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Discrediting the McDonald Commission

Michael Mandel



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It's a safe bet that very few Canadians will ever actually read the McDonald Commission's report on RCMP "wrong-doing." Four years of waiting were probably enough to disinterest the amateurs, and the report itself — 1,784 or so ponderously written and densely printed pages of minute pickings over testimony, dry legal analysis of same and exhaustive recommendations for the future — is calculated to daunt all but the most rabid of RCMP-scandal watchers and the driest of legal academics. After receiving the report in January, 1981, the Government spent the next eight months preparing the proper context for releasing it, which was finally done on August 25. The proper context, naturally, was one in which the less pleasant aspects of the report would do the least damage. This meant a public relations campaign in which, among other things, much was made of the fact that the commissioners had absolved Liberal cabinet ministers of legal complicity in RCMP crimes and in which the Government announced with great fanfare that it was accepting the Commission's recommendation that the Security Service be located outside of the RCMP.

A central role in the campaign seems to have been assigned to two documents released by the Justice Department within two days of the release of the report. In many ways these documents are as interesting as the report itself (they are certainly shorter). After all, the report is about abuses of the past, while these documents are themselves abuses very much of the present. If the McDonald Commission was a cover-up (even if a less than perfect one), what about a cover-up of a cover-up?

The documents in question are two separate memoranda re-examining points of law already extensively discussed in the commission's report. The authors are Wishart F. Spence, an ex-Judge of the Supreme Court of Canada and Robert J. Wright, QC, a lawyer with the Toronto firm of Lang, Mit-chener, Cranston, Farquharson and Wright. According to Jean Chrétien, these opinions, which he termed "the best legal advice I have been able to obtain," were that "certain activ-

ities which the McDonald Commission has characterized as illegal are in fact within the law." Solicitor-General Robert Kaplan referred to these two opinions obliquely in a statement accompanying the release of the report:

Both the Department of Justice and independent outside legal counsel have considered very carefully the criticism of the RCMP's lack of respect for the law. On numerous occasions the Commission criticizes conduct that it describes as not specifically authorized by law. It is the opinion of the Department of Justice and independent counsel that unless conduct is prohibited either at common law or by legislation it is not unlawful, and in proper circumstances conduct not specifically authorized by law may be necessary and appropriate. Indeed cases recognize that there may be circumstances in which particular laws may not apply to certain conduct of peace officers. Furthermore, provincial law does not always apply to the members of the RCMP in the execution of their duties

The Government shares the Commission's conviction that the rule of law must always be respected, but it does not agree with the Commission's interpretation of the law in many matters....

It wasn't long before the Prime Minister had picked up the theme of these two memoranda as well. At a press conference three days after the release of the report, Mr. Trudeau frankly expressed his preference for the Spence and Wright opinions, though he hastened to add that this did not mean that "McDonald is more ignorant of the law than Spence." However, the mere fact of a disagreement indicated to him that "It ... is probably a pretty grey area of the law and only in the last resort will the case law decide if it is an illegal act or not. What in the last resort a judge will decide in a specific case, that is the law."

Now, all of this disagreement about questions of law among judges, ex-judges, ex-law professors and lawyers was enough to make the average (active) law professor blush. But you must admit it seemed rather fishy. Here the Government had carefully selected a Commission made up of a judge and two lawyers, given them four years of hearings and legal arguments and a budget of over ten million dollars to clear up these questions and no sooner had they released their learned opinions (and no one had a chance to read those opinions except for a handful of speed-reading reporters) than the Government released two more opinions, by another judge (this time a Supreme Court of Canada judge) and another lawyer which discredited the conclusion of the commission on one of the central issues.

The commission had concluded that there had been a "breakdown of the rule of law in the Security Service" and an "institutional acceptance of disregard of the law." This is no small charge in a society which purports to be democratic and in which, therefore, the outer limits of legitimate Government activity should really be the bounds of legality. The claim to democracy is, after all, a claim to majority rule, the expression of which in parliamentary democracy is supposed to be the law duly enacted by a majority in Parliament. To the extent that the law is disregarded, parliamentary democracy becomes something of a fraud. This is especially so when the nature of the crimes at issue is so bound up with what the commission described as failure on the part of the RCMP to understand "the difference between legitimate political dissent, which is essential to our democratic system, and such political advocacy or action as would constitute a threat to the security of Canada." According to the commission the RCMP weren't even democratic in their crimes against democracy: it found "an anti-left bias in the judgment of members of the Security Service."

Serious charges indeed. But they had hardly been made before the Government said that the commission got the law all wrong; these weren't crimes at all! So, who is

right? Or, in the Prime Minister's words, who is more "ignorant of the law"? Is it even possible to answer this sort of question? I think it is. I also think that more needs to be said about the memoranda of Messrs. Spence and Wright than simply who has got the law right.

In the first place, as Butch Cassidy once asked the Sundance Kid, "who are these guys, anyway?" Remember that they are frequently described as "independent" and "outside." But whatever it is they are independent from, or outside of, it is certainly not the Liberal Party. In fact, the thickness of both these learned gentlemen with Canada's natural party of Government makes the *McDonald Commissioners* look independent. (I remember well the day when a judge of the Federal Court declared to me in public of the McDonald commissioners: "It's obvious they're biased. They're investigating their friends!") Wright seems to have spent most of his adult life as a Liberal Party campaign manager, managing three Robert Nixon campaigns (one for the leadership of the Ontario Liberals and two party campaigns) and at least three Mitchell Sharp campaigns in Toronto's Eglinton riding.

- With Spence, however, there is a real sense of *déjà vu*. Of course, he is a Liberal, (or was before he became a judge). He worked as Chief Enforcement Officer for the Wartime Prices and Trade Board and was appointed to the Bench shortly after the war by the Louis St. Laurent Government. He was elevated to the Supreme Court of Canada when Lester Pearson got his first chance to fill a vacancy in that Court in 1963. But it was Spence's first *extra-judicial* duty as a Supreme Court Judge that bears such a resemblance to and sheds so much light on his recent task in connection with the McDonald commission. That was in 1966 as Pearson's one man Royal commission of Inquiry into the Gerda Munsinger Affair, Canada's own sex and security scandal involving a Minister of the previous Diefenbaker government. Spence's report, which came out in the midst of the Conservative revolt led by Dalton Camp against Diefenbaker, was so severe in its condemnation of the former Prime Minister and the former Justice Minister (Mr. Fulton) and so laudatory of Prime Minister Pearson and his Justice Minister that the impartiality of the commissioner and the propriety of his involvement became a major issue of the affair. Diefenbaker called Spence "nothing but a political hatchet man" and made the following statement to the commons:

The commission has performed as it was set up to perform. The report is simply a vehicle for the dissemination of opinion by a commissioner hand-picked for his task with the objective of bringing about the destruction of the leader of the Conservative Party. We have had introduced in this nation the shabby and discredited device of a political trial.

Dr. James Johnston, national director of the Conservative Party, called the investigation "a witch-hunt to destroy the Conservative Party" and lamented "it was a great injustice that the Supreme Court of Canada was involved. The Edmonton Journal wrote:

If the Munsinger Report has accomplished anything, it lies in re-emphasizing the impropriety of judges being drawn into inquiries with strong political overtones.... Keep judges out of politics — especially dirty politics.

The Munsinger Report was not unrelated to "national security" and its contents provide Spence with a pedigree of reliability on such issues as well as on partisan political ones. Commissioner Spence's guiding principle was: "Doubt must always be resolved in favour of the 'national security.'" As for the RCMP, they were just great: "Insofar as the Munsinger case is concerned, and it is the matter referred to me, I can find no criticism whatsoever of the RCMP. The action of the Force was efficient, prompt, and discreet."

So much for the "independence" of the two legal opinions. What of their substance?

Let's first look at the Wright opinion. First it castigates the commission for supposedly letting its "philosophy" interfere with its view of the law:

...it appears to us that it is a reasonable assumption to draw from reading the material furnished to us that the commission's philosophic view may have affected the legal research which it directed to be carried out and therefore the conclusion arrived at in the research — or at least affected the way in which the legal research was interpreted.

What was this strange "philosophic" view? Logical positivism? Something from Parmenides, maybe? No. It seems that it was even farther out than that. According to Wright it was that "*the rule of law must be observed in all security operations.*" Now, I think we may be forgiven if we fail to see how the principle that the law should be obeyed could do anything but enhance an investigation into whether or not it had been broken. On the other hand, the opposite approach adopted by Wright, which I take to be that the rule of law need *not* be observed, seems much more likely to interfere with one's purely legal research. And in this case, expectations seem to have been fulfilled. For example, in commenting on a Canadian decision which opposes Wright's "philosophic" principle, his (purely legal) critique was that it was "grossly unfair to the police to impose duties on them which required the commission of illegal activities and then deny them any protection against the usual legal sanctions." This particular case involved a police officer running a stop sign on his way to a bank robbery and seriously injuring another driver. The officer was fined \$25.00. I am

sure that we can all think of a lot better examples of laws that are "grossly unfair." And unfairness doesn't make laws any less legal.

Perhaps it is because the author is not an expert in criminal law (his duties on my faculty have never included the subject — his current part-time course offering is "The Law of Corporate Management") that his opinion fails to distinguish between civil liability and criminal liability, limited statutory rights granted to police and general exemptions, decided cases in Canada (not one of which supports the various positions taken in the paper) and *obiter dicta* by judges in England and the United States (often quoted out of context), powers the police have in the detection of crime versus those they have (or, more properly, don't have) when just nosing about after subversives. Most of the "research" is merely a rehash of some of the many cases cited in the McDonald Commission's Report and research papers. This is probably the reason, incidentally, that Wright missed the very important Supreme Court of Canada decision in *Cole v. The Queen* which the commission cited in the final version of the report, though not in the draft version which Wright must have seen. (*Cole* was decided in late January, after the commission had submitted its report to the Government. Wright and Spence appear to have been commissioned sometime in March and their opinions were completed in July and June respectively. Of course, the decision in *Cole* was available in any law library from February on). The decision in *Cole* strongly supports the commission's opinion, disputed by Wright, that police powers are not to be implied beyond those expressly granted.

The dominant impression received from the Wright opinion is that it is the work of an advocate answering a client's request to think up arguments that might be advanced in the interests of the clients, here the Federal Government and its interests in undermining the commission's report. It is not the work of someone asked for an unbiased opinion. That it was destined to be presented as such by the Justice Department is something for Mr. Wright's conscience to deal with.

As for the Spence memorandum, the one on which, because of the ex-prestige of the author, the Government has put so much weight — it is simply remarkable. Diefenbaker must be smiling somewhere — assuming that posthumous vindication can have that sort of effect.

The memorandum starts off with another slap on the wrist to the commission for going beyond purely "legal" criticism to "moral," "ethical" and "political" matters. This is followed by a self-admonition: "I intend to confine my views as to what is appropriate to a consideration of what is legal" which is then most often honoured in the breach. Indeed, a substantial part of the report has nothing whatever to do with legal questions but becomes a sort of review at large of the McDonald commission's re-

commendations, with most of which, except those recommending the legalization of formerly illegal activities, Spence disagrees. Not emphasized by the Government is his disagreement with the setting up of a separate security service outside the RCMP. Strange that this didn't shake the Government's confidence in *this* commission recommendation.

Where Spence does concern himself with the legal questions discussed by the commission, his approach can be summed up as follows: *anything which might help the police do their job as they see it is legal*. This principle certainly has the virtue of simplicity. Unfortunately, for him and the RCMP, Spence is unable to cite any authority for it. Perhaps his ex-Lordship has forgotten that he is no longer on the Supreme Court and to that extent free to re-write the law as he pleases. The only case he does cite is a case which works *against* the RCMP and, of course, he, too, missed the important recent judgment of his ex-Court. Instead of citing authority and using legal argument Spence peppers his conclusions with terms such as "self-evident," "obvious," "easy," and so on.

So snooping RCMP officers could not be guilty of breaking and entering because in Spence's "personal view" it would be "quite impossible" to prove the necessary intent (even though, of course, it would exist). Of this he has "no doubt whatsoever." They can't be guilty of theft even if they steal because this is "simply" a "police investigation" (sure ... a police investigation that involves theft). A "mere recital of the provisions" of the Criminal Code section covering "mischief" is all it takes to convince Spence that this offence could not have been committed. "It would, of course, be easy" for officers to beat a charge of possession of housebreaking instruments. And provincial laws "simply do not apply" to federal police carrying out their duties. (Can you tell it is a Liberal talking?)

Now all this tells us a lot about Spence's feelings, but is it legal analysis? If it were, then I would have a lot of explaining to do to all the potential Supreme Court Judges I've flunked out of law school. In fact, though, this is pseudo-analysis, bare assertion, however vehement, the sort of thing lawyers trot out when they don't have any real arguments. If Spence had any real arguments, you can be sure he would have made them, especially if they were as "easy" or "obvious" as he pretends.

When Spence comes up against something that is impossible to characterize as "obviously" legal he has two fall-back positions. In his (purely legal, of course) opinion, in such cases the law should be either ignored, or amended. For example, Spence "cannot imagine" a Crown Attorney charging RCMP officers with breaking and entering, theft, mischief or willful disobedience of a statute. (He must have had his imagination broadened by the charges now proceeding in Quebec, or maybe he was thinking only of anglophone Crown Attorneys). And for sheer arrogance, my favourite statement is: "Brea-

ches of the Civil Law of Trespass or of the *Petty Trespass Acts* of Provinces when carrying out surveillance are really too petty to be considered either by the Commission or this Report."

It's not only the police who Spence believes should be granted immunity to commit crimes. Their "sources" too, should not be prosecuted. They should not even have to pay taxes on the pay that they receive for their patriotism: "Income Tax provisions and similar reporting Statutes, both Federal and Provincial, must simply be ignored and the receipt of revenue from taxation of such sources, ignored. It might well be considered, 'danger pay'." And this in a period of fiscal restraint!

As for statutes which Spence feels should be amended to legalize the offences committed by the RCMP, these include the Criminal Code, the Official Secrets Act, the Income Tax Act, the Industrial Research and Development Incentives Act, the Family Allowance Act, the Old Age Security Act, the Foreign Investment Review Act and, of course, Section 43 of the Post Office Act which absolutely forbids interferences with first class mail and makes it an indictable offence: "The peremptory provision of Section 43... is exceptional and one might even say startling in its impact.... the commission recognizes that the inspection of mail, even its opening, is absolutely necessary for the due operation of both security intelligence and criminal investigation phases of the RCMP's task. Therefore, Section 43 of the Post Office Act must be amended."

All in all it is quite surprising, in light of the use to which the Government has put this opinion, how often Spence actually agrees with the commission that crimes have indeed been committed. At one point (in connection with breach of confidentiality provisions), Spence seems to slip and actually calls an offence "inexcusable." In fact, the memorandum gets so confusing towards the end that, after it had been submitted, discussions with the Deputy Attorney-General convinced Spence to write a brief covering memo to "make the import of my report more exact." This is an extraordinary document in which Spence apologizes for suggesting that RCMP officers may have been guilty of trespass. His purely legal recommendation in these circumstances was "that the task facing the RCMP in both security and intelligence investigation and criminal investigation is of critical importance, and that the interruption of their use of electronic surveillance to intercept communications would be an unwarranted interference with the efficiency of the operation." This last statement is typical of the almost mystical confidence Spence has in the RCMP and the almost paranoid fear that anything should be allowed to interfere with their work. Elsewhere Spence writes that "it is almost self-evident that surreptitious entry is such an integral part of the necessary activities of the RCMP" that "it would be difficult to conceive" of



them doing their duties without this technique, especially since they are "called upon to make most difficult, most delicate security intelligence probes" and criminal investigations "where their opponents, the lawbreakers, were most sophisticated in their thinking and their methods."

There is one aspect of the Spence opinion, however, which commands agreement from any but the most prejudiced reader. It comes on the last page when he writes: "As you will have gathered, this report [Spence's that is] does not represent a learned and scholarly research into a very large variety of topics."

What about the McDonald commission's own legal analysis? It's hardly faultless, of course. For one thing, it suffers from an excess of reasoning in the abstract and a distinct cageyness where the actual facts of concrete cases are concerned. This results in a certain hesitancy when it comes to outright condemnation. The most the commissioners are willing to say is that given certain circumstances, officers "may be guilty" of crimes. Perhaps the tentativeness alleviates the commission's embarrassment at not having recommended prosecutions. The commission's excuse seems to be a desire not to prejudice the trials and disciplinary proceedings of individual RCMP officers should such ever ensue. In any event, to determine in advance what a court might actually do in a concrete case, as opposed to what it would be legally required to do, always involves an element of speculation. Naturally, all this tells very convincingly against having a commission instead of trials in the first place.

More important than this defect, perhaps, are the great pains, taken by the com-



mission to be "fair" to the RCMP, that is, to give them the benefit of the doubt. In fact, the commission's estimation of the extent of illegality appears to me to be very conservative, though for some strange reason this received no criticism in the Spence and Wright memoranda. Some examples of undue kindness (and here I am speaking only of kindness in the interpretation of the law) to the RCMP are: the restriction of the crime of mischief to situations where actual damage is done to property even though the Criminal Code definition includes "interference" with the lawful "enjoyment" of property which seems to me to include unlawful bugging and snooping; the finding (partly consequential) that the offence of breaking and entering with intent to commit an offence was not committed on an unlawful intelligence probe in which no damage was done and nothing was taken away; the absolution of Inspector Donald Cobb and his associates for the offences to which they pleaded guilty in the APLQ break-in without pointing out that they were clearly guilty of breaking and entering and theft and that the substitute charge must have been dreamed up so that they could receive absolute discharges which were legally impossible under the more serious charge; and finally the acceptance without further analysis of one very curious trial court ruling on the legality of wire-tapping prior to 1974 as expressing the law, even though the decision was binding on no other court in Canada.

All this notwithstanding, the legal analysis in the Report of the McDonald commission where RCMP crimes are concerned is thorough and workmanlike, showing the benefit of the many submissions to it and the public discussion of these questions

during the four years of its existence. But the important point is — given the slant I have noted, it's hard to imagine an impartial observer disagreeing with the commission where it has characterized acts as *illegal*. Moreover, nobody with any legal training (which includes Messrs. Chrétien, Kaplan and Prof. Trudeau) could seriously believe that anything in the report has been refuted by the Spence and Wright memoranda.

Which brings us to the question of what to make of all this. Let's briefly review the facts. Revelations of rampant, often political criminality on the part of the RCMP lead to a full scale inquiry in Quebec and a call from many quarters for criminal prosecutions. Precisely to avoid both of these unpleasant options, the RCMP itself recommends a federal inquiry which would "see the Security Service in a more favourable light" than criminal proceedings and would "have the effect of limiting" the Keable Inquiry. The Government agrees and appoints the McDonald commission, a judge and two lawyers each with close links of a political, personal or business nature to the Liberal Party and key members of it (one of the commissioners, Guy Gilbert, continued to donate money to the Liberals while investigating them and was even forced to disqualify himself when Marc Lalonde's conduct came to be investigated, indicated a rather subtle sense of propriety). These three proceed with all the urgency of a time-lapse camera thus giving the suspects all the time they need to destroy evidence, prepare stories and let the subject fade. Three and a half years later, in January of 1981, they deliver their report to the Government. The report is pretty favourable on the whole. Liberal Cabinet Ministers involved in the scandal are absolved of responsibility (on very questionable grounds, incidentally, including a massive application of the novel excuse of ignorance of the law and some very flimsy inferences from the evidence). The commission recommends legalization of most of what it has found to be illegal. The political hot potato of prosecution of this illegality is handed over to the provincial Attorneys-General without recommendations either way. The bad news, of course, is that the commission has found so much illegality. So, two more, even trustier, Liberals are called in, one of them bringing to bear the prestige of the Supreme Court of Canada and having an excellent track record on this sort of thing. No matter that they lack expertise. If mere expertise were wanted, there are dozens of academics and lawyers with excellent credentials as specialists in criminal law. It's *reliability* the Liberals were after here. So the necessary counter-opinions are produced on this troublesome legality issue. The report and the opinions are released together. Chrétien calls it the "best legal advice" we have, Kaplan agrees and the Prime Minister, a bit more candidly, says that these questions can only really be settled by the Courts — which not only lacks originality, but is also a little disingenuous given his government's

original rejection of trials in favour of the commission.

An honest government, even a government with any shame at all, would have kept quiet about a commission such as this. After all, it set the terms of references and chose the personnel (not exactly out of a hat, either). It even refused to discuss the issue for four years on the grounds that it was up to the McDonald commission. Yet no sooner does it receive the report than it runs around hunting for opinions to trash it, and won't release the report without them.

To read the Spence and Wright memoranda, for someone whose stock in trade is to understand the issues discussed in them, is to be alternately amazed, amused and outraged. But the lasting sensation is one of deep disquiet. What we have here is an attempt to re-write history, or at least to muck it up a bit, through the disturbing and quintessentially twentieth century device of "disinformation," this time in the special form of *legal* disinformation, an intellectual sort of bullying in which the experts try to cow the average person with their mysterious, specialized knowledge and in which political opinions are dressed up in lawyers' language and presented as purely legal judgment. Whether the attempt has succeeded is impossible to say for the time being. But success or failure is rather beside the point. It is the brazenness and cynicism of the attempt that is so chilling. □

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Artists and Poets

Artists in this issue are **Dawna Gallagher** (5), **Mike Seward** (7), **Judie Shore** (10), **Nina Berkson** (12), **Brad Harley** (14, 16, 17), **Josh Kakegamic** (24, 27, 28), **Goyce Kakegamic** (26), **Tom Thomson** (20), **Joan Irvine** (30), **David Smith** (31, 32, 34), **Matthias Ostermann** (38), **Gerard Brender à Brandis** (40), **Balvis Rubess** (41). Poems are "Girl Asleep" by **Greg Gatenby** and "Les Nymphéas" by **Mark Abley** (40).