the commission on 22 August 1946.

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>60</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 to officially 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>61</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

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<sup>60</sup> Freedman, Samuel, "Twenty-Eighth Annual Meeting of the CBA," *Canadian Bar Review* (October 1946).

<sup>61</sup>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: Monette, Gustav, "Report of the [CBA] Committee on Civil Liberties," *Canadian Bar Review* 22 (August-September 1944).

can be and which unfortunately sometimes have to be interfered with by the actions of Parliament or actions under the authority of Parliament.<sup>62</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>63</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.

King and St. Laurent's conception of Parliamentary supremacy 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 spies 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>64</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>65</sup> The Senator also became involved in various civil liberties groups and chaired several

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<sup>62</sup> Canada. *Hansard Parliamentary Debates*, 1<sup>st</sup> ser., vol. 4 (1947), cols.3214-6.

<sup>63</sup> 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.

<sup>64</sup> NAC, letter from Arthur Roebuck to Louis St.Laurent on 30 July 1946, Arthur Roebuck Papers, MG 32 C68, Vol.4/11.

<sup>65</sup> NAC, speech by Arthur Roebuck to civil rights rally in Toronto on 27 January 1947, Arthur Roebuck Papers, MG 32 C68, Vol.4/11.

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>66</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>67</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>68</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>69</sup> Only two years earlier, Eleanor

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<sup>66</sup> Canada. *Hansard Parliamentary Debates*, 1<sup>st</sup> ser., vol.4 (1947), col.3187.

<sup>67</sup> 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., vol.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., vol. 3 [1947], cols.3179-3205.).

<sup>68</sup> 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., vol. 11 (1947), cols.1214-5.

<sup>69</sup> NAC, Humphrey, John, untitled speech presented at the annual dinner of the Canadian Institute for International Affairs on 4 June 1949, J. King Gordon Papers, Vol.23/15.

Roosevelt had appeared in the Montreal Forum to give a speech on human rights before 8,000 people.<sup>70</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>71</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.

While members of the Canadian Bar Association and Parliament debated the question of how to best protect Canadians' civil liberties, several organizations throughout Canada were active in lobbying both institutions to support the idea of developing greater safeguards against state abuse of individual rights. These groups included the Canadian Civil Liberties Union's (C.C.L.U.) Vancouver and Winnipeg branches, the Toronto Civil Liberties Association, the Winnipeg Civil Liberties Association, the Montreal Civil Liberties Association and the Montreal Civil Liberties Union.<sup>72</sup> The membership of these groups

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<sup>70</sup> The speech was given on 8 January 1947. Hobbins, A.J. "Eleanor Roosevelt, John Humphrey and the Canadian Opposition to the Declaration of Human Rights: looking back on the 50<sup>th</sup> Anniversary of UNDRH." *International Journal* (Spring 1998): 330.

<sup>71</sup> Canada. 1950. *Report on the Proceedings of the Special Committee on Human Rights and Fundamental Freedoms*, vols. 1-8 + Final Report.

<sup>72</sup> Records, although limited, are available on all seven civil liberties groups. Ramsay Cook provides an extensive analysis of the Winnipeg Civil Liberties Association (CLA) in his 1955 M.A. thesis: Cook, Ramsay, "Canadian Liberalism in Wartime: A Study of the Defence of Canada Regulations and Some Canadian Attitude to Civil Liberties in Wartime." (MA Thesis: Queen's University, 1955). He refers to organizations in Toronto, Montreal and Vancouver; the latter two were members of the Canadian Civil Liberties Union (CCLU). There are also letters dated between 1945-9 from the Winnipeg C.L.A., Toronto C.L.U. and Toronto C.L.A. which are available in the Diefenbaker Papers (NAC, MG 26, vols.9, 10 and 82). The Montreal C.L.A. is on record as having made a presentation before the 1950 Senate Committee on Human Rights and Fundamental Freedoms

consisted mainly of journalists, politicians, academics, lawyers, and church ministers.

While it is true that other associations, including the Canadian Defence Labour League and the National Committee for Democratic Rights, championed the cause of civil liberties at this time, they were primarily concerned with labour issues such as wages and working conditions.<sup>73</sup> Larry Hannant argues this point in his history of security screening in the civil service and further suggests that most civil liberties groups of the post-WWII period were perceived by the Canadian public as communist fronts. The stereotype was influenced by the fact that labour groups often used phrases such as ‘individual rights’ and ‘civil liberties’ to justify demands for improved working conditions.<sup>74</sup> These organizations were, in turn, labeled communist fronts partly as a result of several high-profile arrests of labour leaders, including Pat Sullivan, who publicly admitted to holding communist beliefs. There were also several well-publicized cases during the war in which civil liberties groups in Vancouver and Toronto provided financial support to people accused under the Defence of Canada Regulations of helping communist subversives.<sup>75</sup>

The common association of communism with civil liberties created several obstacles for the six groups mentioned earlier in their attempts to gain widespread public support. A writer for the *Canadian Forum* suggested in 1946, that “because civil liberties have mistakenly and vaguely become identified with the Left in the public mind, those of conservative outlook have become increasingly insensitive to the need for their protection.”<sup>76</sup> In reaction to this stereotype, the branches of the Canadian Civil Liberties Union and various Civil Liberties Associations were mostly staffed by social democrats, left-liberals and religious progressives who shunned communist sympathizers. Many of these groups had the active support of such well known figures as Frank Scott (law professor at McGill University), Andrew Brewin (Toronto barrister), A.R.M. Lower (history professor at Queen’s University), C.B. Macpherson (political scientists at the University of Toronto), Alistair Stewart (MP from Manitoba) and B.K. Sandwell (editor of *Saturday Night*).

Most civil liberties organizations advocated the creation of a Canadian Bill of Rights. When representatives from the Ottawa, Montréal and Toronto associations met to discuss common strategies in December 1946, they all expressed a desire to create a constitutionally entrenched Bill of Rights.<sup>77</sup> Between 1944-8, these groups attempted to gain public support by publishing advertisements in

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(Roebuck commission).

<sup>73</sup> Hannant, pp.221-2.

<sup>74</sup> Hannant, pp.220-3.

<sup>75</sup> Cook, pp.220-3.

<sup>76</sup> McDonald, Donald, “The Deepening Crisis in Civil Liberties,” *Canadian Forum* 308 (June 1946): 131.

<sup>77</sup> NAC, copy of agenda for meeting of civil liberties organizations on 28 December 1946, J. King Gordon Papers, MG 30, C241, vol.19/15.

newspapers and writing letters to Members of Parliament demanding an entrenched Bill of Rights.<sup>78</sup> The Winnipeg and Vancouver groups were unrepresented in the meeting, but they were also active in promoting this cause to the Canadian people in local newspapers and, in the case of Arthur Lower in Winnipeg, publishing a booklet on civil liberties for the Canadian Historical Association.<sup>79</sup> In promoting a Bill of Rights, these organizations commonly referred to the internment of Japanese Canadians, the mistreatment of Jehovah's Witnesses in Québec, censorship during the war, racial discrimination and the Padlock law in Québec. The desire for a Canadian Bill of Rights was best stated in the following passage taken from a pamphlet published by the Winnipeg Civil Liberties Association in 1946:

“Recent events in Canada and throughout the world have demonstrated that it is desirable that such rights be stated with the utmost clarity in the written Constitution of Canada, namely the BNA Act, in order that all men and women in Canada shall know them and shall feel that their rights are secure from interference by legislative or administrative action, through the protection of the Court.”<sup>80</sup>

The effectiveness of these organizations in protecting civil liberties and lobbying for a Bill of Rights is difficult to gauge. Their members were active in promoting the cause of freedom throughout the press. Frank Scott published extensively in the *Canadian Forum*, B.K. Sandwell was the editor of *Saturday Night* and the *Winnipeg Free Press* made its editorial pages available to A.R.M. Lower of the Winnipeg Civil Liberties Association. They also produced pamphlets and assembled conferences to spread ideas and attract public attention.<sup>81</sup> While the demographics of their membership suggested little more than a group of intellectual elites, these organizations would emerge from the war intact, organized and prepared to confront the government on any abuse of individual rights.

When Prime Minister King implemented the Royal Commission on Espionage in February 1946, the civil liberties movement was still in its infancy. The movement, however, would receive an important

<sup>78</sup> Correspondence and advertisements by various civil liberties groups available in: NAC, Louis St. Laurent Papers, MG 26L, vol.9, 99; NAC, John Diefenbaker Papers, MG 26 vol.9, 10; NAC, Records of the Privy Council Office, RG 2, vol.162, H-11.

<sup>79</sup> Materiel from the Winnipeg and Vancouver civil liberties groups available in: NAC, Arthur Roebuck Papers, MG 23 C68 vol. 1/15; NAC, John Diefenbaker Papers, MG 26 vol.9, 10. Ramsay Cook also provides a detailed examination of the Winnipeg Civil Liberties Association and the activities of Arthur Lower in: Cook, Ramsay. “Canadian Liberalism in Wartime: A Study of the Defence of Canada Regulations and Some Canadian Attitudes towards Civil Liberties in Wartime.” (M.A.. Thesis. Queen’s University, 1955).

<sup>80</sup> NAC, letter from Winnipeg Civil Liberties Association to John Diefenbaker (no date), John Diefenbaker Papers, MG 26, vol. 9, pp. 6877-80.

<sup>81</sup> Hannant, p.215.

stimulus as a result of the popular outcry against the decision to hold people for several weeks without charge and lacking access to family or counsel. The reaction to the commission also provides a good example of the ideological obstacles that civil libertarians needed to overcome as well as the developing attitude of the legal profession and political elite towards the idea of expanding the role of the judiciary in order to better protect individual rights from abuse by the state.

The release of the commission's remaining prisoners on 29 March 1946, was followed by the completion of the commission's final report on 26 June 1946. With so much focus on the issue of civil liberties in the press, it is not surprising that the commissioners used the final report to defend the tactics employed during their investigation. Responding to the accusation that the commission circumvented the witnesses' right against self-incrimination by pressuring them into testifying, Taschereau and Kellock argued that the right to remain silent was based on the belief that fear and coercion should not motivate confessions.<sup>82</sup> Although holding suspects without access to lawyers and family for over five weeks was certainly suggestive of fear and coercive tactics, the commissioners defended their position by quoting statute law. In this case, the *Canada Evidence Act*, was designed to protect witnesses from having their testimony used against them in court, but it was only applicable to individuals accused of a crime. The commissioners claimed they never charged anyone with a crime, but were simply conducting an inquiry. Hence, they did not have to inform people of this particular Act. They concluded that "in not warning the witnesses, we have then followed the only legal course open to us."<sup>83</sup>

The civil liberties groups operating at this time were not convinced by the arguments of these two Supreme Court justices. The files of the Department of Justice and External Affairs offer a rich source of documentation on the Royal Commission on Espionage, including correspondence from various civil liberties organizations. These files include resolutions passed by the Ottawa Civil Liberties Association and the Manitoba Civil Liberties Association in July, 1946, condemning the distribution of the commission's final report because it could prejudice upcoming trials. The report commented extensively on the character of each suspect and suggested they were predominantly motivated by an ideological belief in communism to betray their country. The commissioners were determined to discern what motivated the suspects to spy and the report detailed every aspect of their political beliefs. Instead of simply describing the activities of each individual witness, however, the commissioners chose to write a chapter on each suspect, at the end of which they concluded that each person was 'guilty of violating the *Official Secrets Act*.' This led both civil liberties organizations to argue that the government, in distributing the report as an official document, legitimized the accusations of guilt contained in the report despite the fact that they had no legal substance (Royal Commissions can not convict criminals).<sup>84</sup>

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<sup>82</sup> Report, pp.235.

<sup>83</sup> Report, pp.672-3.

<sup>84</sup> For correspondence by civil liberties groups to Parliament see: NAC, Records of the Department of External Affairs, RG 25, A12, vol.2081, files AR 13\13; NAC, Records of the Department of Justice, RG 13, vol.2119, 2121; NAC, John Diefenbaker Papers, MG 26 M, ser. 3, vol.82, p.65442.

Attempts by civil liberties groups to condemn the government's tactics were likely hampered by the fact that the accused spies were perceived as communist sympathizers. Anti-communist sentiment was popular in Canada after WWII. According to historians Margaret Conrad and Alvin Finkel, "communists and ex-communists faced constant surveillance and harassment."<sup>85</sup> In the case of labour unions, Finkel and Conrad argue that "communist sympathizers who had been democratically chosen to head unions were denounced so stridently in the media and by their non-communist union opponents that the state confidently persecuted them and, in some cases, destroyed their union."<sup>86</sup> It is no surprise, therefore, that many civil liberties associations openly shunned communist membership. Two journals, *Saturday Night* and *Canadian Forum*, were critical of civil liberties abuses by the state during the war and both editors, B.K. Sandwell (*Saturday Night*) and Eleanor Godfrey (*Canadian Forum*), were active members of civil liberties groups. Both journals had become a forum for members of various civil liberties associations, including university professors F.R. Scott, F.H. Underhill and A.R.M. Lower, lawyers such as J.L. Cohen and R.M. Chitty, and a future member of the United Nations Human Rights division, J. King Gordon. Most of these people considered themselves social democrats and eschewed communism. This ideological division created an interesting problem for civil libertarians who found themselves defending the rights of communists accused of spying for the Soviet Union.

A quick analysis of both journals' coverage of the Gouzenko affair suggests that the suspects' communist affiliations affected the reaction from civil libertarians to the Royal Commission on Espionage. Between April 1946, and March 1948, only four articles on the espionage affair appeared in the *Canadian Forum*. Two of the articles focussed on defending the accused's ideological beliefs instead of criticising the commission's tactics. Conversely, in the other two articles, the authors focussed on denouncing the use of preventative detention as a form of administrative (bureaucratic) over judicial internment.<sup>87</sup> These pieces represented the *Canadian Forum's* entire coverage of Gouzenko's defection and the commission. For a periodical that consistently defended civil liberties during the war, the *Canadian Forum* gave surprisingly little attention to the government's most extensive abuse of individual rights in the post-war period.

*Saturday Night*, a weekly periodical as distinct from a monthly like the *Canadian Forum*, provided more coverage of the commission. Between February 1946, and March 1948, there were seven stories that dealt with the espionage affair. The two most prominent civil libertarians writing for *Saturday Night* were B.K. Sandwell, the editor and member of the Toronto Civil Liberties Association, and Wilfrid Eggleston, a member of the Ottawa Civil Liberties Association. Both writers expressed instant opposition to the commission's approach. They were especially critical of the secrecy surrounding the investigation, the lack of counsel and the use of judges on a Royal Commission investigating a crime. Sandwell and Eggleston's comments in *Saturday Night* demonstrated the dichotomy between a desire to avoid the

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<sup>85</sup> Conrad, Margaret and Finkel, Alvin, History of the Canadian Peoples: 1867 to the Present 2<sup>nd</sup> edition, Toronto: Copp Clark Ltd., 1998, p.377.

<sup>86</sup> Conrad and Finkel, p.377.

<sup>87</sup> Phillips, Lester H., "Preventative Detention in Canada," *Canadian Forum* (April 1946); MacDonald, Donald, "The Deepening Crisis in Civil Liberties," *Canadian Forum* (March 1946).

perception that they were sympathetic to communist spies, while simultaneously condemning the government's tactics. Eggleston's views were summarized in the following passage:

“...had any government failed to move swiftly and courageously in any matter which it sincerely believed threatened the security of Canada... it would have been far more reprehensible if it erred on the other side... [but] surely the security of the state against foreign espionage can be established and maintained by means which do not strike such a blow at the traditional liberties of the individual.”<sup>88</sup>

Eggleston and Sandwell sought to criticize the government's tactics while applauding its hard stance against communism. It is also interesting to note that many of the central figures of the civil liberties movement at this time, among them Frank Scott and Frank Underhill, rarely commented on the espionage affair, preferring instead to comment on the federal government's decision to intern Japanese Canadians.<sup>89</sup>

It is difficult to avoid the conclusion that the spies' communist affiliations forced many of Canada's leading civil libertarians to hesitate in their attack on the Royal Commission on Espionage. This highlights one of the central obstacles of the civil liberties movement in post-WWII Canada. The division between communists and social democrats created several problems in uniting the movement and hampered the attempts of civil liberties groups which may have been perceived by the general public as communist fronts. It had only been four years prior to the commission's creation (1942) when B.K. Sandwell and other members of the Toronto Civil Liberties Association barely managed to fight off an attempt by several communist members to gain control over the association's executive board.<sup>90</sup> Several other civil liberties organizations also suffered from internal divisions between communists and non-communists. The Vancouver Civil Liberties Union was dominated by communists until the end of WWII when increasingly more moderate members joined the organization.<sup>91</sup> The Ottawa Civil Liberties Association, newly formed in response to the commission's proceedings, was no less vulnerable to internal disputes. Tensions mounted at the organization's 1947 general meeting when a battle ensued over the appointment of a new president for the Association. Members left the meeting divided after the groups communists supporters failed to gain a majority of the seats in the executive council.<sup>92</sup> These divisions may account for the fact that Canada lacked a national civil liberties association until 1963 with the creation of the Canadian Civil Liberties Association. The result was a tense dividing line in which the government's abuse

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<sup>88</sup> Sandwell, B.K, “Spying in Canada,” *Saturday Night* 25 (23 February 1946).

<sup>89</sup> Djwa, Sandra, The Politics of Imagination: The Life of F.R. Scott, Toronto: McClelland and Stewart Ltd., 1987, p.235.

<sup>90</sup> Cook, pp.168-9.

<sup>91</sup> Cook, pp.190-1.

<sup>92</sup> Lambertson, Ross, “Activists in the Age of Rights: The Struggle for Human Rights in Canada.” (Ph.D. diss., University of Victoria, 1999).

of individual rights was viewed as deplorable, but its rooting out of subversive communists was seen as commendable.

Despite this obstacle, civil liberties organizations managed to play an important role in increasing public awareness through newspaper articles, pamphlets, and letters to Members of Parliament. The commission's investigation resulted in the creation of two more civil liberties associations, bringing the total of such groups to eight by March, 1946. The Ottawa Civil Liberties Association was led by M.H. Fyfe, a member of the Canadian Bar Association, and the Emergency Committee for Civil Rights (Toronto) was led by University of Toronto professor, Margaret H. Spaulding. All eight civil liberties groups contributed to spreading awareness about the abuses committed by the commission. Members of the Winnipeg Civil Liberties Association wrote articles for the *Winnipeg Free Press* and, as mentioned earlier, A.R.M. Lower produced a booklet for the Canadian Historical Association.<sup>93</sup> The Toronto Civil Liberties Association organized a rally on 27 January 1947, which included a presentation by Leslie Roberts of the Montreal Civil Liberties Association attacking the commission's tactics.<sup>94</sup> The Winnipeg Civil Liberties Association and the Ottawa Civil Liberties Association passed resolutions condemning the commission and circulated copies to Members of Parliament and the Senate.<sup>95</sup> The Emergency Committee for Civil Rights was responsible for several advertisements in the *Toronto Star* criticizing the commission for deviating from established principles of British justice.<sup>96</sup> By the end of 1946, each organization and their individual members had thrown themselves into the task of condemning the Royal Commission on Espionage.

The Emergency Committee for Civil Rights (later changed to the Toronto Civil Rights Union in 1947) was one of the two groups which conducted the most research on the commission; the other was the Ottawa Civil Liberties Association.<sup>97</sup> The former authored a lengthy memorandum entitled, "Justice and Justice Only ?" (Toronto report); the latter established a fact-finding committee in April 1946, which

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<sup>93</sup> NAC, Lower, Arthur, "Some Reflection on a Bill of Rights," copy of a booklet written for Canadian Historical Association, Arthur Roebuck Papers, MG 23 C68 Vol. 1/15; NAC, Lower, Arthur, "Two Ways of Life: The Spirit of Our Institutions," copy of article written for the *Canadian Forum*, John Diefenbaker Papers, MG 26 vol. 9, p.6857-81.

<sup>94</sup> NAC, copy of agenda for civil liberties rally in Toronto on 27 January 1946, Arthur Roebuck Papers, MG 32 C68, vol.1/15.

<sup>95</sup> NAC, resolution passed by the Winnipeg and Ottawa civil liberties associations (no dates), John Diefenbaker Papers, MG 26, vol.9, p.6849, vol.82, p.65438.

<sup>96</sup> NAC, copies of advertisements published in the *Toronto Daily Star* by the Emergency Committee for Civil Rights (Toronto), John Diefenbaker Paper, MG 26, vol.10, p.65434, vol.82, p.65433, 65412.

<sup>97</sup> Both organizations were formed in response to the commission's proceedings in 1946. The Ottawa group consisted of several particularly influential figures including Senator Arthur Roebuck and Senator Carine Wilson.

produced a comprehensive report on every aspect of the government's investigation (Ottawa Report).<sup>98</sup> Most of the criticisms mentioned earlier, including issues of self-incrimination, access to counsel, the administration of an oath and the use of the *War Measures Act* were dealt with in these reports. Both provide an excellent insight into the circumstances surrounding the commission's investigation. The Ottawa report includes dozens of interviews with lawyers, people questioned before the commission, the suspects' wives, politicians and journalists. It provides several examples of how the Royal Commission on Espionage stimulated paranoia towards alleged communist subversives as a result of their findings. In one instance, RCMP guards at the Rockcliffe barracks refused to allow one of the suspect's wives to provide her husband with a book entitled The Spirit of Democracy.<sup>99</sup> There are also accounts of RCMP officers tearing up letters from family members and suspects alleging to have been psychologically tortured by the commission. The report provides several examples of how the commission's proceedings prejudiced upcoming trials. In one instance, a bank teller claimed to have seen a spy in the bank; the 'spy' was one of the suspects who had just been released by the commission and was free on bail, having not yet been tried in court.<sup>100</sup> The Toronto group's report was similarly extensive in its analysis and offers examples of press commentary and an analysis of the *War Measures Act*, *Official Secrets Act* and the *Inquiries Act*. Their memorandum examines every aspect of the commission's final report to demonstrate how extensively character judgment and the suspects' ideological beliefs influenced the commission's conclusions (in the cases of Matt Nightingale and J.S. Benning, character judgment was the sole basis for the commission's accusation of guilt). Each report is remarkable in its attention to detail and the amount of time and effort it must have taken to complete.

The ability of civil liberties groups and the press to conduct a detailed examination into the government's activities demonstrates that the civil liberties movement was well-organized by 1946. Civil libertarians were capable of mobilizing their resources to produce detailed and accurate analyses of the commission's activities. The Ottawa and Toronto reports were created within a few months following the initial arrests, indicating how quickly these groups were able to act. Their research was then passed on to the public through articles in various journals, pamphlets, newspaper advertisement, and speeches at rallies and in the House of Commons. In a system of Parliamentary supremacy where the federal government has the power to use legislation to curtail individual rights, the ability to rally public support and spread awareness of state abuse is central to an effective civil liberties movement. Despite growing anti-communist sentiment in Canada at this time, it is clear that the Royal Commission on Espionage played an important role in stimulating awareness of civil liberties issues in Canada.

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<sup>98</sup> NAC, "Justice and Justice Only?" A draft memorandum on the fourth report of the Kellock-Taschereau commission," memorandum produced by the Emergency Committee for Civil Rights (Toronto), Records of the Department of Finance, RG 19, vol.349, file 101-85-24. (**ECCR Report**); NAC, "Report of a Fact-Finding Committee," report produced by the Ottawa Civil Liberties Association, J. King Gordon Papers, MG 30, C241, vol.19/15. (**OCLA Report**)

<sup>99</sup> Ottawa Report, p.3.

<sup>100</sup> Ottawa report, pp.3-5.

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 only be realized 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-to-two page commentary on a particular issue.

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Vol. 1: 1923- IV	Vol.25: 1947- V <b>(3,Cc.)</b>
Vol. 2: 1924- 0	Vol.26: 1948- IV
Vol. 3: 1925- I	Vol.27: 1949- V <b>(1,Ar.-1,Cc.)</b>
Vol. 4: 1926- II	Vol.28: 1950- II
Vol. 5: 1927- I	Vol.29: 1951- III <b>(1,Cc.)</b>
Vol. 6: 1928- I	Vol.30: 1952- III
Vol. 7: 1929- IV	Vol.31: 1953- I <b>(1,Ar.)</b>
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 <b>(9,Ar.-3,Cc.)</b>
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 <b>(1,Cc.)</b>	Vol.42: 1964- ?
Vol. 19: 1941- II* <b>(1,Ar.)</b>	Vol.43: 1965- ?
Vol. 20: 1942- I <b>(1,Ar.)</b>	Vol.44: 1966- (none)
Vol. 21: 1943- III <b>(1,Ar.)</b>	Vol.45: 1967- ?
Vol. 22: 1944- II <b>(1,Ar.-1,Cc.)</b>	Vol.46: 1968- V <b>(3,Ar.-1Cc.)</b>

Vol. 23: 1945- (none)  
Vol. 24: 1946- II

Vol.47: 1969- ?  
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 concerns.

ABSTRACT

*The Royal Commission on Espionage, 1946-8: A Case Study in the Mobilization  
of the Post-WWII Civil Liberties Movement in Canada.*

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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 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 it 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? Furthermore, the following article will examine the nature of the civil liberties movement following WWII, including the role of the media and civil liberties' organizations in increasing awareness of the vulnerability of individual rights from state abuse. The purpose of this work is to demonstrate 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 the post-WWII civil liberties movement. The Royal Commission on Espionage is only one black spot in the history of Canadian civil liberties but there remain many questions to be asked about Canadians' willingness to trust and accept that dictates of the state.

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BAH, Queen's University,  
MA, University of B.C.  
Doctoral Candidate, Memorial University  
942 Meteor Ave., Navan, Ontario, K4B 1N9  
Email: [vcresearch@mybc.com](mailto:vcresearch@mybc.com)  
Phone: 604-827-8174 (until July 31)