

*Official Secrets Act*

There is no right to a jury, and this is probably the only really serious offence where there is no right to a jury. I certainly feel this right should be given. This is something that should be considered. It could be solved easily by following the McDonald commission and making the jury subject to a quasi-official secrets act, and if they speak of the evidence at any time thereafter, they could be convicted of a crime. In that way, the accused would have the right to a jury and the secrets could be protected.

A very good book has been written by M. L. Friedland of the faculty of law of the university of Toronto and was commissioned for the McDonald commission. It is called "National Security: The Legal Dimensions." In that book, Mr. Friedland dealt with many presumptions. Naturally I have not read every statute, but I have never seen so many presumptions against an accused in such a short document as the Official Secrets Act. I have always disliked evidentiary presumptions. I say that because of my experience as a former police commissioner, a one-time prosecutor and a bureaucrat who had to regulate for a short period of time. Presumptions are short cuts that lead to laziness and a mistrust of the judicial system, but I have never seen them make the system better. As a matter of fact, the more the presumptions the better chance the accused, even if acquitted, will walk away from the courtroom with the sense that justice was not done. Mr. Friedland dealt fairly with the presumptions. He showed how presumptions are used to foster further presumptions. If "A" occurs there is a presumption that "B" occurs; because "B" is presumed then "C" is presumed. It goes beyond what one would normally expect to find in presumption sections. This should be looked at by the committee. I doubt some of these sections would even stand up if the constitutional act passed.

● (1630)

Page 54 of Mr. Friedland's book deals with the penalties for the offence of leakage, a maximum of 14 years being much too high. Even though the courts would never impose it, they assume when Parliament assigns so many years to an offence that it is an indication of our disposition toward the crime. I do not think anyone here intends that 14 years should be the maximum penalty for leakage. I found page 57 of this book interesting. I was a regulator for the CRTC for three years, and I was a part-time commissioner. I have a fair knowledge of the way the media works. There is no such thing as a free media because many things govern what it does, such as the publishers, the size of the media or the advertisers. But there is a growing concern in the country that the media feels it has the right to publish anything it gets its hands on by whatever means. This is not the attitude of Mr. Friedland, nor is it the attitude of the McDonald commission. Recommendation 14 reads as follows:

The communication of government information relating to security and intelligence or the administration of criminal justice by a person who receives such information, even though such information is unsolicited, be an offence.

I think that view should be supported and it is something at which the committee should be looking. Also Mr. Friedland dealt with designation by the minister: should the minister have the right to designate something top secret or should the court decide? It is important that the courts decide because almost everything accessible to bureaucrats is marked "confidential" or words to that effect. It is a system that is too loose to be incorporated in what we traditionally regard as the criminal law.

The final report of the McDonald commission dated October 9, 1979, was very refreshing. It pulled no punches, it was clear and concise, readable and understandable. One does not have to be a lawyer to understand it perfectly, whether one agrees with all of it, some of it or none of it. I agree with the intent of the motion of the hon. member, but there is a weakness in it. It is the strict limitation of the motion which is evident even upon a cursory review of the first report of the McDonald commission. I will run through a few of the sections. Recommendation 1 suggests a single enactment of offences relating to espionage. Recommendation 2 suggests that espionage offences apply only to communications directed to a foreign power. Recommendation 5 sets out the definition of espionage. It is a good definition, but in itself it should be the subject of great debate because the report of the McDonald commission recommends that an offence occurs:

—if such persons know that the foreign power will or might use some information for a purpose prejudicial to the security of Canada or acts with reckless disregard of the consequences of their actions to the security of Canada.

Is that standard too narrow? Should it be broader than that or should we just say, "If it is a reckless disregard you will be convicted; if it is not, even though it might be negligence, you will not be convicted."? Recommendation 6 would repeal the provisions of the act relating to a prohibited place, which has not been an issue here but has been an issue on nuclear rearmament in England. Recommendation 7 deals with harbouring and suggests that a person accused of harbouring should only be convicted if he or she has knowledge of the commission or the anticipated commission of an espionage offence. It is a narrower definition than the old one and fairer to the person who might be caught in the situation of meeting up with someone who has been involved in espionage. Recommendation 8 is a suggestion for a new offence, the possession of espionage instruments. It is similar to the possession of burglar tools.

There are several recommendations dealing with leakage which merit careful scrutiny by the standing committee. Recommendation 19 suggests the removal of the summary conviction provisions. Recommendations 20 and 21 deal with juries. Recommendation 22 suggests that the espionage section be increased to life imprisonment in one case and to six years in the other, whereas in recommendation 23, the McDonald commission recommended that the penalty be reduced from 14 years to six years.