



canadian association of university teachers

association canadienne des professeurs d'université

A Brief to the Prime Minister on the Implementation of the Report
of the Committee of Inquiry concerning certain activities of the
Royal Canadian Mounted Police (McDonald Commission)

PART I

1. Pearson Revisited

In March 1978, the Canadian Association of University Teachers, which represents 25,000 faculty and professional librarians across Canada, made the first of two submissions to the McDonald Commission. The concern of the CAUT on security matters, however, dates back to 1961. In its report, the McDonald Commission casts some interesting light on the role of the RCMP on campuses in the sixties and seventies and illustrates many of the problems raised by the CAUT in its submission. In fact, CAUT specifically asked Mr. Justice McDonald to review this relationship over these two decades. It is clear from the report that the RCMP circumvented the intention of successive federal governments to end general surveillance on university campuses.

In the early sixties, when the Conservative government of the Rt. Hon. John Diefenbaker was in power, the CAUT became alarmed about RCMP attempts to infiltrate and to suppress radical groups on university campuses. The attention of the RCMP at that time was

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particularly focused on individuals involved with the Campaign for Nuclear Disarmament. The CAUT protested to the Minister of Justice, the Hon. Davie Fulton who, the McDonald report makes clear, suspended by memorandum all investigations of Communist activities on university campuses pending review of the policy. The Commissioner of the RCMP informed all divisions of the suspension of investigation of Communist activities on university campuses. The intention of the government was to review its policy while maintaining the freeze.

In 1963 the government changed and the Rt. Hon. Lester Pearson became Prime Minister. The Executive Secretary of CAUT, Professor J.H. Stewart Reid and Professor Bora Laskin, now Chief Justice of Canada, arranged a meeting between Mr. Pearson, the CAUT and the National Federation of Canadian University Students. At the close of this meeting the Prime Minister issued a public statement that there was no general surveillance of university campuses. He stated that the RCMP went to the university "as required for information on people seeking employment in the public service or where there are definite indications that individuals may be involved in espionage or subversive activities." The Pearson government did not revoke the Fulton directive referred to above. In 1963 and 1964, CAUT urged that all replies to the security forces be in writing, signed and dated.

The McDonald Commission makes it clear that by 1967 the RCMP had decided to circumvent the Pearson policy on university surveillance and had found helpers among university faculty in Canadian universities.

A memorandum of 29 November 1967 issued by William L. Higgitt, who was at that time Director of Security and Intelligence, tells how it was done. The document points to the great success of the RCMP in an unnamed university where they simply exploited the right of the police to make inquiries concerning the security clearance of those applying for federal jobs. It suggests that this success be replicated across the country. "Communist penetration" was reviewed, "specific faculties singled out for further study," and all professors whose names were given as referees were interviewed, not just about the candidate for the federal job, but more particularly to see which faculty members might be recruited as informers on the campus.

In addition to those named as referees, faculty heads¹ and their assistants were also interviewed with the same motive in mind. "Following each interview," the Higgitt memo stated, "the investigator committed the salient points to paper in a book which was maintained for the express purpose of compiling data on faculty members of the university concerned." The police officers were

¹ It is not clear whether Mr. Higgitt was referring to deans or chairmen.

encouraged to extend these formal interviews into social contacts over coffee or lunch in order to develop a surveillance network.

The officers asked their informers whether they had any objection to their activities on the campus. "It is significant," the RCMP memo states, "that in most cases, there was no objection to any of our inquiries so long as they were conducted prudently and with discretion."

The McDonald Commission concludes that this was a comprehensive, long-range programme to develop informers on campuses and was in express contravention of the policies laid down by Mr. Fulton and Mr. Pearson. It was, in the view of the Commission, a clear attempt to subvert and circumvent government policy. It was also undertaken exactly at the same time as CAUI presented a brief to the Mackenzie Royal Commission on Security concerning police surveillance for reasons other than the enforcement of the criminal law in which it urged that there should be no general, continuous, permanently authorized activity and that the RCMP should not be able to place informers or undisclosed agents in university classrooms, societies, offices or clubs.

In 1970, in the aftermath of the crisis resulting in the imposition of the War Measures Act, the federal Cabinet reviewed the Pearson understanding. The CAUT believed that the government was wavering in its commitment to the 1963 statement and put pressure on the government to maintain it. An interim decision was made by the Cabinet, after the preparation by the RCMP of a paper entitled "Academe and Subversion," to give the RCMP the flexibility it desired. The McDonald Commission reports that the new Solicitor-General, Jean-Pierre Goyer, however, resisted these attempts by the RCMP to weaken or to abolish the existing policy. The Cabinet reaffirmed the Pearson policy in September 1971.

Nevertheless, the Solicitor-General then made two important modifications of policy which the McDonald Commission found to be in contravention of previous cabinet decisions. He limited the need for prior approval by the Solicitor-General for RCMP activity on campuses to cases involving the use of electronic surveillance or paid informers. In 1972 there appeared to be five paid informers and no electronic surveillance. He appears not to have been informed of the network of unpaid informers described in the Higgitt memorandum and thus was manoeuvred into allowing this area of RCMP activity to fall outside the inspection of the minister in charge.

In addition, in 1972 the then Director-General of Security Service of the RCMP, Mr. John Starnes, advised the Solicitor-General that

informers who had penetrated organizations outside the university, but attended meetings within the university as agents of the penetrated organization were assumed to be free from any restrictions on university surveillance. Mr. Goyer agreed. The McDonald Commission found this to be "a somewhat unwarranted interpretation."

All this activity presumably resulted in the creation of a large number of files containing academic gossip about faculty and students which form part of the collection of security files on 1,000,000 Canadians suspected by the RCMP of subversion or potential subversion. This collection of gossip is presumably on permanent file and can be used against academics and students when they apply for government service or have other significant dealings with the federal government.

The Rt. Hon. Pierre Trudeau reiterated cabinet policy to the CAUT in January 1978 and extended it to include all security forces (the armed services, the RCMP, etc.) but stated that no one can be regarded as immune from investigation or surveillance if there are reasonable grounds for believing that he or she is, or has been, engaged in subversive activities.

It all depends, as the McDonald Commission recognizes, on the definition of subversion. The Commission supported the current

policy of the Cabinet. "The main reason for limiting the activities of the security intelligence agency on university campuses is that excessive surveillance will have a chilling effect on the freedom of discussion and debate which is an essential characteristic of the liberal university." The Commission said that the campus cannot be a sanctuary for criminal activity. But the key is the definition of subversion, and the Commission accepted the government's policy, only on condition that the concept of subversion was defined and limited in the manner it indicated.

The Commission suggested that the fact that some groups held illegal parades, meetings or strikes has been used by the RCMP to give them carte blanche to infiltrate on the grounds that an illegal and thus subversive activity had taken place. The fact that illegality is not synonymous with subversion had been disregarded. The Commission made it clear that the security forces should only be concerned with serious threats to the democratic order. "Most attempts by violence-prone groups to interrupt the process of rational discussion on campus," it suggests, "appear not to fall in this category and should be handled by the local police."

This history also illustrates the reason for many of the other concerns expressed by the CAUT to the McDonald and Mackenzie Commissions and elaborated below. These includes the need for effective ministerial control, a proper definition of subversion,

the enactment of freedom of information legislation which would limit the need for security clearances to jobs involving true national defence or foreign affairs secrets, the creation of quasi-judicial tribunals to hear security appeals, and the need for well-educated and sophisticated police officers.

Recommendation No. 1.1

That the Prime Minister reaffirm the 1963 and 1978 understandings with the CAUT concerning the surveillance of university campuses with the following additions:

- a) that there be an express statement on the value of freedom of discussion as an essential characteristic of the liberal university and of a free democracy;
- b) that all surveillance whether paid, unpaid or through electronic or comparable devices require the written prior approval of the Solicitor-General with other safeguards suggested below and that such surveillance should be limited to individuals where there is a reasonable suspicion of true and significant subversive or terrorist activity and should not include any general surveillance or fishing expeditions or the creation of networks of informers as in the sixties and seventies;

- c) that the surveillance of individuals outside the university who visit the university not be permitted to develop into a loophole to allow general surveillance of individuals or organizations on the campus;
- d) that all files gathered in contravention of the Fulton, Pearson and Trudeau understandings be destroyed and a ministerial statement made that this has been done;
- e) that the security forces be instructed that they are responsible only for serious threats to the democratic order, that, in the words of the McDonald Commission, most attempts by violence-prone groups to interrupt the process of rational discussion on campus appear not to fall in this category and should be handled by the local police;
- f) that the Cabinet define subversion in such a way that the security forces cannot convert the plain intention of most Canadians, namely, that spies and terrorists be apprehended, into the creation of a vast network for spying on all liberal and dissenting Canadians, undermining dissenting but legal organizations, and promoting an undemocratic and oppressive view of the Canadian political process.

PART II

Detailed response to certain of the recommendations of the
McDonald Commission

Preamble

Although one of the central concerns of the CAUT has been to deal with the problem of networks of informers on the campus and to prevent general surveillance by the RCMP, the CAUT Board and Council have also authorized a number of specific recommendations to the Mackenzie and McDonald Commissions. The CAUT took no position before the McDonald Commission on the question of the creation of a security agency separate from the RCMP but our recommendations would apply regardless of whether or not a new force was created. Part II deals with the CAUT recommendations.

2. Ministerial responsibility

The CAUT recommended that the federal government should reassert the doctrine of ministerial responsibility for policies which govern the operations of the security forces and for major decisions in carrying out those policies. The responsibility, it was suggested, should be shared between the Solicitor-General, the Minister of National Defence and the Prime Minister (Brief, R.2(a) and p.29).

Early in its second report (II:1:44-5), the McDonald Commission states that responsible government is among the essential requirements of our system of democracy. As a result, there must be procedures to ensure that security staff are accountable to Ministers responsible to Parliament, and to ensure that Ministers are adequately informed. The security system, says the Commission, must be an "open book" to the relevant Ministers (II:1:408). The main discussion of this matter is in volume II of the second report, part VIII. In summary, the Commission recommends that Parliament should establish the statutory framework for a security agency, and the Cabinet the general policy. The Cabinet committee on security and intelligence should be chaired by the Prime Minister, but the minister responsible should be the Solicitor-General, who should be kept informed by his deputy minister. Parliament should exercise its own responsibility by establishing a joint committee on security and intelligence to monitor the effectiveness and propriety of security and intelligence arrangements. Among its tasks would be the consideration of the annual reports of the proposed Advisory Council on Security and Intelligence. This would be a three-person body, its membership approved by both Commons and Senate, whose function would be to act as a watchdog over the day-to-day activities of the agency and report not only to Parliament, but also to the Solicitor-General (R 158-185, II:2:1097-1103).

CAUT welcomes these recommendations, and urges their implementation. In particular, CAUT would welcome an explicit statement from the federal government that neither the security intelligence agency nor the RCMP is in any way exempt from the normal duty of government agencies to keep relevant ministers fully informed, and that the Solicitor-General is responsible to Parliament for these agencies. CAUT would also invite clarification of the role of the Minister of National Defence in security and intelligence matters. His Department is not considered in the Commission's report although it was alleged in 1970 that military officers taking university courses that year were required to report to the military authorities on the political views of their professors and fellow students. CAUT welcomes the recommendation for a parliamentary committee and for parliamentary watchdogs but would like to see some safeguards to ensure that these bodies do not become the representatives of those they are supposed to oversee. The parliamentary intelligence committee, if it is to be effective, must have its own staff, and be able to commission studies of its own and to call witnesses. This in turn means that it must have a reasonable budget. All this must be guaranteed in the statute; otherwise the committee is at the mercy of the majority in the Commons who may on occasion for short-term political advantage wish to stifle it.

Recommendation No. 2.1

The CAUT recommends the implementation of the recommendations of the McDonald Commission to ensure that security staff are accountable to Ministers responsible to Parliament, and to ensure that Ministers are adequately informed. In particular, Parliament should establish the statutory authority for any security agency, and the Cabinet the general policy. The Prime Minister should chair the Cabinet committee on security and intelligence, and the minister responsible should be the Solicitor-General. CAUT also supports the recommendation for a joint parliamentary committee on security and intelligence and for an advisory body created by Parliament, reporting to it, and with the necessary powers and budget to act in an independent manner.

3. Disclosure of Information and the Official Secrets Act

The Supplementary Submission of CAUT urged the amendment of section 41(2) of the Federal Court Act, which denies the courts a supervisory role in respect of privilege claims in some areas (pp. 2-3). This is one of the most crucial aspects of ensuring effective freedom of information legislation. The CAUT welcomes the McDonald Commission's recommendation that section 41(2) of the Federal Court Act be repealed. The Commission thinks that privilege claims should be referred for decision to a judge of the Federal Court (R 38, 1:58-9).

In May 1980, the CAUT Board approved the brief submitted to the McDonald Commission by the Canadian Civil Liberties Association entitled "Public Disclosure and the Official Secrets Act." This brief severely criticized section 4 of the Act, which deals with "leakage," on the grounds that it was far too vague and indiscriminating. The CCLA recommended that the unauthorized disclosure of government information should not be a criminal offence, except where the "physical safety and defence of Canada" was involved. Receiving government information should not be an offence. In actions over disclosure of national safety and defence information, the court should have the right to review the classification. An ombudsman should have the right to review classifications at any time. The brief also recommended restrictions on in camera trials.

With respect to the Official Secrets Act, the McDonald Commission agrees that it is anachronistic and in need of substantial revision. It recommends that espionage be covered by a new and distinct act, which would incorporate section 3(1) of the Official Secrets Act and section 42(2)(b) of the Criminal Code (R 1, I:11). As for section 4, the Commission accepts that it is far too wide in scope and will have to be revised in the light of freedom of information legislation. Its recommendations, however, are

confined to the Commission's specific concerns. Whatever else may become public in the future, the Commission feels that it should remain an offence to disclose without authorization any government information relating to security and intelligence whether or not it is classified (R 9, I:24). The same applies to information relating to the administration of criminal justice. To support this stand, the Commission refers to the 1978 British White Paper, which in this respect is attacked in the CCLA Brief (p. 12). The CCLA and the CAUT hold that the criminal sanction should be applied far more narrowly, and therefore oppose this blanket restriction. The Commission also follows the British White Paper in recommending that although the mere receipt of such information should not be an offence, its communication to others by the recipient would be (R 14, I:26). Because of the broad exclusion mentioned above, CAUT finds this recommendation unsatisfactory.

The Commission does not address the question of present classification practices, which were criticized by CAUT and the CCLA (see below section 4 of this brief).

In relation to freedom of information legislation, the Commission recommends - consistently with its previous recommendations - that all operational and administrative security and intelligence information, from all government departments, be exempt from

disclosure (R 29-30, I:47). Further, any information falling into the non-exempt categories, which if released could threaten national security, should be exempted from disclosure (R 33, I:49). Such information would eventually surface after thirty years (R 36, I:53). Once again, CAUT finds these recommendations unnecessarily cautious. It seems to us that the test should be the one referred to above, namely whether or not the information would involve the physical safety and defence of Canada. The Commission does recommend, however, that there be a right of appeal. The decision would be reviewed initially by an administrative tribunal, but where the existence of a document is admitted, there may be a further appeal to the Federal Court. (R 37, I:55-6). CAUT would prefer such matters to be referred either to the proposed Security Appeals Tribunal (see below), or directly to the Federal Court.

In addition, CAUT considers that many parts of the operation of the new intelligence and security agency should be public. When the agency commissions background studies, legal studies or the like, these should be made public so that they can be subject to peer evaluation. When the agency gathers public material either from the newspapers or other documents, these files should be public as well and available for the use of scholars. This in turn would prevent the absurdity of court proceedings against someone who had secured a news clipping from a security file.

commendation No. 3.1

The CAUT (a) supports the recommendation of the McDonald Commission to repeal Section 41(2) of the Federal Court Act which would have the effect of allowing the courts rather than cabinet ministers to determine the validity of the withholding of government documents.

The CAUT rejects the recommendations of the Commission in regard to the Official Secrets Act and freedom of information, and (b)

recommends that no new legislation in regard to the security forces go forward unless and until the Official Secrets Act is replaced by legislation consistent with CAUT recommendations on this matter.

The Official Secrets Act should ensure that the unauthorized disclosure of government information should not be a criminal offence except where the physical safety and defence of Canada is involved. Receiving government information should not be an

offence. In actions over disclosure of national safety and defence information, the court should have the right to review the classification. An ombudsman should have the right to review

classifications at any time. There should be restrictions on in camera trials. (c) The new security and intelligence agency should

as far as possible ensure that its background commissioned research, legal studies and the like are made public and thus subject to peer evaluation. Public documentation gathered by the

security forces such as newspaper clippings, annual reports, public information etc. should be in the public domain, available to scholars, and should not be subject to any legal action if used by a member of the public.

4. Security Clearances

In its brief, the CAUT accepted the legitimacy of security clearances in certain circumstances. It recommended, however, that the number of "secret" categories be reduced, thus eliminating many investigations; that the enquiry forms be re-drafted and publicised; that investigators be well-trained and able to understand the difference between dissent and subversion; that investigators obtain written and signed statements from those asked for information; and that those applicants denied clearances have access to judicial review. (Brief, R. 4-5 and pp. 8,13,20). The Supplementary Submission (p.1) urged the appropriate re-writing of Cabinet Directive 35.

The McDonald Commission is in general sympathy with the trend of the CAUT recommendations, even if its specific recommendations differ. It agrees that there is a tendency to over-classify documents, that there tends to be excessive security screening, and that many personal investigations are unnecessary (II:2:787-9). It agrees that the loyalty criteria set out in section 3 of Cabinet Directive 35 are old-fashioned and unsophisticated (II:2:793); recommendation 119 (II:2:1090) sets out new suggested criteria for denials of clearance, which would require the security forces to show that an applicant was actually or potentially connected with

espionage, subversion, political violence or terrorism, "revolutionary subversion," or was vulnerable on personal grounds. The Commission recommends that security screening should be primarily the responsibility of the Public Service Commission rather than the security intelligence agency, on the grounds that such investigations are primarily a personnel matter. Interviews with candidates for Secret and Top Secret clearances would be carried out by the officers involved, and three referees would be interviewed for Top Secret clearances. The security intelligence agency would supply relevant information from its files to the Public Service Commission. The RCMP would check its fingerprint and criminal records. The scope of this procedure would be limited by the recommendation that the Interdepartmental Committee on Security and Intelligence (chaired by the Secretary to the Cabinet and composed of Deputy Ministers of the principal departments involved in security and intelligence activities and, currently, the Commissioner of the RCMP) should be able to decide which departments or agencies should conduct their own screening investigations. (R 119-127, II:2:798-801). The Report further recommends that those denied clearances should be able to appeal (see below in this submission).

These recommendations go a long way to meeting the concerns of the CAUT. However, the CAUT would welcome controls on the ability of the Interdepartmental Committee to exempt departments from normal procedures, and an assurance that the enquiries of the security screening officers of the Public Service Commission will not extend beyond the limits indicated in R 119. Referees for Top Secret clearances should put their views in writing. CAUT regrets that the Commission made no recommendation regarding the reduction in the number of secret categories, and will continue to urge the federal government to liberalise its procedures in this respect.

Recommendation No. 4.1

The relevant legislation and regulations in Cabinet Directive 35 should reduce the number of designations used to classify documents, reduce the number of civil servants with the power to declare documents secret, and make a clear distinction between the small number of legitimately secret areas and those which are confidential temporarily. For normal hiring, the CAUT recommends that the government use the regular business practice of seeking references and interviewing candidates and that security clearances should only be used for truly top secret jobs. Referees in all circumstances should put their views in writing and sign them. Other departmental structures should not be adopted in the name of flexibility which would allow particular departments to abandon the necessary safeguards for the individual indicated by CAUT.

5. The Distinction between Legal Dissent and Subversion

The CAUT brief recommended that an official policy statement of the federal government should affirm that the security forces will draw a distinction between legal political dissent, legal trade union or similar activity, and criminal acts of subversion (Brief, R. 2(b) pp. 2,8, 16-18). In its remarks on Cabinet Directive 35 in the Supplementary Submission, CAUT made the same point, and urged that the Directive be suitably amended (p.1).

The McDonald Commission accepts that the distinction between dissent and subversion is legitimate and vital. The advocacy of unpopular ideas, says the Commission, must not be confused with attempts to undermine democracy. The dividing line between the acceptable and the criminal should be the advocacy of violence: those who urge and use legal means to attempt radical change can be accommodated; those who advocate violence are obviously a threat (II:1:44-7, 409, 416). Nevertheless, the Commission recommends that the security intelligence agency should, rather than disrupt, keep track of the public record of anti-democratic extremist groups of the right and left since these represent a potential rather than an actual threat (II:1:417). The Commission agrees that, in the past, the security forces have not understood the distinction between dissent and subversion, and has shown a tendency to anti-left bias and to assuming guilt by association (II:1:473).

The security forces should also be instructed through Cabinet Directive 35 or other regulations that the Canadian government positively supports free trade unions and the right to strike and that the security forces should not attempt to abridge these rights in any way not specifically authorized by Parliament and should not categorize those who exercise these rights in a lawful manner as in any way subversive. Since in the past the RCMP has operated to disrupt or to oppose trade union activity, we are particularly concerned that explicit instructions of the type indicated above be included in the regulations for any security forces.

The Commission recommends that the legislation establishing the security intelligence agency should contain a limiting clause preventing the agency from investigating any person or group solely on the basis of participation in "lawful advocacy, protest, or dissent." (R.4 II:1:442-3). Those extremist groups which do cause concern should be monitored by non-intrusive techniques only (R.2-3, II:1:441).

The CAUT welcomes these recommendations.

Recommendation No. 5.1

The CAUT supports the recommendation of the McDonald Commission that the security intelligence agency should contain a limiting

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use preventing the agency from investigating any person or group solely on the basis of participation in lawful advocacy, protest, or dissent. Those extremist groups which do cause concern but are lawful should be monitored by non-intrusive techniques only. Cabinet Directive 35 should also be amended to include a statement on the difference between dissent and subversion. The regulations should also make clear that the Canadian government positively supports free trade unions and the right to strike and that the security forces should not attempt to abridge these rights in any way not specifically authorized by Parliament and should not categorize those who exercise these rights in a lawful manner as in any way subversive.

6. Victimization as a result of legal sexual or personal relations

The CAUT recommended that the federal government state officially that individuals will not be victimized in applications for jobs, security clearances or otherwise because of legal sexual or personal relations which the security services may nevertheless regard as deviant. (Brief, R. 2(c), and p. 18) In its Supplementary Submission CAUT asked for an amendment to Cabinet Directive 35 to reflect this principle, and argued at length that homosexuals, to whom the RCMP had paid particular attention, should be judged on the same criteria as any other applicants (pp. 2,6).

These arguments have been accepted by the McDonald Commission. The Report states that the collection of information on homosexuals by

the RCMP was improper and should have been stopped long ago. Indeed, the wholesale collection of information on any such group within the population is improper. There must be, says the Commission, evidence of an actual or potential connection between an individual's character traits and a security threat before those traits become relevant to the security services (II:2:794-5). Recommendation 119 which deals with the grounds on which a security clearance should be denied, states in this regard that there must be

"Reasonable grounds to believe that (the applicant) is or is likely to become

(a) vulnerable to blackmail or coercion, or

(b) indiscreet or dishonest,

in such a way as to endanger the security of Canada."

The same principle is applied to the opening of files (R 11(b), II:1:518-9). The Commission also recommends that existing files on homosexuals be reviewed, and if not falling within the criteria listed in Recommendation 11, be destroyed (R 120, II:2:793-5).

If adopted, the Commission's recommendations would appear to meet CAUT's concerns so far as security clearances are concerned, provided the wording "vulnerable to blackmail" does not simply become a loophole to justify the previous policy. Hence the need

for an explicit statement that groups such as homosexuals or those with relatives in Communist countries are not automatically or generally excluded from employment and not automatically or generally characterized as subversive. CAUT would welcome a clear statement from the federal government that such discrimination is not and will not be tolerated in any area, and that suitable amendments will be made to all relevant regulations and statutes, including those dealing with human rights.

Recommendation No. 6.1

That the government implement the recommendations of the McDonald Commission in regard to victimization as a result of legal sexual or personal relations combined with a statement from the government and the consequent amendment of Cabinet Directive 35 to say that groups such as homosexuals are not automatically or generally excluded from employment and not automatically or generally characterized as subversive. Existing files on the homosexual community should be destroyed except where there is a reasonable suspicion of an actual and particular security offence.

7. Appeal mechanisms in regard to security clearances and immigration appeals

The CAUT recommended that bona fide employers of immigrants, such as universities, should have the right of appeal to a judicial

tribunal whenever entry to the country was denied on security grounds (Brief, R.6). There should also be a right of appeal when guest speakers are denied entry, by summary procedure within a security tribunal. The alternative, CAUT suggested, should be the adoption of the attitude that guests should not be barred on any grounds. In support of this, CAUT called attention to the relevant sections of the International Covenant on Civil and Political Rights and the Helsinki accords (Supplementary Submission, pp. 3-6). CAUT also recommended to the Mackenzie Commission a proper quasi-judicial appeal system for those denied security clearance.

The Commission recommends the creation of a Security Appeals Tribunal with the power to hear appeals about security clearance and in the immigration area (R. 129-33 and 145-7, II:2:808 and 825), and that the procedures be made public. The first stage would be an internal review, followed if necessary by consideration by the Security Appeals Tribunal. Of the five members of the Tribunal, only the chairman would be a judge of the Federal Court.

The CAUT welcomes the recommendations of the McDonald Commission to create proper quasi-judicial appeal procedures in these two areas. The CAUT recommends, however, that at least two judges be assigned to the Tribunal, so that one of them will sit on each panel of three assigned to hear cases. The Commission felt that to apply

the same criteria to visitors' visas was, however, inappropriate. The best solution to the question was to issue temporary non-renewable visas. If the holder of such a visa wishes to change the status of his/her visa, he/she will then be liable to the usual security screening procedure. (R 135-6, II:2:820). The Commission also noted that the section of the Immigration Act dealing with security criteria (19(1)(e-g)) is far too broad, and recommends its replacement by a more closely defined set of criteria (R. 139-40, II:2:823-4).

Apart from reservations about the composition of the Security Appeals Tribunal noted above, these recommendations answer satisfactorily the CAUT's concerns.

Recommendation No. 7.1

That the government implement the recommendation of the McDonald Commission for the creation of a Tribunal to hear appeals regarding security clearances and immigration cases; that in regard to

temporary visitors, the government either accept the recommendation for temporary non-renewable visas or the original recommendation of CAUT for a summary procedure before the Tribunal; and that at least two judges be assigned to the Tribunal so that one of them will sit on each panel assigned to hear cases.

8. The use of intrusive techniques of investigation and the use of illegally obtained evidence

The CAUT recommended to the McDonald Commission that there be a consistent policy concerning such devices as wiretaps, electronic eavesdropping, mail opening, and the interception of other forms of communication. Under current legislation, such as the Protection of Privacy Act, the distinction is drawn between criminal investigations and those falling under the head of national security. The latter require only the consent of the Solicitor-General. CAUT objected to this distinction, and recommended that judicial review should apply to all cases. To prevent breaches of such a policy, CAUT recommended that illegally obtained evidence be inadmissible in court. (Brief, R. 7 and pp. 24-27). The Supplementary Submission returned to this last point, and suggested (p. 7) that the Commission consider an exclusionary discretion modelled on Scottish law.

The Commission retains the traditional distinction between criminal and security investigations. With regard to the former, it recommends that the use of electronic surveillance by police forces be controlled by a committee "with statutory powers," which would also consider "the procedure by which authorizations are applied for." (R 264-7, II:2:1019-23) Mail opening should be performed on judicial authorization and only for drug investigations (R 268, II:2:1023-6).

The Report is very much more specific about security investigations. In summary, the Commission agrees that electronic surveillance and mail interceptions should be based on clear and precise standards of necessity, and that a judge, not the Solicitor-General, should make the final determination. The criteria to be applied should contain those found in the Criminal Code, and additional ones pertinent to security intelligence (R. 21 and 24, II:1:551-569, 574-583).

The question of the admissibility of illegally obtained evidence is discussed in II:2:1036-47, and Recommendation 283, II:2:1115-6. Essentially, the Commission follows the recommendation of the CAUT's Supplementary Submission, and argues that in this respect

Canadian law should follow Scottish and Australian models which give a judge the discretion to exclude illegally and unfairly obtained evidence. The new constitution appears to deal with unconstitutionally obtained evidence in the way suggested by CAUT but it is not clear whether this will cover all illegally obtained evidence. CAUT believes that judges should have the power to review all illegally and unfairly obtained evidence.

The CAUT welcomes these recommendations, but asks the federal government to clarify the terms of reference of the Committee to investigate the use of intrusive techniques in criminal investigations, and state that it will be instructed to consider carefully the applicability in the criminal area of the procedures recommended for security matters. The CAUT fails to see why judicial approval should not be required universally whenever communications are monitored and privacy invaded.

Recommendation No. 8.1

That the government accept the recommendation of the McDonald Commission in regard to illegally and unfairly obtained evidence and that in regard to wire-tapping, electronic surveillance and mail interceptions, a judge, and not the Solicitor General, should make the final determination. In the case of security matters, this should be a judge of the Federal Court or the Supreme Court of Canada.

The CAUT recommends that any application for surveillance should be accompanied by a list of all previous applications for the same surveillance in order to limit the power of the police to keep applying until they find a judge who agrees with them. The reasons offered by the Crown should be required to be specific.

9. Education in human rights for security force personnel

The CAUT asked the Commission to recommend that educational programmes designed for security personnel include adequate instruction in the principles of civil liberties and human rights, and the nature of legal dissent. (Brief, R.8).

The McDonald Commission does not address this point directly. At several points, however, it draws attention to the deficiencies of security staff and their lack of sophistication. It describes "a lack of knowledge of international affairs, a poor capacity for legal and policy analysis, a lack of sufficient experience in working with Ministers and other government departments and a serious deficiency in management skills and expertise. In addition, ...RCMP career service employees tend to allow their powerful, inbred loyalty to the organization to overshadow other important responsibilities." (II:2:706) Position papers supplied by the security service show "little evidence of an attempt to balance the requirements of the agency with the important values of a liberal democratic society." (II:2:707)

The Commission's solution lies in the recommendation that the civilian security intelligence agency draw its members from a variety of backgrounds, that they have a high level of educational achievement, and that they be sensitive to and support democratic values and processes. (R. 74-82, II:2:709-11.) The implementation of these recommendations would meet the CAUT's concerns in this respect.

Recommendation No. 9.1

That the new security force require a high level of education for its members, that it not accept transfers from the RCMP unless the individuals meet this requirement, and that it require instruction in its training programme on civil liberties, human rights and the nature of legal dissent. The members of the force should be encouraged to attend courses at Canadian universities but should be forbidden to report on the political, economic or social ideas or comments of their professors or student colleagues.

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