COMMENTS
COMMENTAIRES

Freedom of the Press and National Security

The *Official Secrets Act*[1] and, to a lesser extent, the Criminal Code[2] provide serious penalties for persons who release confidential information without authority. What is not generally appreciated is that a journalist who publishes information that comes into his hands is also subject to prosecution. The maximum sentence for any breach of the *Official Secrets Act* is fourteen years,[3] and although the legislation has fallen into disuse in Canada (except in cases of espionage), its application to the press needs to be discussed and the alternatives examined.

While it is possible for the government to ignore the leakage of documents in most cases, since the quantity of truly sensitive information is small in relation to the mass of classified material, a confrontation between the press and government over a matter of national security is bound to take place.[4] In the United Kingdom a parliamentary inquiry into the subject under the chairmanship of Lord Franks (Franks Committee) was completed in 1973[5] and the question has also been much debated in the United States.[6]

The Criminal Code

While the Criminal Code includes the ancient "offences against public order" — treason (s.46), sabotage (s.52), inciting to mutiny

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[1] R.S.C. 1970, c.O-3.

[2] R.S.C. 1970, c.C-34, s.46(1)(e).

[3] *Supra*, f.n.1, s.15(1).

[4] Robertson, *Official Responsibility, Private Conscience and Public Information* (Proceedings of the Royal Society of Canada, June 6, 1972).

[5] *Departmental Committee on Section 2 of the Official Secrets Act, 1911* (1972) HMSO Cmnd. 5104. The report was tabled in the House of Commons on June 29, 1973; see also *Royal Commission on Security* (1969) (Canada).

[6] D. Dunn, *Transmitting Information to the Press: Differences Among Officials* (1968) 28 Pub.Admin.Rev. 445; P.J. Buser, *Newsmen's Privilege: Protection of Confidential Sources of Information Against Government Subpoena* (1970) 15 St. Louis U. L.J. 181; Note, *The Right of the Press to Gather Information* (1971) 71 Colum.L.Rev. 838; M.M. Shapiro, *The Pentagon Papers and the Courts* (1972); *N.Y. Times Co.* v. *U.S.* 29 L.Ed. 2d 822 (1971) (U.S. Sup. Ct.).

(s.53) and sedition (ss.60-62) — the mere communication of confidential information to unauthorized persons is not an offence, except under sections 46(e) (treason) and 103 (breach of trust).

Section 46(e), which makes it an offence to communicate military or scientific information to a foreign state, was enacted by the 1953-54 revision of the Code. Since it covers the same ground as the *Official Secrets Act*, its presence is hard to explain. However, the penalty for a conviction under section 46(e) when a state of war exists may be death or life imprisonment, while the maximum sentence under the *Official Secrets Act* is fourteen years.

Section 103 makes it an offence for any official to commit fraud or a breach of trust in connection with his office. However, one must be an "official", which is undefined. In one reported case, *R.* v. *Pruss*,[7] a helicopter pilot on contract to the Geological Survey of Canada was charged with breach of trust for giving information about mineral discoveries to a third party. He was acquitted in Yukon Magistrates Court on the ground that he was not an official.

It should also be noted that a charge can be laid either for conspiracy to commit treason (s.46(b)), or for conspiracy to commit an indictable offence under the *Official Secrets Act* pursuant to the general conspiracy section of the Criminal Code (s.408).

The Official Secrets Act

The Canadian *Official Secrets Act*, 1939[8] is a carbon copy of the British statute of 1911.[9] It has been amended three times — once in 1950[10] to increase the penalties to a maximum of 14 years, again in 1967[11] to dovetail with the language of the *Canadian Forces Reorganization Act*[12] and again in the *Protection of Privacy Act*[12a] — but its language remains that of the British Parliamentary draftsman on the eve of World War I.

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[7] [1966] 3 C.C.C. 315.
[8] S.C. 1939, c.49.
[9] *The Official Secrets Act*, 1911, 1 & 2 Geo. 5, c.28 (U.K.).
[10] R.S.C. 1952, c.198, s.15.
[11] S.C. 1966-67, c.96, Schedule B.
[12] S.C. 1966-67, c.96.
[12a] S.C. 1973-74, c.50, s.6. The effect of this change amends the *Official Secrets Act* by adding s.16, which in effect provides that the wiretapping sections of the Criminal Code, Part IV.1, do not apply to interceptions made necessary for the prevention of subversive activities which are authorized by warrant by the Solicitor-General.

The British *Official Secrets Act* came into being as a result of a series of scandals that occurred in the 1870's and 1880's. The most notorious of these involved Charles Marvin, a temporary clerk at the Foreign Office, who gave details of a secret Anglo-Russian treaty to the press in 1878. Marvin was charged with theft (of the paper on which he had copied the document!) under the *Larceny Act* of 1861, and the Attorney-General was unable to secure a conviction. In 1887 the press published the text of certain instructions of the Intelligence Department of the Royal Navy and the same year a dockyard draftsman obtained and sold confidential tracings of warships.[13] Following these incidents, the *Official Secrets Act* was enacted in 1889.[14]

A stronger version of the statute passed the Commons in 1911 in one day at a time when Parliament was preoccupied with the Agadir crisis. It contained a section (s.2 of the British Act, s.4 of the Canadian Act) which made it an offence for any person to communicate or receive official information without authority. The section, which clearly applied to the press, received no public attention in 1911.[15]

The Canadian *Official Secrets Act* prohibits the communication of information to a foreign power (s.3) or to unauthorized persons (s.4). The marginal notes describe section 3 as "spying" and section 4 as "wrongful communication of information".

Section 3 prohibits the copying or communicating of information which might be useful to a foreign power "for any purpose prejudicial to the safety or interests of the State". This section is directed against passing information to agents of a foreign power, and it is difficult to see how a journalist who is not engaged in espionage could be prosecuted under its provisions. The section also prohibits the "approaching, inspection, entering or being in the neighbourhood of a prohibited place" and it was pursuant to the equivalent provision in the British Act that the members of the "Committee of 100" were successfully prosecuted for staging a "sit-in" at Wethersfield Airfield on December 9, 1961. In this case, *Chandler* v. *DPP*,[16] section 3 was held to include all acts of sabotage, notwithstanding

[13] This account is based on the history of the Act which appears in Appendix II of the Franks Committee, *supra*, f.n.5. An excellent history and study of the whole question is Williams, *Not in the Public Interest* (1965), 15-115.

[14] 52-53 Victoria, c.52 (U.K.).

[15] Franks Committee, *supra*, f.n.15, 122-3. An earlier bill introduced in 1908 had contained a clause prohibiting publication of unauthorized information, but this was not proceeded upon due to criticism. In 1911 the press was preoccupied with other concerns and apparently did not appreciate what had happened.

[16] [1964] A.C. 763.

that the purpose of such acts was to cause interference with the operation of defence installations for a moral purpose. Lord Devlin stated, however, that the purpose "prejudicial to the State" was a matter for the jury to determine, not a question to be concluded by the opinion of the Crown.[17]

Of far greater significance to the journalist and the errant civil servant is section 4(1), which makes it an offence to communicate to any person "any secret official code word, or pass word, or any sketch, plan, model, article, note, document, or information" that

(1) relates to, or is used in, a "prohibited place";
(2) has been obtained in contravention of the *Official Secrets Act;*
(3) "has been entrusted in confidence to him by any person holding office under Her Majesty";
(4) has been obtained by a person, while subject to the Code of Service Discipline within the meaning of the *National Defence Act;*
(5) has been obtained by a person owing to his position as a person who holds or has held office under Her Majesty;
(6) has been obtained by a person who holds a contract on behalf of Her Majesty, or a contract the performance of which is carried on in a prohibited place or is or has been employed by such person.

Having regard to the fact that the phrase "secret official code word" is a special term of art, one can conclude that all official information, whether classified or not, is covered by the section. Although it has been suggested that the Crown might have to prove that the information in question was secret, this interpretation seems scarcely arguable and is not supported by the British cases. For example, in *Rex* v. *Crisp and Homewood*[18] a War Office clerk was convicted of passing information about contracts for the procurement of officers' uniforms to a firm of tailors. On appeal, Avory J. rejected a submission that this kind of official information was not intended to be covered by the Act. Police records, cabinet memoranda, probate records (prior to the issuance of letters probate) and even statements made by a convicted murderer to his warden have fallen under the umbrella of the British *Official Secrets Act.*[19]

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[17] *Ibid.*, 806.

[18] (1919) 83 J.P. 121 (Avory J.).

[19] See Franks Committee, *supra,* f.n.5, 116, for a review of the British prosecutions; a more colourful account appears in Street, *Freedom, The Individual and The Law* 3d ed. (1972), 214-217.

The Act applies not only to persons who have received documents in the course of their duties (such as public servants, military personnel and government contractors), but to all persons who have possession of documents "made or obtained in contravention of the Act" (s.4(1)), including third parties. The following uses, by anyone improperly in possession of such official information, are offences:

(a) unauthorized communication to any person (4(1)(a));
(b) use for the benefit of a foreign power or in any other manner prejudicial to the safety or interest of the State (4(1)(b));
(c) retention, when it is contrary to his duty to retain it or after being ordered to return it (4(1)(c));
(d) failure to take reasonable care of the article or information (4(1)(d));
(e) receiving official information, knowing or having reasonable grounds to believe that such information was obtained in contravention of the Act (4(2)).

In spite of the extraordinarily broad language of section 4 there have been few prosecutions. Thus, the statute does not appear to have been used in Canada against the press or any third party who was not directly involved in the theft or abstraction of the information. In Britain, however, the Act has been used on several occasions against the press. The most recent instance was a charge laid in 1971 against the editor of the *Sunday Telegraph* and other journalists who had received, at third or fourth hand, and published a confidential assessment of the Nigerian war written by an officer of the British High Commission in Lagos.[20] After a charge to the jury which was sympathetic to the press, the journalists were acquitted — an indication that the public, at any rate, was not inclined to put journalists in jail for publishing official secrets.

It is unclear in the present state of the law whether it is necessary to show *mens rea*, or a guilty mind, in the case of the offence of "unauthorized publication" under section 4.[20a] *Mens rea*, however, is unlikely to play much of a role since, unless there has been a series of government-inspired leaks or trial balloons, an editor will surely be deemed to appreciate that an official document which has reached his desk has either been stolen or leaked.

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[20] Unreported, cited in the Franks Committee, *supra*, f.n.5, 15-16.

[20a] Mr Justice Caulfield in the *Sunday Telegraph* case thought it was, while other justices have referred to the section as constituting an absolute offence: *ibid*.

The British *Official Secrets Act*, enacted in the atmosphere of European instability in 1911 and 1939, provides little guidance to the press, to civil servants or, indeed, to the Attorney-General. While it has largely been ignored in Canada, the possibility of its application to the press is always present, as is the threat of its use, which could become an instrument of oppression. *The Royal Commission on Security*[21] reached the conclusion that the Act should be completely revised, an opinion shared by most academic critics.[22]

The most effective comment on the provisions of section 4 (s.2 of the British Act) was made by the Franks Committee in its report to Parliament:

> We found section 2 a mess. Its scope is enormously wide. Any law which impinges on the freedom of information in a democracy should be much more tightly drawn. A catch-all provision is saved from absurdity in operation only by the sparing exercise of the Attorney General's discretion to prosecute. Yet the very width of this discretion and the inevitably selective way in which it is exercised, gave rise to considerable unease. The drafting and interpretation of the section are obscure. People are not sure what it means, or how it operates in practice, or what kinds of action involve real risk of prosecution under it.[23]

Informal Sanctions

In security matters, where prevention is of the greatest importance, one might expect that informal machinery would have been established to give notice to third parties as to which matters are considered by the government to be particularly sensitive. Somewhat surprisingly, informal peacetime machinery for consultation between the press and departments of government (*e.g.*, those concerned with defence and international relations) does not appear to exist in Canada.

On the other hand, although Britain has traditionally enjoyed the benefits of an aggressive sensational press, informal mechanisms of consultation have been developed. Thus, the Press Council has reviewed complaints on breaches of confidence, although usually these have been breaches of administrative secrets involving proceedings of

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[21] *Royal Commission on Security* (1969) (Canada).

[22] For the academic literature, see "The Right of Access and Government Information Systems", Vol. II, *Report of the Task Force on Government Information* (1969), 25; Rowat, *The Problem of Administrative Secrecy* (1966) Int'l. Rev. Ad. Sci. 99; Knight, *Administrative Secrecy and Ministerial Responsibility* (1966) 32 Can.J.Econ. & Pol. Sci. 77; Premont, *Publicité de Documents Officiels* (1968) 11 Can. Pub. Ad. 449. The Task Force report makes no recommendation on the subject.

[23] *Supra*, f.n.5, 37.

county councils, or of security by local officials and minor civil servants. Press Councils exist in Ontario, Quebec, Alberta and Saskatchewan, but there is no comparable organization at the federal level in Canada.

Of greater interest is the existence in England since 1912 of the Services, Press and Broadcasting Committee composed of eleven representatives of the press and broadcasting, and representatives of the Admiralty, the War Office, the Air Ministry, the Ministry of Defence, and the Ministry of Aviation. The Committee, which has no legal basis, is responsible for the promulgation of "D" notices (initiated by a minister but approved by the Committee) which inform the press of subjects regarded by the government to be of a highly sensitive nature. A newspaper has the right to ignore a "D" notice but on the whole they appear to be respected and provide a useful method of communication to avoid breaches of security.

From the briefs submitted to the Franks Committee it would appear that the British press is generally satisfied with the liaison engendered by the "D" notice system. In areas not covered by "D" notices, doubt can be resolved by the Secretary of the Committee, to whom news items can readily be referred and a speedy reaction obtained. The Secretary is a senior government official who is expected to be familiar with the background of each "D" notice. It may be suggested that it is this informal consultation, rather than the few formal "D" notices, that is of the greatest value. It should be noted that in most cases "D" notices are confined to matters of military and diplomatic security rather than administrative secrecy.

Conclusion

There is general agreement that insofar as third parties are concerned, the *Official Secrets Act* is bad law. At worst, it is a weapon in the hands of the executive with which to harass and intimidate; at best, it is confusing and arbitrary.

Even the espionage provisions of section 3 are awkward and in need of revision, as pointed out by the *Royal Commission on Security*. In fact, Mr Justice Wells, in reporting on the case of George Victor Spencer, who gave the Soviet Embassy mostly unclassified information, expressed the view that Spencer could not be charged under either section 46(e) of the Code or under the *Official Secrets Act*.[24]

[24] *Report of the Commission of Inquiry into the Complaints made by George Victor Spencer* (Hon. Mr Justice Dalton Wells, Commissioner, July 1966).

The Franks Committee came to the conclusion that section 2 of the *Official Secrets Act* (our section 4) should be replaced by a new statute which would apply to the communication or disclosure of official information by civil servants. It would also apply to communication of information by third parties, including the press, but only in cases of *mens rea* or guilty knowledge. It was also recommended that the offence of receiving official information be eliminated. These recommendations appear to be sensible and could be applied in Canada. However, to continue to apply criminal sanctions to the press for the publication of any "official information" would hardly be a forward step in the present situation. What could be done would be to restrict the criminal sanction to the communication or publication of information which might affect national security.

It is of equal importance for government to indicate to the press those subjects which it regards as affecting national security. Whether this be done by a statement of general guidelines or by informal consultation on specific questions, as in Britain, it is important that the government make clear to all concerned the categories of diplomatic and military information that must not be disclosed.

Any attempt to restrict an editor's freedom to publish documents which do not affect the national security would meet resistance. There is a public interest in keeping certain types of administrative secrets confidential, but whether this extends to muzzling the press once the information has been leaked is a question which requires extensive public discussion. However, there are strong arguments in favour of maintaining administrative secrecy over certain classes of information, such as cabinet documents and similar state papers.

The real problem is to bridge the gap between an archaic statute and the operation of the press in a democracy. Drifting along, without any serious attempt to enforce the criminal law and without significant communication between the press and government, brings discredit to the law itself while failing to protect against leaks of national security information. Yet one cannot be sanguine that there will be any serious attempt at reform until the government is forced to act by a confrontation of major proportions.

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