The Official Secrets Act and the Mass Media

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The Official Secrets Act is worrisome in that its very vagueness makes it a net which, by and large, can cover all illegal disclosures of secrets. There has been a tendency in Canada to see the Official Secrets Act as a sort of an ultimate weapon - with penalties of up to 14 years in prison. It applies to everybody: cabinet ministers, parliamentarians, Public Service officials, members of the armed forces, the press and the public at large where there has been a serious breach of highly classified information. There has been at least one instance when it has been applied in relation to a Member of the House of Commons. (1)

The Official Secrets Act - based on legislation in Britain - has a catch-all nature to it, although in Canada the statute uses the phrase "secret official" qualifying the more general phrase "document or information" of the British statute. The case of R.V. Biernacki in Quebec in 1962 illustrates the importance attached by the courts in Canada to "official secret" in that it puts significant limitation on the kinds of information whose disclosure the Act makes criminal. (2)

A reading of the Act suggests that it lends itself to broad application. In practice, however, the Act has been confined as an instrument for dealing with situations of a security or espionage nature. The so-called Gouzenko trials, stemming out of the 1945 defection of a cipher clerk, Igor Gouzenko, from the Soviet embassy in Ottawa, provide some of the best illustrations of prosecutions based on specific violations of the Official Secrets Act.

There is no precedent of the Act being employed in any ministerial breach of secrecy, even in the case of budget leaks in Britain. Disclosures of secrets by cabinet Ministers are essentially a violation of the Privy Councillor's Oath. The unauthorized disclosures of information by
members of the Public Service would be a violation of the
Oaths of Allegiance Act. (3) In both cases, the Official
Secrets Act stands in the background with its penalties
specified; but its use in such incidents appears unlikely.
(4) It is, on the whole, an untested sword in relation to
the cabinet and members of the Public Service. Parliamen-
tary secretaries and other members of parliament who are
not members of the Privy Council also take an oath; but
not one of secrecy. The oath simply calls on parliamen-
tarians to carry out their duties.

Because of the vagueness of the Act there is confusion,
even among expert observers, about the application of its
provisions in relation to governmental leaders and officials
on the one hand, and the press on the other hand. The
broad nature of the Act could lead to possible abuse and
the dangers of spillover from the Act into the interaction
between press and politics are real. The Official Secrets
Act can be seen as a subtle but nevertheless effective
instrument of censorship. It is inconceivable, for exam-
ple, that Canadian newspapers would publish the equivalent
of the American Pentagon papers on the Vietnam war, as
occurred in the United States. In such a situation in
Canada, both the press and those involved in providing
the documents to the press would be open to prosecution
under the Official Secrets Act. Editors and publishers
could be given long jail terms.

The Official Secrets Act is a two-way restraint: jour-
nalists are deterred from probing and civil servants are
overcautious in disseminating information. (5) The British
journalist, William Hardcastle, in writing about the ef-
fects of this kind of statute, says it "stiffens the
secret spine of the bureaucrat and softens the vertebrae
of the press." (6) The most unsatisfactory aspect about
the Canadian Official Secrets Act is its vagueness and,
may be argued that uncertain law is an effective
censorship.

The notion of censorship, while generally regarded as
abhorrent in the Canadian political process under normal
conditions, is not all that alien to us in times of severe
stress. And it may be argued that crisis situations are
a moment of truth for the political system and the social
institutions and provide important clues about basic char-
acteristics in our society. The last time Canada imposed
censorship was in the course of the Front de Liberation
du Quebec (F.L.Q.) crisis in October 1970 which saw po-
itical kidnappings in Montreal and other traumatic devel-
opments. The invoking of the War Measures Act by the federal government, in effect declaring a state of emergency in Canada, limited the freedom of the press.\(^7\) The regulations under the Act imposed censorship, prohibiting media publication of anything that threatened security or in any way gave a platform to statements of publications by the F.L.Q.\(^8\)

The F.L.Q. crisis marks the most dramatic use of censorship in Canadian peacetime. In Quebec province, the menace of the highly unpopular Padlock Law - "An Act to Protect Against Communist Propaganda" - operational for some years until the Supreme Court found it *ultra vires* in 1957 - provides an unhappy story of a form of press censorship in Canada. The Alberta Press Act, disallowed by the federal government after referral to the courts, is yet another example of the authorities trying to exercise media control, using the argument that they were actually promoting freedom of the press. There had, of course, been censorship in this country in World War II under regulations of the War Measures Act as well as outside the Act for a limited period. Wartime censorship goes back to World War One. Before that, Canada's communications system was not regarded as an effective enough carrier of information that it could be seen as having adverse effects on Canadian involvement in such conflicts as the Crimean and Boer wars.

A characteristic common to the legal restraints that affect the media, the Official Secrets Act, parliamentary privilege and libel - is the unpredictable way they may be employed. This element of uncertainty contributes to a cautiousness on the part of the media, a matter of great concern. It undermines the media's ability to play a meaningful political watchdog role.

In theory, the restraints on the media that stem from the characteristics of the political system appear to be formidable. But, by and large, these restraints are psychological. In practice, governments and individual politicians personally have been most hesitant to become involved in legal confrontations with the media. The Canadian experience has been that newspapers have done extremely well before the courts in cases where the rights of the press and freedom of the press are concerned.

It has been nearly 150 years since the celebrated Joseph Howe libel trial victory that provided perhaps the most momentous freedom-of-the-press precedent in our
Although Howe appeared to have a hopeless case - stemming from a letter that appeared in his Novascotian January 1, 1835 - the jury took only ten minutes to acquit the accused editor. There was a landmark quality to the case and it played a role in helping to define and expand the rights of the media in the political setting. **There have been hardly any major precedent-setting incidents of this kind in recent years.** This is in strong contrast to the situation in Britain where newspapers have directly or indirectly become embroiled in legal controversies stemming from all the restraints enumerated here. In the United States also, the courts are regularly called upon to deal with matters where freedom of the press is at stake.

In Canada, the press in this century has become largely depoliticized and shows a general lack of enterprise in dealing with politics and government. The structural arrangements of our political system makes the House of Commons the main source of political news. The focus of attention is channelled in the direction of situations that are normally under the control of the government. The Press Gallery in Ottawa is a vital link in the political communications flow from the federal level of government that reaches the public. The shortcomings of this arrangement suggests there is a rather shallow coverage of the nation's business; there is little scope for investigative reporting. This situation encourages strong government but leaves much to be desired about the role of the media in the Canadian political process. The problem stems in part from the hesitancy of the media.

**NOTES**

1. Maxwell Cohen, "Secrecy and Policy; The Canadian Experience in International Relations," in Secrecy and Foreign Policy, op. cit., p. 364
2. Ibid., p. 358
4. Ibid.
6. Ibid