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FREEDOM OF EXPRESSION AND NATIONAL SECURITY

by

Michael Mandel

This essay will discuss the implications for freedom of expression of “the R.C.M.P. Scandal”, that richly revealing sequence of events starting in 1976 with a fluke disclosure during an unrelated criminal trial, and culminating in the passage of the Canadian Security Intelligence Act in June of (appropriately) 1984, (it is important, for reasons I will come to, to see the new law as part of the scandal and not as a solution to it). The events are well known, so I will only concentrate on a few important elements.

First, the R.C.M.P. Scandal involved the Security Service of the R.C.M.P., with and without the connivance of the government of the day, in the investigation, deliberate disruption and suppression of groups and activities that were neither unlawful in themselves nor directed at or preparatory to any violation of the law. The groups “countered” were involved in the essence of what freedom of expression is supposed to protect — dissent, protest, and non-conformity. They included lawful political parties such as the P.Q. and the N.D.P., unions, native groups, news agencies, and politicians. The R.C.M.P. were also concerned with investigating and suppressing criminal activities, but this was not the factor determining or guiding their efforts. As the McDonald Commission found, the R.C.M.P. took no notice of “the difference between legitimate political dissent ... and such political advocacy or action as would constitute a threat to the security of Canada”.¹

Secondly, again according to the McDonald Commission, the Security Service offensive against freedom of expression was infected by an “anti-left bias”.² This means that the groups disrupted were all either organisations of subordinate persons in the social order (blacks, natives, unions) or political movements that were generally oriented to the cause of such groups (for example the N.D.P., the P.Q., Marxists of all stripes). Their “agitation for social change” was all in favour of the redistribution of social power in favour of those without it (the same ones who are still without it).

Thirdly, this activity involved the commission of *crimes* by the police, serious crimes such as breaking and entering, theft, arson, kidnapping, and opening mail. Despite some attempts, pathetic or frightening depending on how you look at it, at legal disinformation by the government aided by some high-powered legal talent, no one doubts that crimes were indeed committed. Many were admitted during the investigation and others were proved in court.

Fourthly, these crimes went completely unpunished. No charges were laid by the state outside of Québec. The Government of Ontario even stepped in to stop privately initiated prosecutions. The Québec charges were mostly thrown out on technicalities or resulted in acquittals against the evidence. Where offenders were found guilty they were given suspended sentences or discharges.

Fifthly, the crimes went unpunished because of criminal law enforcement practices, deeply imbedded in the culture of the criminal process, which undermine the ostensibly democratic nature of the criminal law and protect the social status quo by

1. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security under the Law*, Vol. 1 (1981), at 474
2. *Ibid.*

allowing it to parade in court in the guise of “national security”, “noble motives” and “unblemished characters”.

These points may seem controversial, but I have argued them so extensively elsewhere³ that it would be pointless for me to do so again. Let us take them for now as given. Has anything changed?

The only thing that could possibly qualify as a change is the enactment of the Canadian Security Intelligence Service Act. What can we expect from it in the protection of freedom of expression?

Now the Act does make some earnest declarations that “lawful advocacy, protest or dissent” by themselves are not to be considered “threats to the security of Canada” for the purposes of the Act.⁴ Of course, if such advocacy, protest or dissent is carried on in conjunction with activities that *are* defined as a threat, all bets are off. And the definition of security threats turns out to be even wider than it was under the Official Secrets Act which defined “subversive activity” as “activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means”.⁵ The definition in the new legislation also includes activities “in support of the threat” of serious violence even against “property” for the purpose of achieving “a political objective” in Canada.⁶ Furthermore, “subversive activity” is not restricted to activity that is “criminal” activity; it extends as well to “covert unlawful acts ... intended ultimately to lead to the destruction” of “the constitutionally established system of government in Canada or elsewhere”.⁷ While the old and new definitions are both wide enough, the new one is wider.

I do not think that we can make much of this until we see what the definition is intended to trigger, legally speaking, though some people seem to argue that it makes an important ideological statement in itself (Peter Russell, one of the drafters of the Act, made such a point at the Conference “1984 in Canada: Authority, Conformity and the Policing of Citizens” held at the University of Toronto in October 1983). But we have many such statements in bills of rights, charters of rights, political science textbooks, and so on and we have had them as long as we have had the suppression of freedom of expression. The real question is whether they can withstand the many contradictory ideological statements in the mass media and elsewhere (one is reminded of former Prime Minister Trudeau’s inability to “get excited” about the fact that “some Maoists had their mail opened”) and, more important, whether they can withstand a practice which is quite contrary to the theory.

In fact, the practical effect of the Act is to legalise much activity that was previously illegal. In the speech I cited earlier, Peter Russell also said something to the effect that at least we now have a law where there was none before. In fact we have always had the Criminal Code and the Post Office Act and all the other legislation that made it criminal to do what the R.C.M.P. were doing. The Act legalises these crimes by granting the Security Service access to *any* place or thing if only they can obtain a warrant from a judge.⁸ These warrants differ fundamentally from other warrants because they are completely unrelated to any function of preventing or investigating crime. All there has to be is a “threat to security” as previously defined. Thus, there has been a substantial legalisation of what was

3. “Law and Social Order: Part I”, *Ideas*, C.B.C., 4 Jan. 1983, C.B.C. Transcripts, at 1-12; M. Mandel, “Crime, Punishment and Democracy: The RCMP Affair”, *This Magazine*, June 1984, 7; M. Mandel, “The Discrediting of the McDonald Commission”, *Canadian Forum*, March 1983, 14

4. *Canadian Security Intelligence Service Act* S.C. 1984, c. 21, s. 2

5. *Official Secrets Act*, R.S.C. 1970, C. 0-3, as am. S.C. 1973-74, c. 50, s. 16; S.C. 1984, c. 21, s. 88

6. *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 2

7. *Ibid.*

8. *Ibid.*, ss. 21-27

recently recognised to be crime, albeit unpunished. The only case of a new legal restraint in the legislation is the requirement that wiretapping be done pursuant to an order of a judge, whereas before a Solicitor-General's warrant was adequate. On the other hand, mail opening, breaking, entering and theft have all been legalised. Of course, some things that were illegal before will continue to be illegal, though it is not the new Act which prohibits them. However, all those mechanisms in the criminal law which allowed the Mounties to escape when they could advance "national security" as an excuse remain. So there is no reason to believe that the zealous security officer with an "unblemished record" who, for "noble motives", disrupts some marginal left-wing group will be treated any differently in the future than he was in the past. And there is no ground for believing that the courts will be more effective watchdogs on behalf of the powerless in the future than they were in the past.

There is another new twist to the Act worthy of attention. This is the creation of a Security Intelligence Review Committee with wide powers to investigate the Service.⁹ There was a good deal of controversy over the composition of this committee, with the N.D.P. arguing that it should be a Parliamentary Committee as recommended by the McDonald Commission.¹⁰ The result was that the Committee is to be composed of cabinet appointments "who are not members of the Senate or the House of Commons, after consultation by the Prime Minister of Canada with the Leader of the Opposition in the House of Commons and the leader in the House of Commons of each party having at least twelve members in that House".¹¹ In fact, the membership announced in November of 1984 does roughly reflect the membership in the House of Commons (though this can be no consolation to the Liberals) in that three of the members have Tory affiliations, one is a Liberal and the other has a background with the N.D.P. Socially speaking, of course, they represent a very narrow stratum of society (four lawyers and a businessman). Even the N.D.P. member, a minister in the Manitoba Government between 1969 and 1975, is a lawyer who is the son of a lawyer, and was also a Captain in the Intelligence Corps of the Canadian Army during the Second World War.¹²

This committee's power is virtually unlimited, but how it will exercise it is another matter altogether. Since the Act lacks concrete legal safeguards, the same can be said of the whole security apparatus. But we do not have to judge these things in the abstract, for there are good grounds for believing that, despite formalities, the "inability to distinguish between protest and dissent" and the "anti-left bias" of the police are definitely not things of the past. The most important reason for this is that the *context* has not changed.

To say that the security apparatus has an "anti-left bias" is essentially to claim that its functionaries weigh in on the side of the status quo of social power, because what we mean by "left-wing" is anything that challenges existing social power. However contrary this may be to the law's ideology of neutrality, is it any surprise that the security police should take such a position? When we think of the enormous power of the business class, the acknowledged rulers of the so-called "private sector", to determine the orientation of government via the power to invest, not to invest, or disinvest according to profitability and economic security (the idea of "business confidence"), to control ideology through ownership of the media and thereby to

9. *Ibid.*, s. 34-40

10. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *supra*, note 1, vol. 2, at 1102-3

11. *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 34

12. Office of the Prime Minister, Release, Ottawa, 29 November 1984

define “national security” in its own interests, should we be surprised that the police, the courts and the legal profession in general define “national security” in the same way? And if there is no “anti-right bias” in the police, is it not because we understand “right-wing” to mean those who want to *strengthen* the social status quo? Furthermore, in the context of the Cold War, old or new, our practical alliance with the United States, as well as the cultural and economic dominance the U.S. exercises over Canada, virtually determines our tendency to regard anything “left-wing” as synonymous with “security threat”. If anything, this has been enhanced in recent years by the accession to power of a right-wing U.S. administration which seems to have no respect for truth as it violently suppresses social change around the world in the name of fighting Communism. We already have some evidence that the new Security Intelligence Review Committee will look at things in the same way. In a speech at the Royal York Hotel in Toronto in March 1985, the Committee’s Chairman, Ronald Atkey, in explaining just why it was that we need our Security Intelligence Service, exhibited some of the same biases as the R.C.M.P. Security Service:¹³

In Canada, from the Gouzenko revelations in 1945 to the more recent murder of Turkish diplomats or bombing of Litton Industries and B.C. Hydro, it is evident that not everyone is prepared to play according to our rules. The expulsion every few years of Eastern Bloc diplomats for flagrant military or industrial espionage activities adds further convincing evidence.

Outside Canada, the PLO, the IRA, the Bader-Meinhof Band or the Red Brigades of both Italy and Japan attest to what seems to be a growing willingness to inflict terror on innocent civilians in order to attain political objectives which cannot be achieved otherwise.

The Chairman did not choose to mention the “state terrorism” or “wholesale” (as opposed to “retail”) terrorism¹⁴ of Israel, South Africa, or El Salvador, or even the American sponsored unofficial, right-wing terrorism of the “contras” in Nicaragua. Later on in his speech, Mr. Atkey provided concrete reasons for Canada’s dependence on the American world view:

Neither is it easy to conceive of a massive espionage effort against Canadian industrial or military secrets. But if any nation were to make such an effort, and if we were unprepared or unwilling to counter that effort, then the Nato Alliance would be loath to keep us informed on military matters, and many Western Nations would stop sharing their technological expertise with Canadian industry. The fastest growing and most productive sector of Canadian industry would be hobbled - even in areas where Canada is in the lead - by the lack of information from other technologically advanced nations.

You will agree, I am sure, that there are important national interests at stake. Even those who believe that Canada has no military secrets to protect, would surely not wish this country to become so militarily isolated that we were unable to influence either Nato or U.S. military strategy because we were no longer informed about essential aspects of that strategy. Nor would most of us want to see Canadian industry deprived of technology developed by our allies because they saw Canada as a leaky conduit for such information to other, less friendly nations.

There is more evidence of continuity between old and new practices in the realm of “security clearances”. The new legislation seems to permit a distinction between “threats to security” (which are the bases for legalised invasions of private property and personal privacy) and “security assessments” defined as “an appraisal of the loyalty to Canada and, so far as it relates thereto, the reliability of an individual”¹⁵

13. R. Atkey, “Notes for the use of the Honourable Ronald G. Atkey, P.C., Q.C.”, *Address to the Human Rights Foundation*, Toronto, 1 March 1985, at 6, 10-11

14. N. Chomsky and E.S. Herman, *The Political Economy of Human Rights - Volume I: The Washington Connection in Third World Fascism* (1979), at 6-7

15. *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 34

which are carried out by the Service for the purpose of hiring in the public sector. It seems that the “loyalty criteria” used by the new Security Service are the identical anti-left criteria, and indeed anti-nonconformist criteria, that were developed during the period of the R.C.M.P.’s dirtiest tricks. The case of Jack Gold¹⁶ shows how damaging it could be to the job prospects of a senior civil servant to be active in the N.D.P. and to take part in peace demonstrations on Parliament Hill.

All this suggests to me that it would be foolish to expect protection from the law for freedom of expression during periods of social upheaval. To the extent that we on the left become a threat to the social status quo, whether or not we are a threat to other notions of “national security”, we can expect the same harassment, disruption and violence from the security police who can in turn expect the same support from the legal system. This is not to say that police repression seriously restricts the availability of ideas in our society. Its effect is infinitesimal compared to the enormous restrictions on freedom of expression exercised by the despotism of the marketplace itself, where the one-dollar/one-vote philosophy saturates us with the “ideas of the ruling class”. Nor do I think that what the police do to left-wingers seriously inhibits the left’s willingness to speak out. Committed individuals are not deterred by such harassment, nor are powerful social movements long held back by it. The violent suppression of opinion by police is an *effect* of power rather than one of its determinants, perhaps even its barometer, in that the more violence must be resorted to, the more is legitimacy in decline. Still, our century’s experience with fascism has demonstrated the tenacity and brutality with which fundamental social change is resisted and, even if you cannot make an omelette without breaking some eggs, that does not make it any more pleasant to be one of the eggs.

16. Z. Kashmeri, “Rebuffed R.C.M.P., civil servant called security risk”, *The Globe and Mail*, 17 August 1984