

THE 1946 CANADIAN ROYAL COMMISSION ON ESPIONAGE (GOUZENKO) AND THE 1954–55 AUSTRALIAN ROYAL COMMISSION ON ESPIONAGE (PETROV): JUDICIAL INDEPENDENCE OR COMPLICITY?

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The unexpected defection of Igor Gouzenko in 1945 and the planned defection of Vladimir Petrov in 1954 led to similar Royal Commissions on Espionage in Canada and Australia respectively. Cold War security operations that followed extended well beyond international espionage to perceived domestic threats and security over-reach ‘beyond the law’ that persisted in Canada and Australia into the 1970’s. This article explores the formative influence of the Gouzenko and Petrov affairs with a focus on the legal dimensions and the issue of judicial independence in particular. The Supreme Court of Canada Justices who presided over the closed secret hearings of the 1946 Canadian Commission demonstrated outright complicity with government security measures as they assisted police investigations and recommended prosecutorial responses with little regard for constitutional rule of law and due process conventions. While Royal Commission hearings are inherently inquisitorial, unlike Canada’s Espionage Commission, witnesses at the 1954–55 Australian Commission were permitted legal representation and attention was paid to procedural fairness during largely open public hearings. Moreover, Chief Justice Owen Dixon refused the government’s request to head it, upholding a convention that judges of Australia’s highest court not preside over Royal Commissions. He nonetheless engaged in informal extrajudicial government advising as the Commission was formed and proceeded, and his close involvement with the government’s security response also raises questions about separation of powers and the integrity of judicial independence during perceived security crises. The later legislative tightening of security mandates and more robust oversight of security operations by Parliament and the Courts, the refinement of formal protections of judicial independence and further informal separation between judicial and political cultures and leading personnel, all represent an advance, but the possible compromise of judicial independence under the pressure of government security priorities remains a concern.

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I INTRODUCTION

Royal Commissions on espionage in Canada and Australia, prompted by the defections of Igor Gouzenko in September 1945 and Vladimir Petrov in April 1954, confirmed the existence of local Soviet spy networks, demonstrated the dominions warranted inclusion as junior partners in the British and American postwar defence and security alliance, and endorsed domestic Cold War security policies. The expansion of operations by the Royal Canadian Mounted Police ('RCMP') security branch and Australian Security Intelligence Organisation ('ASIO') that followed led to new security interventions that went well-beyond countering international espionage. Related counter-subversion measures directed at perceived domestic security threats affected a wide range of opposition groups, and persistent security overreach was belatedly addressed by another pair of Royal Commissions in the 1970s: the Commission on Intelligence and Security ('Hope Commission') in Australia and the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police ('McDonald Commission').

Beyond their broad similarities, the Gouzenko and Petrov affairs differed in particular circumstances and immediate consequences. As examined in Part II, Gouzenko's unexpected defection revealed the depth and breadth of Soviet espionage, hastened the shift in the focus of British and American intelligence operations from wartime German and Japanese adversaries to their Russian ally, and lent urgency to the decryption of Soviet communications. Strict secrecy was maintained around the Gouzenko affair for months, and as the public became aware of it when the Royal Commission on Espionage commenced in February 1946, there was wide deference to the government's response which continued during its closed hearings and the *Official Secrets Act* trials that followed.¹ As examined in Part IV, Petrov's highly publicised defection was the result of a planned ASIO counter-espionage operation at a time when government security policies had been a matter of contentious debate. No trials followed the largely open hearings of the 1954–55 Royal Commission on Espionage. Its findings confirmed ASIO's capabilities and endorsed the government's security policies, but its main legal recommendation was a modest one; an expansion of the

¹ *Official Secrets Act*, SC 1939, c 49 ('*Official Secrets Act*'). This legislation included espionage and unauthorised disclosure of classified information offences and originated in the *Official Secrets Act 1911*, 1 & 2 Geo 5, c 28 ('*UK Official Secrets Act*') which consolidated and expanded 19th century English legislation adopted in the Canadian *Criminal Code*, SC 1892, c 29 ('*Canadian Criminal Code*') and the Australian *Crimes Act 1914* (Cth) ('*Commonwealth Crimes Act*'). The *UK Official Secrets Act* widened espionage to include spying for foreign nations outside of war and conspiracy, and it was made a reverse onus offence, reducing the Crown's burden of proof. Liability for disclosure of classified information was extended beyond public servants and government contractors to include recipients such as journalists. Passed as imperial legislation, it no longer applied to the dominions after the *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4. The virtually identical Canadian *Official Secrets Act* was enacted, but a *lacuna* remained in Australian law.

definition of espionage similar to the Canadian and UK *Official Secrets Acts*, which was not implemented until 1960.

Almost a decade separated the Gouzenko and Petrov affairs, and the development of Canadian and Australian counter-espionage capabilities and new security measures in the late 1940's, and the British government's role in these developments, is briefly surveyed in Part III. The 'red scare' had escalated with fuller knowledge of Soviet espionage and development of an atomic bomb but there were also growing concerns about responses, in particular American excesses and attempts to ban the Communist Party in Australia itself. Contention around the Australian government's security policies played out during the Royal Commission hearings in 1954. Unlike Canada's Espionage Commission, Australia's Commission had few legal consequences but it had significant political repercussions. The Petrov affair dominated two federal election campaigns and strengthened the Liberal-National Coalition ('Coalition') government while dividing the Australian Labor Party ('ALP'). Prime Minister Robert Menzies' handling of the Petrov affair reinforced his hold over power for another decade. Opposition Leader Herbert Vere Evatt's impolitic responses during the Commission suggested that the ALP was unsound on security, a reputation that continued to haunt the Party even after its return to power under Gough Whitlam in 1972.

As noted in Part IV, many studies of the Petrov affair have tended to focus on its domestic partisan political impact, and as noted in Part II, much of the scholarship on the Gouzenko affair is concerned with its place in heralding an international 'Cold War'. The wider Canadian and Australian scholarship on the Cold War has examined its effect on institutions and the public service, labour and industry, dissent and civil liberties, society and culture, but there are few comparative studies and the legal and constitutional dimensions remain relatively neglected. This article explores some of these dimensions, building on the author's 2025 study which provides a more detailed examination of Britain's supervision of responses to the Gouzenko affair and subsequent early Cold War development of Canadian and Australian security measures, and notably the role of the British Security Service ('MI5').² The 2025 article also surveys a range of rule of law issues arising out of the Espionage Commissions. The focus this study are the particular issues related to judicial independence and the extrajudicial role of senior judges.

The differences between the Gouzenko and Petrov affairs include the nature and reach of extrajudicial activity, although the roles played by the Supreme Court of Canada Justices, the Hon Roy Kellock and Rt Hon Robert Taschereau, and the Chief Justice of the High Court of Australia, Sir Owen Dixon, raise similar concerns about judicial independence. The former demonstrated outright complicity with executive government security measures as they presided over the *in camera*

² See Barry Wright, 'Gouzenko, Petrov, and the Canadian and Australian Espionage Commissions: The Rule of Law and the Neo-Colonial Development of Cold War Security States' (2025) 36(3) *King's Law Journal*, 425. The article contains a more detailed examination of matters surveyed here in Part III and in the Part VI postscript.

Commission hearings in 1946 and supervised police investigations and recommended prosecutorial responses with little regard for constitutional rule of law and due process conventions. Royal Commission inquiries involve inquisitorial rather than regular adversarial legal processes but the state Supreme Court judges who presided over the Australian Commission's public hearings were attentive to procedural fairness and, unlike in Canada's Commission, witnesses were permitted legal representation. Moreover, Dixon refused the government's request to head the Commission, upholding a convention that judges of Australia's highest court not preside over Royal Commissions. The Chief Justice nonetheless engaged in informal extrajudicial government advising as the Commission was formed and proceeded. It was a less egregious blurring of the separation of powers than demonstrated by Kellock and Taschereau but his involvement with the Commission response also raises questions about the integrity of judicial independence.

The extrajudicial involvement of these senior judges with the government security responses to Gouzenko and Petrov is not surprising from a broader historical perspective in which a pattern may be discerned of routine judicial deference to government security priorities and outright judicial complicity with executive security responses during serious security crises. Viewed retrospectively, seven-to-eight decades on, the actions of Kellock and Taschereau clearly represent seriously compromised judicial independence while Dixon's informal extrajudicial contributions were of questionable propriety. Additional protections for judicial independence have since been developed and judges have become more attentive to distancing themselves from centre of government decision-making. The Hope and McDonald Commissions have also led to tighter legislative mandates for security services, and improved oversight and enhanced accountability around the administration of national security. Despite more recent advances, the Gouzenko and Petrov affairs are salutary reminders of the need to remain attentive to the challenge of maintaining the integrity of judicial independence during security crises to help ensure that security exigencies do not undermine the rule of law.

II THE GOUZENKO AFFAIR, KELLOCK AND TASCHEREAU, AND THE 1946 CANADIAN ROYAL COMMISSION ON ESPIONAGE

Igor Gouzenko's 5 September 1945 defection from the Soviet Embassy in Ottawa, just weeks after the bombing of Hiroshima and Nagasaki and Japan's surrender, marked an opening chapter of what became known as the 'Cold War.' Gouzenko's evidence confirmed suspicions of security leaks around the Manhattan Project and suggested the magnitude and breadth of the network of Soviet espionage in

the new atomic age.³ The 1946 Royal Commission on Espionage began secret hearings in February and its recommendations included over 20 prosecutions under the Canadian Official Secrets Act including a communist Member of Parliament ('MP'), public servants, labour activists, and scientists. Gouzenko's defection also lent urgency to the US 'Venona' decryption of Soviet communications and hastened the formation of a new postwar British and American security and defence alliance. By 1947, Venona revealed evidence of similar networks of espionage in the United States ('US'), the United Kingdom ('UK'), and Australia. At this point, the status of Canada and Australia as junior partners in the alliance was under review.⁴

Canadian officials did not initially know what to do with Gouzenko. Prime Minister William Lyon Mackenzie King dithered and, concerned about continuing good relations with the Soviet Union, pondered reaching out directly to Joseph Stalin. Meanwhile, attempts by Sir William Stephenson, the Canadian wartime head of allied British Security Coordination, to directly liaise with his Washington contacts and the British Secret Intelligence Service ('MI6') Director-General Stewart Menzies confused lines of communication. Kim Philby, head of MI6's reconstituted Soviet section intervened to further muddy the waters. Findlater Stewart's review concerning reorganisation of British wartime security and intelligence operations was also underway as the Gouzenko affair unfolded, and Guy Liddell, Roger Hollis, Dick White and others at MI5 were concerned about the possible amalgamation of all British international counter-espionage and related

³ Rebecca West's noteworthy contemporary articles for the *New Yorker* and the British press soon identified the broader implications of Gouzenko, assembled and further analysed in her book, *The Meaning of Treason* (Viking, 1947), updated following the trials of Klaus Fuchs, Alger Hiss, and Julius and Ethel Rosenberg, and the defections of Guy Burgess, Donald MacLean, and Harold Philby in *The New Meaning of Treason* (Viking, 1964). Amy Knight's *How the Cold War Began: The Gouzenko Affair and the Hunt for Soviet Spies* (McClellan and Stewart, 2005) provides further insight into the international significance of Gouzenko and the more recent scholarly debate about its role. See also Robert Bothwell and JL Granatstein (eds), *The Gouzenko Transcripts: The Evidence Presented to the Kellock-Taschereau Royal Commission of 1946* (Deneau, 1982); JL Black and Martin Rudner (eds), *The Gouzenko Affair: Canada and the Beginnings of Cold War Espionage* (Penumbra Press, 2006); Dominique Clément, 'The Royal Commission on Espionage and the Spy Trials of 1946–9: A Case Study in Parliamentary Supremacy' (2000) 11(1) *Journal of the Canadian Historical Association* 151; Dennis Molinaro, 'How the Cold War Began... with British Help: The Gouzenko Affair Revisited' [2017] (79) *Labour/Le Travail* 143; Reg Whitaker, 'The Gouzenko Affair: From Star Chamber to the Courtroom' in Barry Wright, Susan Binnie and Eric Tucker (eds), *Canadian State Trials Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990* (University of Toronto Press, 2022) 125; Barbara J Falk and Tyler Wentzell, 'The Enemy Within: A Review and Comparison of Early Cold War Canadian and American Spy Trials' in Barry Wright, Susan Binnie and Eric Tucker (eds), *Canadian State Trials: Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990* (University of Toronto Press, 2022) 177.

⁴ United Kingdom ('UK') and United States ('US') wartime signals intelligence shifted from Germany and Japan as the Manhattan Project renewed concerns about Soviet spying and disclosure of classified information by high-minded scientists, negligent military personnel, and public servants and labour activists sympathetic to the Communist Party. Gouzenko helped to prioritise the Venona project led by Meredith Gardner. See, eg, William Walters, *State Secrecy and Security: Refiguring the Covert Imaginary* (Routledge, 2021), 27–57.

counter-subversion operations within MI6.⁵ After Hollis arrived in Ottawa in mid-September, he found he had to fend off Philby's interventions which continued over the following months.⁶

The RCMP had initiated surveillance and reported Soviet intelligence officers (from the civilian NKVD and military GRU) searching for Gouzenko and his family, who were placed in protective custody after the arrival of Roger Hollis, Guy Liddell's successor as head of MI5's counter-espionage operations, delayed by two weeks because of Director-General David Petrie's concern about a 1943 agreement requiring Canadian consent before such visits were arranged.⁷ Hollis met with the senior RCMP security and intelligence officers, Charles Rivett-Carnac and George McClellan, briefed the RCMP on MI5 counter-espionage investigation and operational practices, sat in on interviews with 'Corby' (Gouzenko), and reported back to London on the gathering evidence of espionage and possible responses.⁸

Prime Minister Mackenzie King was informed of the importance of a coordinated response with the UK and US governments during his visit to London in October. The RCMP investigations, set on course with the help of Hollis, were to continue but no further actions, including arrests that might attract publicity,

⁵ MI5 responsibilities for Commonwealth security and intelligence, distinct from MI6 foreign operations, was a remnant of direct supervision of security and intelligence within the British Empire. MI5's Commonwealth role continued during decolonisation into the 1960s: see Christopher Andrew, *The Defence of the Realm: The Authorized History of MI5* (Penguin Books, 2010), 330–2, 442–3; Daniel WB Lomas, *Intelligence, Security and the Attlee Governments: 1945–51* (Manchester University Press, 2016), 224–58. See also n 25 below on the Findlater Stewart review and later clarification of MI5's mandate.

⁶ Hollis and Liddell requested service directors be reminded of MI5's exclusive Commonwealth role; see National Archives United Kingdom (NAUK), KV 4/466 and 467, *Diary of Guy Liddell: Deputy Director General of the Security Service ('Liddell Diaries')*, entries, 11 September and 19 October 1945 (see also <<https://discovery.nationalarchives.gov.uk/details/r/C13200344> et al), Andrew (n 5) 341–4. Philby, informed of Gouzenko's defection soon after warning Moscow about Konstantin Volkov's planned defection and anxious about UK Soviet spy network disclosures, requested Soviet handlers avoid contact with Alan Nunn May, who had returned to London after his Canadian scientific wartime work. He pushed to have MI6 take the lead on Gouzenko, despite having no remit in Canada. Philby had become a master of exploiting inter-service rivalries and covering his tracks by the time he became head of MI6's Washington station and during MI5's 'third man' investigations after the 1951 Burgess and Maclean defection. Christopher Andrew correctly dismisses journalist Chapman Pincher's speculation that Liddell and Hollis were double agents, and similar suggestions by Peter Wright and others: Andrew (n 5) 325–6, 382.

⁷ The Royal Canadian Mounted Police ('RCMP') merged the Royal North-West Mounted Police (territorial law enforcement) with the Dominion Police (government and diplomatic protection, and intelligence operations) in 1919, and the security branch, similar the British Special Branch, focused on labour movements and immigrant organisations during the interwar years, and while its domestic security operations were coordinated with military security and intelligence during World War Two by an interdepartmental security panel, it had little experience with counter-espionage: see Reg Whitaker, Gregory S Kealey and Andrew Parnaby, *Secret Service: Political Policing in Canada from the Fenians to Fortress America* (University of Toronto Press, 2012) 71–144 ('Secret Service').

⁸ *Liddell Diaries* (n 6) entries, 7, 11, 14, 19 September 1945. See also NAUK, KV 2/1419 and 1420 ('Gouzenko Records'), correspondence from Hollis to MI5, 9, 14, 15 and 28 September 1945 (see also <<https://discovery.nationalarchives.gov.uk/details/r/C11151696>> including KV 2/1419–26. See also KV 2/1421 *Gouzenko Records*, 'notes on the Corby case prepared by RHH (Hollis) in Canada,' 1 October 1945 and Andrew (n 5) 344–7.

were to be taken until agreement was reached between the three governments.⁹ The terms for subsequent action were set out in a November memorandum, which in-effect became the blueprint for the 1946 Commission. It called for a joint diplomatic response, the intensification of secret police investigations, followed by an inquiry led by a senior judge to review evidence and determine an appropriate legal response.¹⁰ As Reg Whitaker describes it, the subsequent domestic response fell into three stages: continuing RCMP investigations that now included arrests, indefinite detentions, and interrogations which extended from late November through February; Commission 'star chamber' hearings from February to June; followed by criminal trials from 1945 to 1949.¹¹

The memorandum was developed when British and Canadian officials met with the US government in early November. There was agreement in Washington that the RCMP should intensify investigations and commence arrests in late November, and Hollis travelled on to Ottawa again to consult further with Superintendents Rivett-Carnac, McClelland, and other Canadian officials. MI5's involvement continued through the next year, including Guy Liddell's visit to Canada in March after the Royal Commission on Espionage hearings commenced.¹²

⁹ Hollis returned to London in early October and was emphatic about the seriousness of Gouzenko and the need for a coordinated response. He met frequently with Norman Robertson, Ottawa's top mandarin and later High Commissioner to the UK, who accompanied Mackenzie King to London. See *Gouzenko Records* (n 8) KV 2/1425, note (Hollis) on meeting the previous day with Robertson, Liddell and others, 9 October 1945. Attlee and Mackenzie King further agreed in late October, after discussion between senior British Foreign Office and Canadian External Affairs officials, MI5 and the RCMP, on the importance of maintaining the strictest secrecy during the investigations and that a coordinated response must include the US: see *Liddell Diaries* (n 6) entries 23, 24 October 1945.

¹⁰ See *Gouzenko Records* (n 8), KV2/1425 no.765, November 1945. See also Whitaker (n 3); Barry Wright, Susan Binnie and Eric Tucker (eds), *Canadian State Trials: Volume V: World War, Cold War, and Challenges to Sovereignty, 1939-1990* (University of Toronto Press, 2022) 513 'Appendix 3: Supporting Document' ('CST5'). MI5's November memorandum summarises agreement between London, Ottawa, and Washington and recommends the close coordination of diplomatic and intelligence responses and the maintenance of strict secrecy as RCMP investigations continue, with the arrest, detention, and interrogation of suspects when necessary, followed by a judge-led commission of inquiry to review the evidence and conduct hearings to examine suspects and other witnesses with a view to formulating charges, followed by trials as appropriate. Hollis had travelled to the US in November with other British and Canadian officials, and telegraphed an outline of the agreement to Liddell, and the resulting draft was approved by MI5 Director General Petrie and endorsed by MI6 Director General Menzies: *Gouzenko Records* (n 8), KV2/1425 no.764, 19 November 1945.

¹¹ Whitaker (n 3) 131.

¹² Hollis's second Ottawa visit ended as arrests commenced at the end of November. See correspondence from Hollis to MI5, 2, 7 and 23 November 1945, *Gouzenko Records* (n 8) KV2/1425, and correspondence from MI5 to Hollis, 7 and 11 November 1945 (not digitised) NAUK KV 2/1425B. After returning to London from his second Ottawa visit, Hollis corresponded frequently with the RCMP, advising on the investigations and counter-espionage techniques and coordinating intelligence-sharing (including updates on Nunn May who confessed in February). Liddell was in Ottawa from 17 to 21 March following travel to the US to see his estranged wife. He attended Mackenzie King's comments on the espionage Commission in Parliament, met with the Joint Intelligence Committee, Norman Robertson and Hume Wrong at External Affairs, Colonel WAB Anderson, the new head of military intelligence, RCMP Commissioner Wood and

Canadian government leadership of the Gouzenko affair had passed into the hands of Justice Minister Louis St Laurent who authorised exceptional police powers by way of renewal of a wartime order in council, which allowed the RCMP to indefinitely detain suspects without access to counsel or warnings about self-incrimination.¹³ Over 30 suspects were interned and interrogated at the Mountie barracks in Ottawa from December through the Commission hearings, and detention continued past June for suspects recommended for prosecution until they were arraigned.

The extension of special wartime police powers was followed by an executive order in council issued to establish the Royal Commission on Espionage. These orders in council represented a significant delegation of Parliament's legislative powers to the executive branch of government. Cabinet's exceptional authority to issue executive regulations under the *War Measures Act*, continued past the end of the war by way of temporary 'emergency transition' legislation, renewed annually to 1950, when it was replaced by the less-sweeping *Emergency Powers Act*, in effect until 1954.¹⁴ Many other temporary executive orders led to more permanent legislative changes to Canada's security laws, consolidated in the 1954 major revision of the *Canadian Criminal Code*.¹⁵

Order in council PC 411 appointed Justices Kellock and Taschereau of the Supreme Court of Canada to preside over the hearings and gave them a broad mandate to report on the communication of secret and confidential information to agents of foreign powers by public officials and others in positions of trust or active with the Communist Party. Their inquiry was to review collected evidence, authorise further investigation, seizures, and arrests if necessary, and hold *in camera* hearings according to procedures the Commissioners deemed appropriate and necessary for the thorough examination of suspects and other witnesses. The

Superintendents Rivett-Carnac and McClellan, senior government counsel to the Commission, EK Williams and Gérard Fauteux, and interviewed Gouzenko at length: see NAUK, KV 4/467 *Liddell Diaries* (n 6) 'summary of US and Canada visits' 25 April 1946; KV 2/1422A *Gouzenko Records* (n 8) Liddell's Report (same date).

¹³ Assistant Clerk of the Privy Council, *Order in Council* (PC 6444, 6 October 1945), *Defence of Canada Regulations*, SOR/39 pursuant to the *War Measures Act*, SC 1914, c 2; Clerk of the Privy Council, *Order in Council* (PC 1639, 2 March 1942) renewed in November 1945 under the authority of the *National Emergency Transitional Powers Act*, SC 1945, c 25.

¹⁴ *War Measures Act* (n 13); *National Emergency Transitional Powers Act* (n 13), *Continuation of Transitional Powers Act*, SC 1947, c 16 (renewed SC 1948, c 5; SC 1949, c 3; SC 1950, c 6); *Emergency Powers Act*, SC 1951, c 5 (effective at March 1951 and expired at May 1954). The *War Measures Act* was executive-enabling legislation that delegated Parliament's powers to the Executive Council of Cabinet, empowering it to issue defence and security regulations for the duration of an emergency following Parliament's proclamation of war or 'apprehended insurrection.' Temporary 'emergency transition' legislation in 1919 sustained wartime regulations in response to security concerns about spread of Bolshevik-style revolution through demobilisation, unemployment, and the Winnipeg general strike: see Barry Wright, Eric Tucker and Susan Binnie (eds), *Canadian State Trials Volume IV: Security, Dissent, and the Limits of Tolerance in War and Peace, 1914-1939* (University of Toronto Press, 2015) 10-13 ('CST4').

¹⁵ *Canadian Criminal Code* (n 1), see n 98 below on the 1954 revision.

Commission was to also determine the applicability of the *Official Secrets Act* and make prosecution and trial recommendations.¹⁶

The public knew little about the defection and the reasons for the arrests and detentions until an American journalist broke news of a Soviet spy ring in Canada in early February, just as the Commission commenced its hearings. The Commissioners, instructed to review the RCMP's evidence and recommend appropriate legal responses, maintained strict secrecy as they deliberated and as Whitaker puts it, conferred judicial respectability on the investigations.¹⁷

Royal commission inquiries involve inquisitorial processes that differ from adversarial legal proceedings but Order in Council PC 411 went much further, granting the Commissioners a veritable *carte blanche* in terms of discretionary powers. Kellock and Taschereau continued the suspension of regular legal procedural conventions and dispensed with the most basic presumption of innocence protections found in public criminal proceedings. The suspects still had no access to defence counsel in the closed Commission hearings as the judges reviewed the collected evidence, identified deficiencies and directed further investigation where necessary, heard testimony, and examined witnesses. With few challenges to the evidence apart from the Commissioners' identification of weaknesses in their review of evidence, the deliberations moved quickly, judicial supervision more a matter of supporting the RCMP investigations than checking them, with the aim of presenting sound and convincing evidence for Crown prosecutors to take to trial. Moreover, Kellock and Taschereau offered authoritative interpretations of the applicable provisions of the *Official Secrets Act*. Their involvement with government security responses, in complicity and concert with the police and Crown prosecutors in the production and presentation of evidence, as well as in the interpretation of the law, were to significantly tie the hands of trial judges in the cases that followed.

The Commission's final public report, containing a brief summary of findings and recommendations, was issued on 27 June.¹⁸ Twenty-two suspects were named spies and recommended for prosecution under the *Official Secrets Act* (all to be tried in Canada except Alan Nunn May, who had confessed under MI5

¹⁶ Clerk of the Privy Council, *Order in Council* (PC 411, 5 February 1946). Historically, Royal Commissions are an exercise of prerogative and parliamentary commissions are legislated. Consistent requirements for terms of reference, legal powers and procedure in the UK only emerged with 20th century inquiries legislation and Canada's *Inquiries Act*, 1868 31 Vict. c.38 ('*Inquiries Act*') simply delegated prerogative to the governor in council (as in recent colonial legislation), so Royal Commissions for matters within the jurisdiction of the Canadian government could be initiated by executive orders in council. There were subsequent consolidating amendments before World War Two to deal with jurisdictional issues, but major revisions to regulate scope of powers and procedure were postwar, enacted well after the Espionage Commission.

¹⁷ Whitaker (n 3) 136–8.

¹⁸ *The Report of the Royal Commission: Appointed under Order in Council PC 411 of February 5 1946* (Report, 27 June 1946). The final report was issued on 27 June 1946, and summaries of the Commission's interim reports issued on 2 March, 15 March and 29 March were published in the Report's appendix.

and Special Branch interrogation and already been convicted in London under the same provisions of the *UK Official Secrets Act*). The authoritative interpretations of the *Official Secrets Act* provisions offered by Kellock and Taschereau were unlikely to be defied by trial judges and indeed prevailed in the cases that followed. Their widely conceived view of s 3 espionage offences included an expansive interpretation of conspiracy to commit espionage. Warnings to journalists made at the beginning of the hearings about prosecutions for unauthorised disclosure under s 4, if in receipt of any information about the hearings or leaks of evidence presented, were repeated as also applicable to *in camera* sessions at future trials. Their expansive interpretation of suspected breaches of official secrecy under s 11 enabled the RCMP to continue investigations without warrants after the temporary extension of their special wartime powers expired. The full record of the Commission, transcripts of the hearings, all classified evidence and related intelligence briefings, intelligence from other sources, detailed security recommendations, and information on operational matters, remained classified.

The trials commenced in 1946 and, along with appeals, continued to 1949. Unlike the Commission hearings, they were public and the accused were able to retain defence counsel, although under special provisions set out in the *Official Secrets Act*, the procedural protections found in regular criminal trials remained compromised. The reverse onus espionage offences reduced the Crown's burden of proof and limited the presumption of innocence. There was wide resort to *in camera* sessions where classified information came up in evidence or where disclosed evidence otherwise touched on classified government information. Most of the 15 Canadians found guilty were convicted of conspiracy to commit espionage under s 3 of the *Official Secrets Act*. The most serious sentences were handed to Communist Party of Canada MP Fred Rose and labour activist Sam Carr, who each received sentences of six years' imprisonment.¹⁹ Nunn May's conviction under the *UK Official Secrets Act*, at the Old Bailey before the Canadian trials, resulted in the harshest sentence of 10 years' penal servitude.²⁰ Seven of the accused were acquitted, and nine of the convicted appealed. Only two convictions were overturned, and a new trial ordered for a third appellant resulted in another conviction.

Contemporary criticism of the RCMP's investigative powers and the complicity of senior judges with the government's security responses was remarkably muted. The Gouzenko affair did little to disturb the government, although it helped position Justice Minister St Laurent as Prime Minister Mackenzie King's successor. The war-weary Canadian public were certainly aware of the atomic bomb in the closing months of 1945, but the Soviet Union had

¹⁹ See Falk and Wentzell (n 3) 182–93 for detailed examination of the trials and appeals, which they also compare these cases to the later American Espionage Act trials, notably Hiss in 1950 and the 1951 conviction and 1953 execution of the Rosenbergs.

²⁰ As noted, Philby stopped Soviet handlers from making contact but Nunn May, who had passed on atomic and weapons secrets during wartime research in Canada. He had been placed under close MI5 surveillance upon his return to London mid-September and nonetheless confessed under interrogation in February 1946.

been an ally since 1941 and instrumental in the defeat of the Nazis, and perceptions of the nature of Soviet espionage remained murky during the first months of 1946. The significance of the Gouzenko affair only became widely apparent once the Commission issued its final report and the Official Secret Act trials commenced, yet public deference to the government's response continued. Warnings about unauthorised disclosures under the *Official Secrets Act* had a chilling effect on Canadian journalists and public commentators, but the investigations, Commission, and trials also drew little criticism from Opposition politicians or civil libertarians, progressive lawyers, and constitutional scholars.²¹ MP John Diefenbaker and lawyer JL Cohen KC were two notable exceptions. Diefenbaker raised concerns about the investigations and hearings when the Commission submitted an interim report to Parliament. Cohen, a leading defence counsel at the *Official Secrets Act* trials, presented a motion during at the 1946 Annual Meeting of the Canadian Bar Association, to condemn the manner in which evidence was collected and the procedural expedients taken at the trials, but it was roundly defeated led by Canadian Bar Association President EK Williams, recently one of the senior government counsel to the Commission.²²

Most progressive lawyers, constitutional scholars, and civil libertarians in 1946 were preoccupied with issues before the Judicial Committee of the Privy Council ('JCPC').²³ Interest in the JCPC's long-delayed decision on the constitutionality of a 1939 Canadian Bill to end appeals to that body was heightened by the 1946 Japanese-Canadian appeal case on reparations for

²¹ Dominique Clément, 'It Is Not the Beliefs but the Crime that Matters: Post-War Civil Liberties Debates in Canada and Australia' [2004] (86) *Labour History* 1, 6–8 reviews media coverage and parliamentary debate and notes that apart from speculative stories about spying and interviews with families of suspects in custody, the press consistently supported government responses with little reference to police and legal procedures apart from three op-eds that expressed general concern about the RCMP's powers and judicial safeguards. Mildly critical academic commentary at the time focused on continuation of wartime orders in council but avoided issues such as police powers and judicial independence: see Wilfrid Eggleston, 'Public Affairs: The Report of the Royal Commission on Espionage' (1946) 53 *Queen's Quarterly* 369; MH Fyfe, 'Some Legal Aspects of the Report of the Royal Commission on Espionage' (1946) 24(9) *Canadian Bar Review* 777.

²² Alistair Stewart and MJ Coldwell of the Co-operative Commonwealth Federation party later echoed Diefenbaker but most opposition parliamentarians deferred to government, despite fellow MP Fred Rose's plight. Diefenbaker represented persons affected by war measures during World War Two, became Conservative leader in 1957, formed government in 1958, and enacted the *Canadian Bill of Rights*, SC 1960, c 44. Labour law and constitutional scholar Bora Laskin endorsed the proposed bill as means to prevent the due process abuses experienced during the Gouzenko affair: Bora Laskin, 'An Inquiry into the Diefenbaker Bill of Rights' (1959) 37(1) *Canadian Bar Review* 77, 96. However, like most commentators, he was silent about the issues in the late 1940s. See also Philip Girard, *Bora Laskin: Bringing Law to Life* (University of Toronto Press, 2005) 170, 195, 266–9; Laurel Sefton MacDowell, *Renegade Lawyer: The Life of JL Cohen* (University of Toronto Press, 2001) 215.

²³ Clément (n 21) 2–6 notes the slow postwar rebuilding of the Canadian Civil Liberties Union and remnants from the Canadian Labour Defence League. Like many of his colleagues, lawyer and McGill scholar Frank Scott, prominent in both organisations, neglected Gouzenko to focus on the Judicial Committee of the Privy Council ('JCPC'). On legal debates at the time, see Philip Girard, 'St-Laurent, Judging, Justice, and the Death Penalty in the Shadow of the Cold War' in Patrice Dutil (ed), *The Unexpected Louis St-Laurent* (University of British Columbia Press, 2020) 336.

wartime treatment and challenge to continued enforcement of repatriation (deportation) agreements signed under duress during internment. The JCPC ruled in favour of the federal government in both cases in 1947.²⁴ The JCPC's 1947 rulings suited Prime Minister Louis St Laurent, who ended JCPC appeals in 1949 in legislation that also expanded the Supreme Court from seven to nine members, adding Gérald Fauteux J (another senior government counsel during the Commission hearings), and JR Cartwright J (the lead Crown prosecutor in the *Canadian Official Secrets Act* trials that followed). Thus, four of nine judges of the Supreme Court of Canada, now Canada's highest court, were deeply implicated in the responses to the Gouzenko affair.

III BRITISH COMMONWEALTH SECURITY AND THE CREATION OF ASIO

By early 1947, revelations of Soviet espionage prompted by the Gouzenko affair and security crises in Palestine and Greece shaped the UK's security policies under the new Labour government of Prime Minister Clement Attlee. Domestic measures against Communist activists intensified, MI5's counter-espionage initiatives extended to counter-subversion, and intelligence ties with the US were renewed. These new Cold War initiatives were promoted in Canada and Australia as the UK government projected American security demands through the Commonwealth.²⁵

²⁴ *Attorney-General for Ontario v Attorney-General for Canada* [1947] AC 127; *Co-Operative Committee on Japanese Canadians v Attorney-General for Canada* [1947] AC 87 ('*Japanese Canadians*'). The JCPC ruled the *Statute of Westminster* (n 1) gave the Canadian government unimpeded jurisdiction to legislate on appeals, and the decision in *Japanese Canadians* confirmed that the JCPC would otherwise be a disappointment for progressive causes as Lord Wright's ruling extended earlier precedents on the *War Measures Act* (n 13) and added that judges must not only defer entirely to executive security decisions during war but also the transition to peace. (See Wright, Binnie and Tucker, *CST5* (n 10) 9; Wright, Tucker and Binnie, *CST4* (n 14) 475–6 'Editors' Note on Judicial Review of the War Measures Act'.)

²⁵ While MI5's response to Gouzenko's unexpected defection was initially improvised, and many in the new Labour government were suspicious of the Security Service (having helped destabilise the Ramsay Macdonald government in the 1920s), but postwar security policy settled into a severe Cold War form from mid-1946 through early 1947 (US policies toward the Soviet Union hardened more quickly following George Keenan's influential February 1946 Moscow memorandum). MI5 had begun work on a proposed Soviet section in October 1945 as Philby continued to interfere, but uncertainty about its future mandate persisted after Findlater Stewart's November report which further separated civilian and military security and intelligence. Home and Foreign Office responsibilities for MI5 and MI6 and Treasury's role remained unclear and their mandates remained a matter of executive decree. MI5 concerns eased in the new year as Attlee assumed direct responsibility for it, setting out his expectations in an April 1946 directive or 'MI5 charter', which prevailed until modified by the better known 1952 Maxwell Fyfe directive that put MI5 directly under Home Office control: see Keith Ewing, Joan Mahoney and Andrew Moretta, *MI5, the Cold War, and the Rule of Law* (Oxford University Press, 2020) 16–17, 33–4. (See also Findlater Stewart Report and Prime Minister's Directive to the Director General of the Security Service <<https://discovery.nationalarchives.gov.uk/details/r/C13430286>>). Attlee's 'hands-on' approach included fortnightly meetings with Percy Sillitoe, MI5's new Director-General, who according to Liddell, was not troubled by a lack of reference in the directive to MI5's work abroad: see *Liddell Diaries 2* (n 11) diary entry following his summary of US and Canada visits, 25 April 1946. MI5's Commonwealth role was reiterated and reinforced in a further Attlee directive in 1948: see below n 30.

Venona revealed Soviet spy networks extended to Australia later in 1947, and the ALP government was under pressure to tighten security or risk exclusion from the postwar UK-US security alliance, but there was resistance to reform within Prime Minister Ben Chifley's government. This eased after the 1948 Commonwealth Security Conference, paving the way for the creation of ASIO, and Petrov's defection was to be its first major counter-espionage operation.

Concern about Australian security was flagged by MI5 as early as September 1945, and Canberra received the Canadian espionage Commission's public report in 1946, but security reforms largely entailed the winding-down of wartime arrangements.²⁶ In April 1947, the US raised concerns with the UK about security arrangements in the dominions and Australia's possible exclusion from intelligence-sharing, and as Venona yielded more evidence in the following months, Attlee was informed that Australian leaks of British intelligence had been detected. Director-General Percy Sillitoe and Roger Hollis visited Australia in January 1948, and Hollis stayed on for further discussions about security reorganisation and expansion of Australian security operations, but there was a deep divide within Chifley's Cabinet over security policy.²⁷ Evatt, Attorney-General and Minister of External Affairs, opposed the proposed security reforms. He sought a more independent foreign policy based on international cooperation, was suspicious of military involvement, and had concerns about the potential for domestic security overreach and its impact on civil liberties, underscored by Opposition rhetoric about the 'enemy within'. Defence Secretary Frederick Sheddon supported reforms; Australia's status in the UK-US security alliance was in jeopardy and there was clear evidence of failures in the government's handling of classified information.²⁸

²⁶ When Gouzenko broke, Liddell observed that '[t]here is evidently a tendency in Australia to pack up on security and Evatt the Minister of External Affairs does not seem to appreciate the necessity of having an efficient organisation': KV 4/466, *Liddell Diaries* (n 6) entry 20 September 1945. Evatt strongly opposed Colonel Charles Spry's proposed joint committee, arguing that peacetime operations should fall entirely under civilian control: see David Horner, *The Spy Catchers: The Official History of ASIO, 1949-63* (Allen and Unwin, 2014) 38-9.

²⁷ See NAUK, KV 4/453-5, 'Intelligence Organisation in Australia' (also <<https://discovery.nationalarchives.gov.uk/details/r/C11602771>>) for MI5 correspondence, exchanges and reports on Australian security in 1946-7. British concerns about the inadequacies of Australian security inadequacies continued and intensified in 1948: see KV 4/456, *Intelligence Organisation in Australia* (also, <<https://discovery.nationalarchives.gov.uk/details/r/C11602774>>), MI5 to Hollis (regarding the Prime Minister and Foreign Office's views on Australian security reforms and the need for Chifley to provide concrete assurance to the UK and US governments), 7 April 1948; Hollis to MI5 (reporting little progress in Australia, the differences between Evatt, and the Sheddon government's resistance to a MI5-type organisation or reforms similar to Canada), 7 April 1948 and 15 August 1948; Hollis to White about Evatt, 27 August 1948, and Hollis-Sillitoe exchanges throughout September (on the low quality of Australian security, inadequate grasp of Soviet espionage, and the 'insecurity situation'). See also Andrew (n 5) 367-9; Horner (n 26) 43, 49-50, 53-61.

²⁸ See Horner (n 26) 57-61; Andrew (n 5) 367-8. Evatt's longstanding concerns about civil liberties were evident while on the High Court bench in the 1930s and upon entering government during the war. He repealed the communist legislation in 1942 but his 1944 proposed constitutional

The debate was resolved after Chifley visited London in July 1948 and was briefed on Venona, and agreement reached at the secret Commonwealth Security Conference in September on security priorities and a common approach.²⁹ Attlee and the Foreign and Commonwealth Secretary Ernest Bevin circulated a detailed conference agenda that reflected the UK government's hardened Cold War security policy and sought to project it to the established Commonwealth dominions in the context of the Gouzenko affair and Australia's security lapses. The urgency of the security issues and urgency of reforms was made clear to member states and MI5's international role was confirmed and refined.³⁰ Evatt, unaware of evidence derived from Venona, continued to dismiss claims of leaks from the Department of External Affairs as rumours and was increasingly distracted by his work for the United Nations ('UN'), becoming president of the third session of the General Assembly from September 1948 to May 1949.³¹ Hollis returned to Australia in January 1949 and Cabinet agreed the following month over the shape of the new operations necessary to restore UK and US confidence.

The proposed new security agency, ASIO, was more closely modelled on MI5 than the RCMP and would not operate as a police force or engage in law

amendments, including a bill of rights and limits on prerogative powers, were rejected in a referendum. Harold Holt's repeated calls to restore the early wartime ban and for a public inquiry into the Australian Communist Party prompted by receipt of the Canadian commission's 1946 public report annoyed him, he was suspicious of British interventions into Australian affairs, and increasingly committed to the UN and preoccupied with it in 1948. Sheddon met with Hollis frequently and a 1948 US embargo on the transfer of classified information to Australia deepened his alliance concerns.

²⁹ Chifley, in the UK to attend the Commonwealth Prime Ministers' meeting, endorsed a new security service along the lines of MI5 after the security conference – see KV 4/456 *Intelligence Organisation in Australia* (n 27), Chifley's comments on a new service, 30 September 1948; Correspondence from Chifley to Attlee, 4 October 1948; Sillitoe's comments, 14 October 1948; correspondence from Attlee to Chifley confirming new security arrangements, 21 October 1948.

³⁰ The British government sought to ensure the dominions fully recognise the threat of Soviet espionage and commit to developing domestic security operations according to MI5 'best practices.' Hollis led discussion of confidential papers related to MI5's role, Soviet intelligence and espionage, counter-espionage processes, and intelligence-sharing protocols. Canada resisted a greater MI5 directing role and centralising Soviet intelligence gathering but agreed it should continue to coordinate and lead intelligence-sharing and security initiatives. Agreement was reached on the security challenges posed by Soviet espionage and domestic communist activity, the need for dedicated security service sections on counter-espionage and communist organisations, and shared registries and procedures for vetting and purges. See Gregory S Kealey and Kerry A Taylor, 'After Gouzenko and "The Case": Canada, Australia, and New Zealand at the Secret Commonwealth Security Conferences of 1948 and 1951' in Dennis G Molinaro (ed), *The Bridge in the Parks: The Five Eyes and Cold War Counter-Intelligence* (University of Toronto Press, 2021) 22, 22–8. Following the conference, MI5's international role was reiterated in a further Attlee directive that affirmed the Commonwealth was the exclusive preserve of the Security Service and prohibited clandestine Secret Intelligence Service operations in those jurisdictions: see Andrew (n 5) 442, more generally 347–8, 365–6, and Lomas (n 5).

³¹ Evatt was dismissive of concerns about senior External Affairs officials Robert Milner and John Burton, his principal advisor who was disdainful of the security services, and like Evatt, careless with official documents.

enforcement.³² ASIO was announced in Parliament in March 1949, to be led by South Australian Supreme Court Justice Geoffrey Reed as a concession to Evatt's concerns, but the new Menzies government would soon replace Reed, appointing Colonel Charles Spry Director-General in July 1950.³³

While Evatt was away at the UN, Acting Attorney-General Nicholas McKenna refused to stay private and state level sedition prosecutions under *Crimes Act 1914* (Cth) ('*Commonwealth Crimes Act*'). McKenna portrayed his government's consent as a matter of leaving it to the courts to decide the reach of existing law, unlike the intrusive communist legislation proposed by the Coalition in Opposition.³⁴ Both convictions were appealed and upheld by the High Court.³⁵ Chifley's government was defeated at the December 1949 election and the new Menzies government introduced legislation to restore and expand the early wartime communist ban. It declared the Australian Communist Party an unlawful association and empowered the government to investigate and prohibit suspected related activities and was passed in June 1950.

The legislation was challenged in the High Court and Evatt, back from the UN, was retained as leading counsel to present arguments in the Court he had once been a member of. The Court ruled the legislation unconstitutional in March 1951, the Chief Justice, Sir John Latham, in sole dissent.³⁶ Menzies secured a double dissolution of Parliament, his government returned with a stronger

³² As noted, while the RCMP's security branch engaged in undercover security and intelligence operations from 1919–45, it had little counter-espionage experience and MI5 elements were appended to it by way of the operational reforms Hollis contributed to from late 1945. Liddell's account of his visit to Canada is followed by a separate diary entry about meeting again with Colonel Anderson, head of Canadian military intelligence then visiting London. Liddell writes there that Canada must decide (KV 4/467 *Liddell Diaries* (n 6) final entry 25 April 1946):

whether it is desirable to set up an organisation on somewhat similar lines to MI5 in Canada or whether ... [they] should concentrate on getting the RCMP built up in such a way as to enable then to look after not only civil but [intelligence] service security ... From what I have seen of Canada I am quite sure if this were to be done properly an enormous organisation would be required ... It seemed to me that it would be much more profitable to build up the RCMP and draw them much more into the [Joint Intelligence Committee] orbit. To do this it is necessary that the Intelligence [Security] Branch of the RCMP should have a much more important status and not be mixed up in the ordinary criminal police hierarchy. It needs a ...director with direct access to the commissioner. At the moment Rivett-Carnac as [sic] to go through two other individuals who know nothing about his work, before he can get to the Commissioner.

³³ Horner (n 26) 75–7, 91–4. Spry was to lead the Australian Security Intelligence Organisation ('ASIO') for the next 20 years.

³⁴ Laurence W Maher, 'The Use and Abuse of Sedition' (1992) 14(3) *Sydney Law Review* 287, 299. Public pro-Soviet declarations were prosecuted as seditious — the first was a privately initiated case against Gilbert Burns for statements at a 'Communism and Liberty' debate in Brisbane shortly after Chifley's return from London, and in the second case, the New South Wales Attorney-General indicted labour activist Lance Sharkey for his newspaper comments when the creation of ASIO was announced.

³⁵ *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121. The High Court ruled that the federal government has jurisdiction to enact criminal laws to protect Australia and the *Australian Constitution*, and found the s 24A offence in the *Commonwealth Crimes Act* (n 1) consistent with current common law that distinguishes criticism of authority from excitement of disaffection and incitement to disorder but encompasses published libels and words as well as actions.

³⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

majority in April, and Evatt became ALP leader in June after Chifley's death. After receiving advice from Latham, Menzies called a referendum to amend the *Constitution* to give federal government necessary powers to enact amending legislation. Evatt led the 'No' campaign and the referendum failed in September 1951.³⁷ Although the first 'round' went to Evatt, 'round two' three years later was to go to Menzies in a 'knockout punch.'

IV THE PETROV AFFAIR, DIXON, AND THE 1954–55 ROYAL COMMISSION ON ESPIONAGE

Vladimir Petrov, like Gouzenko, was a Soviet Embassy cipher clerk whose defection and evidence of espionage implicated sympathetic idealists in the public service, the labour movement, and elsewhere. The status of Canada and Australia in the postwar UK-US security alliance was under review, their responses to Soviet espionage were orchestrated in significant part by MI5, and the Canadian and Australian espionage Commissions demonstrated the dominions warranted inclusion in the alliance. The Commissions also endorsed new security policies that opened the way to sweeping security measures that extended beyond international counter-espionage to perceived domestic threats. However, while Gouzenko's unexpected defection opened the door to significant intelligence about Soviet espionage, Petrov's defection was a planned exercise that added little intelligence value apart from the Commission's confirmation of details about suspected Soviet espionage in Australia before 1949. The Gouzenko affair was a lesson that prompted Cold War security measures; the Petrov affair was, in key respects, a public relations exercise that sought to justify them.

The Petrov affair followed nearly a decade of Cold War developments. As noted, little was known about the reach of Soviet espionage in September 1945, strict secrecy was maintained during investigations supported by executive orders, and once the public became aware of the defection, there was general complacency about departures from constitutional and legal conventions during the closed Commission hearings and the public trials that followed. Gouzenko lent urgency to the Venona decryptations, and by 1947 British security policy had settled into a 'cold warrior' approach to Soviet international espionage and domestic communism, collaboration with the US was renewed, and MI5's interventions were less of a scramble than in 1945–46 as UK and US security priorities were projected further through the Commonwealth. Security anxieties deepened as the Soviets developed an atomic bomb, but government responses also became more politically fraught as they reached deeper into the domestic public sphere. Public

³⁷ See George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18(3) *Melbourne University Law Review*, 630; Frank Bongiorno, 'Herbert Vere Evatt and British Justice: The Communist Party Referendum of 1951' (2013) 44(1) *Australian Historical Studies* 54.

concern grew with the US spectacle of ‘un-American’ enquiries, spy trials and the execution of the Rosenbergs, and in Australia itself, the Coalition government’s anti-communist legislation, the High Court challenge and referendum defeat.

As we shall see, unlike the secrecy that surrounded the Gouzenko affair, Petrov’s defection was quickly publicised, highlighted by Petrova’s dramatic rescue by ASIO from the KGB. Although the Australian Commission also entailed an inquisitorial process and the rules of evidence differed from regular legal proceedings, there was not the wide suspension of legal conventions as in Canada. The hearings were public, the witnesses had access to counsel, and the Commissioners were attentive to due process expectations. Unlike the order in council PC 411 *carte blanche* given to the Canadian Commissioners, inquiry terms of reference and powers were significantly regulated under the *Royal Commissions Act 1902* (Cth), although the Act was further amended part way through the hearings.³⁸ The Petrov affair, unlike Gouzenko, had few legal consequences. The Commission recommended no prosecutions and only modest law reform. Its consequences were essentially political. The Commission justified and helped legitimate the Coalition government’s controversial security policies and Menzies was to dominate domestic politics for over another decade. Evatt squandered his 1951 victories, the ALP seemed unsound on security, and divides within it deepened. Security issues continued to haunt the ALP, even after its return to power under Whitlam in 1972.

Much of the Petrov affair literature unsurprisingly focuses on domestic political matters, as Menzies prevailed over Evatt to secure the Coalition’s hold over power and marginalise the ALP.³⁹ More recent studies, notably by Robert Manne and David Horner, place the Petrov affair in its international security and intelligence context, access new sources, refrain from taking sides in the

³⁸ *Royal Commissions Act 1902* (Cth). On the 1954 amendment see n 55 below.

³⁹ Apart from Brian Fitzpatrick’s contemporary civil libertarian critique (*The Royal Commission on Espionage: A Commentary* (CB Christesen, 1955)), many studies that followed sought to confirm Evatt’s claim of political conspiracy, that the defection and commission hearings were engineered by Robert Menzies and Charles Spry for the Coalition’s political advantage, returning it to government in May 1954 and a majority in late 1955 election, fostering division within the Australian Labor Party (‘ALP’), and further fostering the impression it could not handle security challenges as ASIO continued to undermine the ALP over the next decade: see eg, Nicholas Whitlam and John Stubbs, *Nest of Traitors: The Petrov Affair* (Jacaranda, 1974). Less critical accounts tend to reflect the opposing political perspective, hagiographies that celebrate ASIO as well as Menzies as a consummate politician and his stabilising domestic and international policies. Fitzpatrick stands apart in carefully raising questions about the political and judicial process, and while the Hope Commission found Evatt’s collusion claims unfounded, the judicial issues examined more closely in this study were brought back into view by George Winterton (‘Judges as Royal Commissioners’ (1987) 10(1) *University of New South Wales Law Journal* 108) and Laurence W Maher (‘Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia’ (1993) 21(2) *Federal Law Review* 151).

Menzies–Evatt conflict, and present it as ASIO’s rite of passage.⁴⁰ Horner’s detailed account of ASIO’s first major counter–espionage operation emphasises the organisation’s professionalism, how the successful orchestration of the defection and effective responses to it secured Australia’s status as a sound partner in the Cold War security and defence alliance, and he finds no evidence of collusion between Spry, Menzies, and the Commissioners.⁴¹ Manne’s assessment is similar but also acknowledges that Menzies took full political advantage of the Petrov affair, skillfully exploiting it to enhance the Coalition’s power to become its chief beneficiary and Evatt’s *nemesis*.⁴²

The proceedings arising out of the Petrov affair can be recounted in more detail than Gouzenko (when secrecy was extended through the entirety of the Commission hearings and most elements of the transcripts, including evidence considered and related security documents, were classified and many have remained so). Government informer Michael Bialoguski initiated ASIO’s contact with Petrov in July 1951, befriending him as they indulged in the distractions and high life of Sydney’s King’s Cross. Spry met with Menzies on 10 February 1954 to inform him that Petrov was ready to defect, and was instructed to come to terms and plan for his reception. Spry reminded Menzies of Canada’s Royal Commission and suggested a similar response. Petrov was not mentioned when Menzies met with his Cabinet in the following weeks when it was agreed that the government would call an election when the current legislative session ended in mid–April.

Petrov defected at the beginning of April after a protracted negotiation of terms including financial support. The legislative session ended a couple of weeks later with the government calling the long–planned election to take place on 29 May and also announcing Petrov’s defection and plans for an inquiry.

During this time Spry prepared a detailed memorandum for a Royal Commission and briefed Menzie’s Executive Council on 17 April, noting the high regard for the Canadian espionage Commission in UK and US intelligence circles, adding that such a response was needed since ASIO had no legal power to require persons to cooperate with investigations or compel testimony in relation to Petrov’s evidence. The public report of the Canadian espionage Commission was

⁴⁰ There is no partisan political axe to grind in Robert Manne, *The Petrov Affair: Politics and Espionage* (Pergamon/MacArthur Press, 1987) or Horner (n 26), which place the Petrov affair in international context and access new primary sources (Manne conducted exclusive interviews with Spry while Horner’s ‘independent official history of ASIO’ involved access to previously classified material). Although they reflect a somewhat uncritical institutional bias, both studies provide rigorous and thorough accounts of Petrov’s defection and the Commission response which I have relied upon primarily for my narrative.

⁴¹ See Horner (n 26) 6, 346–8, 372.

⁴² Manne’s study was the first to adequately explore the important connections to the Gouzenko affair, and as he puts it in his preface (Manne (n 40) xi):

From the broadest perspective the Petrov Affair might be seen as the last in the series of major Soviet spy dramas which shook the Western democracies during the period of the Cold War 1945–1954. From the strictly intelligence point of view it was the most closely reminiscent of the Gouzenko defection which occurred nine year earlier in Canada ... Gouzenko, however, did not divide Canada.

available but Spry suggested that the full record, including transcripts of all the hearings, classified evidence presented, intelligence service exchanges, and additional confidential recommendations, would be invaluable. A formal request for the complete Canadian Commission record was sent through the Australian High Commission in Ottawa.⁴³

Menzies had assured Evatt on 14 April that the government was committed to an independent inquiry, adding that Coalition candidates would be instructed to refrain from comments on Petrov during the election campaign and the inquiry. The timing of the election and defection announcement raised suspicions, but Evatt pledged his party's support for an impartial, non-partisan approach. Days later, Petrov's estranged wife, unaware of her husband's defection until it was made public, was escorted by KGB agents through a crowd of anti-communist demonstrators and journalists to board a flight to Moscow at Sydney Airport, and then dramatically 'rescued' by ASIO agents as the aeroplane refuelled in Darwin. The drama deepened Evatt's suspicions, and further consultation proved desultory, Evatt insisting he could make no meaningful input without access to Petrov's evidence.⁴⁴ This was denied, and while there was to be no further consultation with the Leader of the Opposition, Menzies consulted closely with ASIO Director-General Spry and Chief Justice Dixon as the Commission rapidly took shape.

Australia's *Royal Commissions Act* led to a more structured process than in Canada for establishing the espionage Commission and the hearings that were to follow, with general guidelines on terms of reference, legal powers, and procedure.⁴⁵ After informal discussions and hectic preparations at the Attorney-General's office during the latter half of April, the key elements of the espionage Commission were finalised at a series of Executive Council meetings in early May. At the first of these on 1 May, Menzies' Cabinet was joined by Spry and senior Attorney-General's Department officials, and agreement was reached to commence hearings on 17 May and on ASIO's relationship to the Commission.⁴⁶

The specific terms of reference and major appointments were confirmed at a second Cabinet meeting two days later.⁴⁷ The selection of lead Commission personnel had proved a complex task. Dixon, who Menzies appointed as Latham's replacement as Chief Justice of the High Court in 1952, was the Prime Minister's

⁴³ Ibid 118.

⁴⁴ Ibid 113.

⁴⁵ The *Royal Commissions Act* (n 38) regularised commission inquiries to a greater degree than Canada's *Inquiries Act* (n 16) which, for the most part, simply delegated prerogative to the Canadian government for matters falling under its jurisdiction.

⁴⁶ Horner (n 26) 352–7. Ron Richards, Deputy Director-General (Operations), was put in charge of ASIO's support work for the Commission as 'Controller of the Royal Commission section'. The section interviewed suspects and prepared briefs for the Commissioners.

⁴⁷ See *ibid* 352; Manne (n 40) 113–18. The Commission's terms were to inquire into and report on the Petrov evidence of espionage and related activities in Australia, whether espionage was conducted and attempted by Soviet agents in Australia, whether Australian citizens or organisations communicated information to Soviets contrary to Australia's security interests, and whether Australian citizens or organisations might have aided or abetted such espionage.

first choice to head the Commission. Dixon was approached shortly after Cabinet agreed to a Commission response, but he refused, citing a convention in place since the end of World War One that judges of Australia's highest court not sit on commissions of this kind. However, he agreed to be consulted informally and Menzies was to rely heavily on his legal and constitutional suggestions and his extra-curial advice continued as the hearings got underway.⁴⁸ Soon after, Dixon advised Menzies on the selection of sound judges from the state Supreme Courts and about approaching their respective governments.

The selection of the preferred candidate for Commission Chair, Sir William Owen of the New South Wales Supreme Court, went smoothly, but the search for associate Commissioners from Victoria and Queensland did not. Victorian Premier John Cain referred the matter to the Chief Justice of that State's Supreme Court, Sir Edmund Herring, who refused to release his judges. Menzies turned to South Australia instead and Supreme Court Justice, Sir George Ligertwood, was selected. The Queensland selection was also fraught. When Menzies approached Labor Premier Vince Gair, naming Sir Roslyn Philp of the Queensland Supreme Court as the preferred candidate, Gair left the choice to Queensland's Chief Justice without naming Philp. When the Hon Kenneth Townley was selected, Menzies rejected the choice, at which point Philp was selected instead.⁴⁹ Menzies also followed Dixon's recommendation of equity lawyer Victor Windeyer QC as lead government counsel, despite Spry's preference for an experienced criminal barrister. Windeyer's appointment, along with Owen, Ligertwood and Philp were confirmed.⁵⁰

The classified full Canadian Commission record arrived shortly after, was closely examined by Spry, Dixon, and the Attorney-General, and key points were presented at the final Executive Council meeting on 9 May. Procedure and related matters such as disclosure and publicity still needed to be decided, and lines of authority between government, ASIO, and the ostensibly independent Commission needed further clarification. It was agreed that relevant classified evidence from the Canadian Commission and MI5 could be disclosed to Windeyer and the Commissioners where necessary to corroborate or supplement Petrov's evidence, but only with Spry's approval. Scrupulous about preserving the classified status of these sources and the security sensitivities around other evidence, Spry expressed a strong preference for closed hearings like Canada's. Closed hearings would protect sources and witness confidentiality, and also

⁴⁸ On debate about the convention sparked by Petrov, see below n 79. Dixon's advising continued during the hearings, notably on the retroactive amendment of the *Royal Commissions Act* (n 38) in response to Evatt's challenges: see below n 55.

⁴⁹ Manne (n 40) 114–115. In refusing Menzies' request for Justice Michael O'Bryan, Herring referred to Dixon's refusal and may have also been influenced by Victoria Chief Justice Irvine CJ's 1923 memo arguing that the State Supreme Court should also follow the High Court convention. Gair made an issue of the Queensland selection during the May election.

⁵⁰ Ibid 116. George Pape and Bernard Riley were appointed as assisting counsel, and Kenneth Herde of the Prime Minister's Office headed the Commission Secretariate. Windeyer appeared with Barwick for the government in the 1951 High Court challenge to the anti-Communist legislation and Spry separately retained Barwick as ASIO's counsel part-way through the Commission hearings.

protect innocent persons who might happen to have been mentioned in the evidence, called to appear, then put under a cloud of suspicion. Witnesses should only be named if and when the Commission recommended legal proceedings. Menzies and his Cabinet colleagues decided that secrecy clashed with the principle that justice must be seen to be done. The political costs of closed sessions would be too high given existing publicity around the Petrovs, encouraging rumours of a cover-up by the press and government opponents, and limiting the salutary public impact of evidence about the dangers of Soviet espionage. There would be public hearings to review evidence of espionage, with defence counsel and cross-examination of government sources permitted, and with classified evidence from intelligence partners vetted by ASIO reviewed *in camera*.⁵¹

The next day, the government announced details of the Royal Commission on Espionage to the public, with hearings to commence the following week after a press conference with the Petrovs. Spry, still concerned about open hearings, informed the Commissioners that the Petrovs were not ready for any public appearance. Evatt also warned Windeyer that such a conference could constitute contempt of the Commission. Windeyer consulted Owen and Menzies, who contacted Dixon. Dixon and Owen agreed that Evatt raised a valid concern; the Petrov affair was now in the hands of the Commission which must maintain every appearance of independence. Spry also contacted Windeyer to remind him that his opening address must avoid any hint of ASIO payments to the Petrovs. Nor should other names be mentioned, their identities disclosed only when directly relevant to the proceedings as the Commissioners came to consider their specific evidence during the hearings.⁵²

The Commission opened on 17 May 1954, the focus of press attention in the wake of the defection drama and in the midst of the election campaign. Windeyer's address ran to a second day, set out the Petrovs' role in Soviet intelligence and the circumstances of the defections, with long forays on the devious nature of Soviet espionage and the malign influence of communism. He duly avoided mention of ASIO inducements, noted that the government's case would be presented in public except for review of classified sources from other governments, and added he would not name others implicated in the alleged espionage apart from the Petrovs to avoid harmful speculation, their identities to be disclosed only when directly raised in evidence during the hearings as relevant witnesses were examined.

Windeyer's reference to sources from other governments prompted Spry to request an urgent meeting with government counsel and the Commissioners to remind them of the strictly classified nature of the full Canadian Commission record and other overseas evidence from MI5, which should not be referred to during the hearings until ASIO determined it was appropriate to review them *in camera*. Spry also had practical concerns, noting the Canadian hearings

⁵¹ Ibid 116–17; Horner (n 26) 352–7.

⁵² Manne (n 40) 118.

commenced after evidence had been collected for months. By contrast, the Australian hearings began just weeks after the defections and ASIO would not only be hard-pressed by the Commission's demands for evidence, but also more time was needed to ready the Petrovs for their appearance.⁵³ This may explain, at least in part, why the Commission began with consideration of two documents submitted by ASIO, separate from Petrov's evidence of Soviet espionage. The first, allegedly written by journalist Rupert Lockwood, implicated Jim Hill and Ian Milner, formerly with External Affairs, and Ric Throssell, still in the Department, and also referred to Evatt staffer Fergan O'Sullivan. A second, from O'Sullivan himself, implicated fellow Evatt staffers Allan Dalziel and Albert Grundeman. The introduction of this evidence on the eve of the election, with no prior word to the ALP, caused a sensation in the press.

The Coalition won the election on 29 May. Evatt's suspicions of political manipulation became a certainty and he blamed the election loss on a political conspiracy led by Menzies and ASIO.⁵⁴ When hearings reconvened a week after the election, O'Sullivan, dismissed from Evatt's staff as a suspected plant, admitted he wrote the second document and was a source for the document attributed to Lockwood. Owen emphasised that nothing in the evidence cast suspicion on the Opposition Leader, but a furious Evatt demanded immediate access to all information detrimentally affecting his staff, protested the defamatory and widely publicised imputations about them with no notice, and insisted this be read into the Commission's record. Menzies consulted with Dixon, who recommended amendment of the *Royal Commissions Act* to widen legal immunity for government counsel and the Commissioners from defamation action, and protect the proceedings from insult and disruption that could bring the Commission into disrepute. It was introduced on 11 August following the opening of the new Parliament, and soon passed following acrimonious debate the next day.⁵⁵ Protected by parliamentary privilege, Evatt declared the Commission was part of a political conspiracy rather than an impartial investigation of espionage, but the Speaker ruled

⁵³ Ibid 120–2; Horner (n 26) 358–9.

⁵⁴ Evatt's suspicions had deepened from mid-April but the Commission's examination of separate ASIO evidence implicating his advisors on the eve of the election and the election result convinced him of an orchestrated political conspiracy to discredit the ALP, which became an obsession, leading to poorly-judged interventions in the next parliament and committee hearings later in the year. On Evatt's decline: see Manne (n 40) 123.

⁵⁵ *Royal Commission on Espionage Act 1954* (Cth), amending the *Royal Commissions Act* (n 38). Menzies was careful to avoid comment on the ongoing work of the Commission, but in response to Evatt's aggressive questions during debate on the amendment and the Petrov affair, he noted: 'When it was decided to appoint a Royal Commission, I first of all had discussions with the Chief Justice of the High Court of Australia ... who made it very clear why the High Court traditionally refused to allow its member to serve on Royal Commissions'. He made no mention of course of Dixon's ongoing extrajudicial advising: Commonwealth of Australia, Parliamentary Debates, House of Representatives, 12 August 1954 ('*Parliamentary Debates*') (see <https://historichansard.net/hofreps/1954/19540812_reps_21_hor4>).

there could be no further debate on matters currently before the Commission and Evatt announced he would appear at the hearings to defend his staffers.⁵⁶

Commission hearings resumed on 16 August when Evatt appeared as legal counsel for Dalziel and Grundeman. He mounted a robust cross-examination of Ron Richards, ASIO's Commission liaison, his questioning of Petrova revealed bitterness towards her husband, and he helped Ted Hill defend Lockwood, who refused to answer questions before this. Lockwood now testified that he did not write the document in question. Evatt submitted expert evidence that it was not in Lockwood's usual style and reflected the work of at least two hands, suggesting it was fabricated by ASIO. He was cautioned by the Commissioners, who were increasingly concerned about incompatibilities between Evatt's legal role as counsel for his staff and political role as leader of the official Opposition, a reflection of government claims that Evatt was engaged in a political excursion rather than acting as a disinterested advocate for his staffers. When hearings resumed from a break on 7 September, Evatt was informed that his leave to appear was under consideration. He refused to withdraw allegations of fraud and political conspiracy or refrain from them in future proceedings, so the Commissioners ruled unanimously in favour of his formal exclusion.⁵⁷ Evatt returned to Canberra the next day to an increasingly divided caucus.

Spry's lack of confidence in Windeyer increased during Evatt's cross-examination of Richards and other senior ASIO staff at the hearings, compounding his concern that the lead government counsel might compromise classified sources, so he insisted ASIO retain its own counsel and Sir Garfield Barwick QC accepted the brief.⁵⁸ Barwick commenced examination of Dalziel and Grundeman on behalf of ASIO on 13 September and Evatt applied to be readmitted as counsel. He was refused but remained at the hearings to informally assist Ted Hill for several days without informing his caucus. He returned to meet it on 21 September and faced the first of a series of unsuccessful resolutions to remove him as ALP leader.⁵⁹

The Commission's unanimous interim report of 21 October declared Evatt's allegations of political conspiracy groundless, his assertions that ASIO fabricated documents, claims of dereliction of duty and abuse of public funds and office wholly unsupported, and that his maligning of ASIO had caused disquiet in

⁵⁶ See Manne (n 40) 131–7; Horner (n 26) 356–9. Blocked by the Speaker, Evatt infuriated Menzies by elaborating his claims and plans to appear as defence counsel at the Commission in a subsequent press release.

⁵⁷ Manne (n 40) 144–8; Horner (n 26) 362–4. Evatt's conduct fell short of the common law grounds for contempt of court but the amended legislation conveniently provided the basis for the Commissioners' assessment of Evatt's conduct and motives.

⁵⁸ Barwick later became Attorney-General, succeeded Dixon as Chief Justice of the High Court and, in 1975, advised Governor-General John Kerr on the controversial dissolution of the Whitlam government.

⁵⁹ Manne (n 40) 152–4, 160, 167–70. The staunchly anti-communist Victorian branch led the challenge, and others feared Evatt was undergoing a nervous breakdown. ALP divisions grew through 1955 to include New South Wales.

Australia and undermined the confidence of friendly nations.⁶⁰ In response to questions in Parliament in anticipation of the interim report, Menzies had stated that, while hesitant to comment before the Commission's work was complete, he felt compelled to defend the honour and integrity of the Commissioners and ASIO. He declared Evatt's attacks had compromised Australia's security more than communist propaganda, and he wondered why the ALP tolerated his leadership.⁶¹

The second phase of the Commission hearings commenced in early November and proceeded with more efficiency and less drama. Petrov's evidence and testimony from over a hundred witnesses was reviewed, including: Ian Milner, Evatt's former senior External Affairs advisor; Ric Throssell, still at External Affairs; Bert Chandler, returned from Hong Kong where he fled in 1953 after ASIO searched his home; Communist Party of Australia leader Lance Sharkey, convicted of sedition in 1949; and fellow Party-member Jim Hill, Ted Hill's brother. Hearings concluded in March 1955 with the *in camera* examination of Frederick Chilton from the Department of Defence and John Burton from External Affairs, along with evidence from what the Commission vaguely but carefully described as sources of proven reliability. Spry then arranged for the three Commissioners to view classified overseas intelligence, including Venona sources with the MI5 attaché. He then reviewed their draft report in July and insisted on revisions to better protect sources.⁶²

The final report, submitted to Parliament on 14 September 1955, confirmed that Soviet Embassy personnel engaged in espionage, members of the Australian Communist Party collaborated, and that there had been security leaks within External Affairs, but concluded that further damage to Australia's security ended in 1949 with ASIO's formation. No prosecutions were recommended (though a few security clearances, including Throssell's were withdrawn). The Commissioners noted that much of the evidence considered included hearsay, inadmissible in a court of law, and intelligence sources could be compromised should their evidence be disclosed and tested in open court. They identified the deficiency in Australian espionage law on spying for foreign powers outside of wartime, and recommended reform of ss 70 and 78–9 of the *Commonwealth Crimes Act* to bring it into line with the provisions of the *UK Official Secrets Act* and *Canadian Official Secrets Act*.⁶³

⁶⁰ *Royal Commission on Espionage* (Interim Report, October 1954) ('*Royal Commission Interim Report*'), see n 63 below.

⁶¹ *Parliamentary Debates* (n 55) 28 October 1954.

⁶² See Manne (n 40) 188–214; Homer (n 26) 370. The Commissioners carefully deferred to Spry's obsessive concerns about the confidentiality of sources. Petrov's evidence of a spy network similar to Canada's, dating back to the war and continuing during Markarov's residency until 1949, was corroborated by the Venona decrypts.

⁶³ *Royal Commission on Espionage* (Final Report, August 1955) 288–304 <<https://nla.gov.au:443/nla.obj-2587286978>> ('*Royal Commission Final Report*'). See also the National Archives of Australia which includes associated documents such as the *Royal Commission Interim Report* (n 60) and official transcripts of proceedings <naa.gov.au>.

In Parliament, Evatt declared that he had contacted Soviet Foreign Minister Vyacheslav Molotov (whom he had met at the UN), who dismissed all evidence of Soviet espionage as a fabrication — an incredulous assertion which met with predictable derision in the House. With little need to say more, and briefed by Spry to say as little as possible, Menzies simply responded to personal attacks on his integrity, adding only that the independent Commission findings spoke for themselves and confirmed the ALP's weakness on security.⁶⁴ The Coalition won a comfortable majority at the 10 December election and Menzies' domination of federal politics continued for another decade.

V COMPROMISED JUDICIAL INDEPENDENCE

The tension that exists between the rule of law and effective national security measures is well illustrated by the Gouzenko and Petrov affairs. The early Cold War Canadian and Australian experiences are consistent with a broader historical pattern of responses to security crises that illustrate the limits of formal constitutional claims associated with the rule of law, including judicial independence.

During war or other serious security emergencies there is a typically wider government reliance on executive authority and measures to enhance security and public order. Police investigative and enforcement powers are widened, procedural expedients are adopted that supersede regular legal processes and suspend rights and due process conventions deemed obstacles to an effective security response, and state interventions mobilise domestic resources. Such measures and the exercise of executive powers beyond the law may be authorised by temporary emergency legislation, the delegation of legislative powers to the executive empowering it to issue emergency regulations, or the direct exercise of prerogative.⁶⁵ Such measures are accompanied by government expectations that the judiciary will facilitate and legitimate these responses. The tendency of judges to defer to government security priorities sometimes deepens into outright judicial complicity during serious security crises, as senior judges become more closely involved in security deliberations and are consulted for extrajudicial government advising. 'States of exception' (a term attributed to Giorgio Agamben) also tend to persist beyond the immediate war emergency or security

⁶⁴ Manne (n 40) 253–4; Horner (n 26) 372–4.

⁶⁵ Exceptional emergency powers may be directly authorised by temporary emergency legislation (as has been the case in Australia under elastic federal defence powers), by Parliament passing permanent emergency legislation delegating its powers to the executive and empowering it to issue orders in council or regulations that have the effect of law, for the duration of an emergency (as in the case of Canada's *War Measures Act* (n 13), or by executive decrees issued under prerogative powers (as in the UK during World War One for measures to supplement those issued under temporary defence of the realm legislation). See Peter McDermott's comparison of Australian, British, and Canadian responses and modalities of executive power in 'Enemy Aliens and the First World War: Legal and Constitutional Issues' in Wright, Tucker and Binnie, *CST4* (n 14) 71.

crisis that justified them, and have a longer-term impact on security responses and institutional relations concerning security matters.⁶⁶

These themes are clearly demonstrated in the responses to Gouzenko's defection when the revelations of Soviet espionage provided justification for the continuation of wartime measures and related executive actions in which Supreme Court of Canada judges played a key supporting role. As noted, emergency transition legislation continued wartime executive regulations, notably the RCMP's special investigative powers and the indefinite detention of suspects, interrogated without self-incrimination warnings and legal representation. During the closed Commission hearings, Kellock and Taschereau acted in concert with police and prosecutors, blurring the boundaries between the courts and the Crown as they reviewed evidence without regard for separation of powers conventions. Compromised judicial independence was further demonstrated by their authoritative interpretations of the *Official Secrets Act* which placed pressures on the trial judges. This compounded the Crown's advantages during the trials as it took full advantage the *Official Secrets Act's* reverse onus and *in camera* provisions.

The tension between the separation of powers and security was less obvious during the Petrov affair. The government's security responses had been contentious over the previous five years, the defection and open hearings were a focus of public attention, witnesses were permitted counsel, and no spy trials followed. The Australian Espionage Commission was typical of such bodies in terms of inquisitorial process and consideration of wider forms of evidence than permitted in court. However, the retroactive legislative amendment of the Royal Commissions legislation in response to Evatt's claims as its hearings continued did limit defence contestation and helped justify his eventual exclusion. Dixon's informal extrajudicial advising both before and during the Australian Commission hearings, after turning down Menzies' request to head the Commission, was certainly less egregious than Kellock and Taschereau's extrajudicial activity. And while it could be argued that Dixon ensured the selection of capable Commissioners and was consistent as a senior judicial peer in

⁶⁶ These themes recur through the Canadian record of political trials and national security measures, from the colonial period (prosecutions for the classic political offences of treason and sedition, suspensions of habeas corpus and invocations of martial law) through the 20th century (where such responses were supplanted by modern emergency measures and new forms of state secrecy eg, the *War Measures Act* (n 13) and the *Official Secrets Act* (n 1), and coordinated intelligence-sharing). See generally the chapters in the Canadian State Trials series: F. Murray Greenwood and Barry Wright (eds), *Canadian State Trials Volume I: Law, Politics, and Security Measures, 1608-1837* (University of Toronto Press, 1996) ('CST1'); F. Murray Greenwood and Barry Wright (eds), *Canadian State Trials Volume II: Rebellion and Invasion in the Canadas, 1837-1839* (University of Toronto Press, 2002) ('CST2'); Barry Wright and Susan Binnie (eds), *Canadian State Trials Volume III: Political Trials and Security Measures, 1840-1914* (University of Toronto Press, 2009); Wright, Tucker and Binnie, CST4 (n 14); Wright, Binnie and Tucker, CST5 (n 10). For an overview of the series themes, see Barry Wright, 'Epilogue: The Canadian State Trials Series in Retrospect' in Barry Wright, Susan Binnie and Eric Tucker (eds), *Canadian State Trials Volume V: World War, Cold War, and Challenges to Sovereignty, 1939-1990* (University of Toronto Press, 2022) 462.

his public encouragement of a distanced, disinterested approach to government interests, it remains the case that he informally, and without transparency, contributed to the government's response through extrajudicial advising during a perceived security crisis. Dixon's contributions were more discrete but not dissimilar to Latham's in extensive government advising during the war and after, notably his help with the response to the High Court decision on the anti-communist legislation. His advising was certainly a more modest contribution to government interests than those of Kellock and Taschereau, but also raises questions nonetheless about the pernicious influence of security crisis exceptionalism on judges and judicial independence.

The British constitutional protections that provide the institutional basis for judicial independence tend to be taken for granted from a modern perspective, but they are relatively recent developments. In the case of Canada and Australia, these were established only as they developed self-governing status, fully operating with modern Westminster parliamentary government institutions and shared British constitutional foundations, including the basic protections of judicial independence. Responsible cabinet government and the formal judicial independence, as they had developed in the UK in the first half of the 19th century, did not extend to the colonies. The British North American colonies federated in 1867 and the Australian colonies in 1901, but the shift from colonial status to self-government was a protracted and gradual process that preceded and followed those dates.⁶⁷ And the division of jurisdictional powers, including authority over judicial appointments, not only marked a departure from the unitary British state but also differed between the two federations. A brief review of this constitutional history further explains the differences in judicial responses during the Gouzenko and Petrov affairs. While they reflect, in part, the direct influence of the differences in immediate circumstances, of Gouzenko's unexpected defection and attendant secrecy and Petrov's planned defection and the associated publicity, they also reflect a broader context of constitutional developments related to judicial independence in Canada and Australia to this time.

AV Dicey identified the requisite institutional and procedural elements of the rule of law found in the 19th century British constitution, one of which is judicial independence, protected by security of judicial tenure and the separation of judicial deliberations about the interpretation and application of law from the

⁶⁷ Colonial self-government increased in the mid-19th century, but independent authority over international affairs and relations only emerged after World War One, and while full legislative autonomy came with the 1931 *Statute of Westminster* (n 1), British supervision and coordination around defence and security continued during World War Two, as illustrated by MI5's Cold War Commonwealth role across the Commonwealth), and JCPC appeals continued (having a significant impact on Canadian affairs, though somewhat less on Australian).

influence of executive and legislative branches of government.⁶⁸ The first protection derived primarily from the *Act of Settlement* which shifted judicial tenure from Royal Pleasure to good behaviour as determined by Parliament but colonial judges continued to hold office according to royal pleasure until belatedly adopted in Australia and Canada in the mid-19th century.⁶⁹ Separation of powers conventions on the relationship of the courts to the Crown and Parliament remained ambiguous in Britain itself in the 18th century, but it solidified in the 19th after senior judges were excluded from Cabinet, resort to ‘extrajudicial opinions’ was discouraged, and liberalising representative and responsible government reforms during the 1830’s reinforced the convention.⁷⁰ Senior colonial judges remained leading members of appointed Executive Councils, the nexus of colonial government, with limited accountability to elected legislative assemblies. Colonial judges played a key role in government deliberations and extended its control over the local administration of justice in support of local governing elites.⁷¹

Colonial responsible government struggles against government executives, to make colonial governments more accountable to legislative assemblies, was a central issue in the 1837–38 Canadian rebellions, and Lord Durham’s report on colonial governance that followed led to broader liberal modernisation of colonial administration, manifested in reforms such as the 1865 *Colonial Laws Validity Act*.⁷² Increasing self-government and amendment of colonial constitutions

⁶⁸ The basic requisite elements of the rule of law identified by Dicey, as reflected in the conventions of the modern British constitution, were that all law must be the product of duly constituted authority (sovereignty of Parliament), it is applicable to all (none above the law), and it is administered by an impartial, independent judiciary – see Albert Venn Dicey, *An Introduction to the Law of the Constitution* (Macmillan, 8th ed 1915), 179–201. These constitutional conventions of the rule of law were elaborated in common law principles (eg, the doctrine of natural justice) and in decisions such *The Zamora* (1916) 2 AC 11, where Lord Parker rejected the assertion that Crown prerogative could alter existing law by order, but the rule of law only found explicit written recognition in the UK Constitution in the Constitutional Reform Act, 2005.

⁶⁹ See *Act of Settlement* 1701, 12 & 13 Wm 3, c 2. Appointment of colonial judges on the basis of royal pleasure was a means of enabling the British government supervision of the colonial administration of justice, along with the routine review of colonial legislation by the Colonial Office (and the possibility of disallowance) and appeals from the colonial courts to the JCPC.

⁷⁰ Controversies about the inclusion of senior judges in Cabinet/Executive Councils and the push for greater legislative accountability of ministers intensified during the period of the French Revolution and the Napoleonic wars. The 1806 ‘Ministry of All the Talents’ was the last judicial inclusion. The ‘Great Reforms’ to Parliament in the 1830’s made cabinet directly accountable to the Commons and entrenched the separation of powers conventions.

⁷¹ The role of senior colonial judges in support of local governing elites is illustrated in the many of the chapters in Greenwood and Wright, *CST1* (n 66) and Greenwood and Wright, *CST2* (n 66) but there are also exceptions to the general pattern of judicial complicity (see John D McLaren *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial 1800–1900* (University of Toronto Press, 2011)). Judges appointed to colonial benches from Britain occasionally became defiant after falling out with established local elites who demanded their removal: John Walpole Willis is an example, removed from the bench in Upper Canada in the late 1820’s after demonstrating support for government opposition, then encountering similar conflict in New South Wales. Such conflicts became more prevalent in plantations colonies but less so in settler colonies as more judges were recruited from the maturing local bar.

⁷² (Imp) 28 & 29 Vict, c 63, allowing colonial legislatures to enact laws that departed from English law, reform their courts, and amend colonial constitutions but imperial laws passed by the UK parliament remained paramount until the 1931 *Statute of Westminster* (n 1).

confirmed the full adoption of the modern British protections of judicial independence and culminated in the federation of the Canadian and Australian colonies.⁷³ However, Canada and Australia diverged just as they caught up.

Canada has a more centralised division of legislative powers than Australia, including wider federal jurisdiction over criminal law and judicial appointments (including the superior trial courts and provincial courts of appeal, as well as the Supreme Court). The Australian government appoints judges to federal courts only; other judicial appointments fall to the state governments, which also have primary jurisdiction over criminal law.⁷⁴ A reference procedure, introduced when the Supreme Court of Canada was established in 1875, in effect a formalised process for soliciting extrajudicial opinions, marks another relevant divergence.⁷⁵ Similar formal references in Australia were struck down by the early High Court,⁷⁶ although it appears there was continuing toleration for *informal* extrajudicial advising. Yet another difference is the High Court convention on royal commissions that emerged after World War One. No such convention developed in Canada where senior judges frequently headed royal commissions for much of

⁷³ Canadian judiciary: Preamble and part VII of the *British North America Act, 1867* (Imp) 30&31 Vict. c 3 ('BNA Act') and *Supreme and Exchequer Courts of Canada Act, 1875* SC 1975, c 1. The *Colonial Laws Validity Act* also led to the adoption of the modern protections of judicial independence in the Australian colonies through 1860's amendments to the colonial constitutions (Victoria and New South Wales) or legislation (Tasmania, Queensland), further set out in the *Australian Constitution* and the creation of the Australian High Court in the *Judiciary Act 1903* (Cth); see also David Clark, 'The Struggle for Judicial Independence: The Amotion and Suspension of Supreme Court Justices in 19th century Australia' (2013) 12 *Macquarie Law Journal* 21; Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive' (2014) 40 (3) *Monash University Law Review* 534.

⁷⁴ Canadian federal and provincial jurisdictional powers are enumerated in sections 91 and 92 of *BNA Act* (n 73), with the federal government having residual powers related to 'Peace, Order and Good Government'. The *Australian Constitution* ss 51 and 52 set out concurrent federal and state jurisdictions, enumerated exclusive federal powers, with residual powers held by the states (s 107 adds that states retain all the jurisdictional powers they had as colonial legislatures while s 109 specifies that that federal law prevails over state law if there is inconsistency or conflict). The decentralised American model of federalism was much discredited by the US civil war which raged at the time of the 1860's Canadian confederation debates, reinforcing an existing disdain for American institutional arrangements in loyalist/Anglo-Canadian political culture. There was unanimous support for Sir John A. Macdonald's assertion that federal jurisdiction over criminal law was as important as defence for proposed new federal government, and as Canada's long-serving first Prime Minister and Justice Minister, he pursued a robust assertion of federal powers, which the provinces contested through JCPC appeals. Unlike the comprehensive *Canadian Criminal Code* (n 1), the *Commonwealth Crimes Act* (n 1) relates to matters directed associated with enumerated federal powers, notably security and defence. Australian constitutional framers in the 1890's were more open-minded about US federalism, openly adopted elements of it, and constitutional conflicts over jurisdiction were mostly settled within the country by the High Court of Australia. See, eg, Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

⁷⁵ References enable the Canadian government to solicit advisory opinions directly from the Supreme Court without the matter going to trial. This exceeded the UK Lord Chancellor's residual government advisory role by introducing a formal procedure to elicit judicial views on contemplated legislation with constitutional implications, notably in relation to jurisdictional issues (and possibly to legitimate resort to federal disallowance powers, which became moribund as the provinces turned to JCPC appeals; their success curbed federal powers but the Canadian government has continued to use the reference procedure continues for advice on constitutional matters).

⁷⁶ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

the 20th century (this was also the case in the UK, notably the 1960s Commissions on security headed by Lords Cyril Radcliffe and Alfred Denning). Taken together these differences between Canada and Australia help to explain, beyond the different particular circumstances around the defections, the deeply engaged participation of Kellock and Taschereau in government responses in 1946 and Dixon's caution in 1954.

Royal commissions and extrajudicial government advising and opinions, whether formal (via committees and reference cases in Canada) or informal, have the potential to compromise judicial independence and the independent operation of the courts. Judges can easily cross into matters of public policy that are properly the responsibility of Parliament, and their recommendations, particularly if issued by senior judges, may compromise the position of trial judges should related issues subsequently come to the courts. On the other hand, judge-commissioners lend nonpartisan legitimacy to the review of contentious issues and policy, and although inquiries differ from adversarial legal proceedings, their expertise lends procedural fairness in the collection of evidence and the conduct of hearings, and their sensitivity to legal rights can prevent proceedings from becoming unfair inquisitions.

There was more attention to balancing these concerns in Australia and rather more complacency in Canada until the 1970s and the formation of the Canadian Judicial Council ('CJC'). Prior to this, Canadian debates about Royal Commissions focused narrowly on the issues in contention, often government actions or inactions, and the role of presiding judge-commissioner seldom came into question. Canada's wartime Chief Justice, Sir Lyman Poore Duff, engaged in extensive extrajudicial advising during World War Two and headed a number of Royal Commissions, including the highly controversial inquiry into the disastrous 1941 deployment of poorly-trained Canadian troops to Hong Kong just before Japan's invasion. Mackenzie King's government was absolved of fault but Duff continued to advise the government in subsequent responses to opposition criticism of the contentious findings and few questions were raised about the propriety of that. Complacency around the integrity of judicial independence was even more strikingly demonstrated less than four years later when Kellock and Taschereau presided over the secret hearings of the espionage Commission.⁷⁷

Sir Samuel Griffith was the last High Court Justice to preside over an Australian Royal Commission after his 1918 inquiry into recruitment issues

⁷⁷ Lyman P Duff, *Report on the Canadian Expeditionary Force to the Crown Colony of Hong Kong* (Report, 4 June 1942). Canadian troops were quickly overwhelmed when the Japanese invaded the colony months later; after surrendering, many of the soldiers and almost all the officers were summarily executed rather than taken as prisoners of war. See also David Ricardo Williams, *Duff: A Life in the Law* (University of British Columbia Press, 1984).

controversially endorsed conscription despite its defeat in referendums.⁷⁸ The emerging convention was informed by the concern that appeals could be compromised if legal issues arising out of a commission end up in the courts and, in 1923, the Chief Justice of Victoria, Sir William Irvine, issued a memorandum that attempted to extend it, declaring that judges in the State's courts should also avoid such appointments. Dixon's reliance on the convention in response to the Prime Minister's request to head the espionage Commission, and Chief Justice Herring's refusal to make Victorian Supreme Court Justices available (possibly influenced by his predecessor's memo), renewed debate about appointing serving judges to royal commissions. This played out at an August 1955 conference, recounted by JD Holmes in the *Australian Law Journal*, and included comments from Dixon, Latham, and Douglas Menzies QC (cousin of the Prime Minister and a prominent Melbourne QC later appointed to the High Court).⁷⁹

These commentators agreed that Irvine's attempt to extend the convention went too far and the familiar arguments were made about judicial expertise lending greater impartiality and integrity to commission proceedings, rigour around procedure, and care in the handling of evidence in hearings when witnesses are compelled to appear.⁸⁰ Latham and Menzies argued for the relaxation of the High Court convention to make these justices available for the most challenging formal inquiries. In Dixon's view, the advantages of judicial expertise were outweighed by the dangers posed to perceptions of impartiality as well as the impact of the recommendations of judge-commissioners on trials, appeals, and the integrity of judicial independence. He admitted that turning down the Prime Minister's request was a difficult decision, but correct in retrospect, and reiterated that it would be improper for justices of the High Court to deal with issues arising in a commission inquiry that could be reasonably be anticipated to be a matter of challenge and appeal, and that judges in other courts should recuse themselves, should issues arising from the commission they participated in appear before them. The convention insulates Australia's highest courts from contentious policy and protects the administration of justice and judicial independence.⁸¹

Fiona Wheeler notes that Dixon left the impression that the convention was firmly established after 1918, yet governments persisted with Royal Commission requests to High Court justices. During his tenure as Chief Justice, Sir Adrian Knox stoutly refused such requests, but his rigid stance was criticised by his successor, Latham (who served on wartime commissions but no Royal Commission inquiries), and it seems the Prime Minister approached Dixon in 1954 hoping for

⁷⁸ Samuel Griffith, *Royal Commission as to Number of Members Fit for Active Service and Number of Reinforcements and Enlistments Required* (Report, 14 March 1918). Griffith's Commission endorsed the policy of conscription despite the referendum defeats of the government's attempts to introduce it in 1916 and 1917.

⁷⁹ See JD Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253.

⁸⁰ *Ibid.* Douglas Menzies describes Irvine's memo as 'absurd' at 264.

⁸¹ See Dixon's comments: *ibid* 271–3.

similar flexibility.⁸² Dixon's principled refusal appears to reflect his legal formalism, his noted jurisprudential adherence to 'strict legalism,' and his response burnished a reputation for uncompromising impartiality and neutrality on contentious policy matters.⁸³ However, in light of his informal government advising the previous year, Dixon's comments seem somewhat disingenuous. While he made much of his principled decision to turn down Menzies's request to play a public role, he appeared to have few scruples when Menzies informally consulted him about the selection of Espionage Commission personnel and responses to Evatt's legal challenges from the time of the planned Petrov press conference to the amendment to the royal commission legislation. It seems Dixon was willing to compromise his declared principles when it came to pressing security concerns so long as his extrajudicial advising was kept out of public view.

That said, Dixon was rather more discrete about his government advising than his predecessor. Wheeler has closely examined Latham's extrajudicial activities, in particular his extensive government consultations and advising during the war, including leave to take up a diplomatic posting to Tokyo in 1940–41. This approach tailed off once the ALP formed government but resumed when Menzies came back to power in late 1949 and continued until Latham's retirement from the bench in 1952 (most notably his advising after his sole dissent in the High Court decision on the anti-communist legislation).⁸⁴ Dixon also took leave from the High Court from 1942–44 for diplomatic service and, in his 1955 *Australian Law Review* comments, he recognised this contradicted his principled stance which he regretted but saw as justified by wartime exceptionalism, but of course made no mention of his informal advising the previous year.⁸⁵

This would suggest that Dixon's concerns about extrajudicial involvement were significantly about public perceptions of independence which would be endangered by assuming a formal role on behalf of government. Again, there was a clear difference of degree between Dixon's informal extrajudicial advising and the extrajudicial activities of Kellock and Taschereau but it reflected compromised judicial independence nonetheless, and in a situation that was

⁸² Fiona Wheeler, "Anomalous Occurrences in Unusual Circumstances": Towards a History of Extra-Judicial Activity by High Court Justices' (Public Lecture, High Court of Australia, 30 November 2011). See also Fiona Wheeler, 'Book Review: Owen Dixon' (2003) 31 *Federal Law Review* 415.

⁸³ See Philip Ayres, *Owen Dixon* (Melbourne University Press, 2007). Dixon's detachment or distance from policy debates is described as 'strict and complete legalism' in approaching contentious issues and Ayres also notes numerous examples of Dixon's lack of direct engagement with partisan politics and policy, which set him apart from his predecessor Latham and successor Barwick who had been senior government ministers (including as Attorneys-General and as Ministers for External Affairs) before joining the bench (Evatt served in those ministries after his time on the High Court). After joining the High Court in 1929 Dixon was regarded as a 'peacemaker' in a highly divided Court that included Evatt, and following his diplomatic appointment by the ALP government, he ruled Chifley's 1947 legislation on bank nationalisation and Menzies' 1950 anti-communist legislation unconstitutional. He refused to sit on the JCPC and urged Menzies to end appeals to it.

⁸⁴ Fiona Wheeler, 'Sir John Latham's Extra-Judicial Advising' (2011) 35(2) *Melbourne University Law Review* 651.

⁸⁵ See Holmes (n 79) 271.

rather more distant from wartime exigencies, and during a security crisis that was rather less serious than that presented by the Gouzenko affair, given the rudimentary understanding of postwar Soviet espionage and its international implications in 1945–46.

Concern that arises from the compromising of judicial independence demonstrated during the Gouzenko and Petrov affairs does not imply that judicial service on Royal Commissions or that governments formally soliciting judicial advice and opinion is necessarily unacceptable. Judicial expertise outside the court can be invaluable and exercised without compromising judicial independence. The agreement on this point among Dixon and the others in the 1955 debate on Royal Commissions published in the *Australian Law Review* is generally sound, supported by the doctrine of *persona designata* to distinguish a judge's role in the courts from one in other capacities, as elaborated in more recent Canadian and Australian cases.⁸⁶ However, as Dixon recognised, service on commissions presents dangers that can compromise independence, dangers that senior appellate judges must be especially mindful of as leading judicial peers.

The development of further protections for judicial independence since the mid-1950s is beyond the scope of this article but warrant brief mention in passing. The Australian courts have articulated constitutional boundaries on permissible judicial powers and roles in cases such as *R v Kirby*; *Ex parte Boilermakers' Society of Australia* and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.⁸⁷ Wider public debate about judicial independence (and Evatt's concerns about the reserve powers of the Crown), erupted again around Barwick's involvement in the 1975 dissolution of the Whitlam government while Chief Justice of the High Court.

Despite little debate in Canada about extrajudicial activity, wider complacency about judicial service on royal commissions, and less sensitivity about departures from separation of powers conventions for much of the 20th century, there is now a degree of convergence with Australia on independence protections and extrajudicial activity. Sustained attention to these matters in

⁸⁶ While in general principle and by constitutional convention it is impermissible for judges to exercise non-judicial powers, the doctrine allows for limited or specific exceptions if the power has been conferred personally on an individual judge rather than on the court. See, eg, *Minister of Indian Affairs and Northern Development v Ranville* [1982] 2 SCR 518; *Grollo v Palmer* (1995) 184 CLR 348.

⁸⁷ *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. For a comprehensive review of cases setting out principles of independence, incompatible practices, and limits on extrajudicial activities, see Ananian-Welsh and Williams (n 73). In addition to Wheeler on extrajudicial activities (royal commissions, service on non-inquiry government commissions, quasi-judicial tribunals, and extrajudicial advising): see Winterton (n 39); Maher (n 39); AJ Brown, 'The Wig or the Sword: Separation of Powers and the Plight of the Australian Judge' (1992) 21(1) *Federal Law Review* 48.

Canada largely emerged in the 1970s after the creation of the CJC.⁸⁸ The Council has regularised the handling of complaints about judges (the discipline or removal of judges is more straightforward in Canada than in Australia due to the centralisation of judicial appointments).⁸⁹ The CJC has also developed guidelines for all federally appointed judges, notably those that aim to further protect the integrity of judicial independence, including judicial participation in royal commissions and other extrajudicial activities.⁹⁰

VI COLD WAR SECURITY POSTSCRIPT AND CONCLUSIONS

The 1946 and 1954–55 espionage Commissions, assisted directly and indirectly by judges of Canada and Australia's highest courts, endorsed the development of Cold War security institutions and processes as a government policy priority, and provided powerful domestic justification and legitimacy to new RCMP and ASIO operations with consequences that lasted for decades. As noted, this was driven in no small part by international pressure on the Canadian and Australian governments arising from the new postwar UK-US security alliance that rapidly emerged after Gouzenko, and new counter-espionage measures developed with the assistance of MI5 and elaborated at the Commonwealth Security Conferences, where an expansive definition of security threats was promoted, security expectations set and refined, and 'best practices' and new counter-espionage and counter-subversion techniques introduced. However, the Gouzenko and Petrov affairs and the espionage Commissions provided powerful local pretexts and justifications for the widening of counter-espionage against international security threats to encompass counter-subversion against perceived domestic security threats.

The RCMP and ASIO were coordinated by security committees with related government Departments such as external affairs, immigration, defence, and

⁸⁸ The Canadian Judicial Council ('CJC') was developed by Justice Minister John Turner in 1971 after his predecessor, Pierre Trudeau, was presented with Justice Leo Landreville's refusal to resign after a criminal conviction. Trudeau initially referred the case to the Law Society of Upper Canada but the regulatory body has no disciplinary powers over the bench and it was confirmed that the prevailing constitutional rules involved a resolution of both Houses of Parliament: see William Kaplan, *Bad Judgment: The Case of Mr Justice Leo A Landreville* (University of Toronto Press, 1996).

⁸⁹ Complaints are reviewed by a council of peers headed by Canada's Chief Justice which can issue a reprimand, temporary suspension from office, or make a recommendation to Parliament for removal. Resignations usually occur before the CJC reaches a decision, and in the few cases where removal has been recommended, before the matter goes to Parliament.

⁹⁰ On the CJC's judicial independence guidelines and a comprehensive report on the issues: see Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* Report (Report, May 1995). Guidelines related to royal commissions were ironically prompted when the federal and provincial governments brought a complaint about Thomas Berger's northern pipeline recommendations and pronouncements in favour of indigenous interests. Berger was reprimanded, Laskin CJ noting that judges serving on such commissions must refrain from speaking out policy matters that reflect political positions which are properly a matter for Parliament. Judges must also recuse themselves if matters they deliberated on as commissioners come to trial or appeal. Senior Canadian judges have refrained from serving on commissions until after retirement, compulsory at age 75 for federally appointed judges.

criminal justice.⁹¹ Liaison officers were attached to these departments and to diplomatic and consular offices internationally. Allied intelligence-sharing protocols were renewed as military wartime signals intelligence transitioned into collaboration on Venona. New security priorities informed the management of migrants, displaced persons, and the issuing of visas and passports.⁹² Within Canada and Australia, the handling of classified information was tightened, security clearances and vetting processes became more intrusive, and security registries more comprehensive, informed by MI5 guidelines reviewed at the Commonwealth Security Conferences.⁹³

Counter-espionage and counter-subversion were the pretexts for wider domestic surveillance and ambitious, highly-intrusive RCMP and ASIO operations.⁹⁴ It was a short step from the conflation of Soviet espionage with the activities of domestic communist organisations to security overreach. The boundaries were dissolved between demonstrated international security threats and perceived potential domestic security threats as the labour movement, immigrants, public servants and institutions, and a wide range of opposition and social justice movements became targets. Civil liberties and the rule of law were compromised as new forms of surveillance were deployed, purges implemented on loose security pretexts, informers recruited, and ‘fishing expeditions’ surreptitiously sought evidence against identified targets, or attempted to lure them into actions against the state, sometimes using illegal means and criminal acts. There is extensive scholarship on these Cold War experiences in Canada and

⁹¹ Canada’s wartime Joint Intelligence Committee continued for the coordination of the Gouzenko investigations and was reconstituted as a permanent security and intelligence advisory committee with a more robust counter-espionage focus. It approved new security procedures and reviewed the handling of classified government information, security screening and vetting of public servants, signals intelligence, and intelligence-sharing, priorities that were further developed at the Commonwealth Security Conferences. ASIO was also part of a similar joint committee in Australia but its lack of law enforcement powers made police coordination more complex and inter-agency issues mounted.

⁹² For background on the ‘Five Eyes’ see Dennis G Molinaro (ed), *The Bridge in the Parks: The Five Eyes and Cold War Counter-Intelligence* (University of Toronto Press, 2021). RCMP and ASIO officers were placed at overseas offices, visa and passport screening tightened, and security liaison with the Department of Immigration shifted the vetting of displaced persons from Nazi war criminals to communists.

⁹³ RCMP ‘red lists’ of activists in the labour movement and migrant associations, compiled from interwar RCMP undercover operations and informants, were reactivated, renewed and absorbed into more comprehensive registries in accordance with MI5 guidelines, also followed by ASIO.

⁹⁴ See Whitaker, Kealey and Parnaby (n 7) 179–267 for renewed surveillance and measures against labour organisers and immigrants, extended to the public service, researchers and universities, and businesses with government and defence contracts, uranium mining and processing. Covert operations included Featherbed, directed at diplomats, public servants, and scholars with suspected Communist sympathies and other ascribed ‘character weaknesses’ such as homosexuality, and the Profunc registry of suspected communist supporters, immigrants, and their families compiled for possible internment. Horner provides a detailed examination of the expansion of ASIO’s operations and administrative details after the Royal Commission and undercover operations Pigeon, Boomerang, Cockerel, Landslip and others, which included ‘blackbirding’ (covert searches of records, membership lists and incriminating evidence), and ‘spoiling’ (discrediting organisations): Horner (n 26) 383–507, 531–59.

Australia but the legal dimensions warrant further research and can only be touched upon here as a demonstration of some of the lasting impact of the Espionage Commissions in which Kellock, Taschereau, and Dixon played an important role.

The Gouzenko affair prompted an array of security law reforms and related amendments to the *Canadian Criminal Code* completed by the time of Petrov's defection. Ottawa faced fewer constraints than Canberra with the Canadian government's wide jurisdiction over criminal law, and the *Official Secrets Act* provided a 'head start' on espionage and unauthorised disclosure of confidential government information. It also provided the legal justification for the RCMP's wide surveillance and evidence collection powers. The expansive interpretation of s 11 put forward by Kellock and Taschereau was that it authorised surveillance of those suspected of *Official Secrets Act* offences without warrant. They added that the RCMP's wartime authority to conduct searches and preventative detention without warrants could continue with renewal of the emergency transition legislation, with no time limit on holding persons reasonably suspected as about to commit a security offence.⁹⁵ Based on this, the security branch routinely conducted operations without warrants, extended in 1951 to phone tapping and other electronic surveillance.⁹⁶ Many of these practices continued to the late 1970s though the legal basis had become obscure. The emergency transition legislation expired in 1950, replaced by the more modest *Emergency Powers Act* in effect to 1954.⁹⁷ During this time the government began amending many of the security-related offences in the *Canadian Criminal Code* including sabotage, fomenting disloyalty, and treason, largely unchanged from its enactment in 1892 and these were folded into a major revision of the Code in 1954.⁹⁸

Lacking the RCMP's police and law enforcement role, ASIO faced unwieldy processes for warrants and coordination around enforcement and the collection of evidence. And Australian security law reforms were less comprehensive and took longer to implement, even though it had long been apparent that the espionage and other security-related provisions in the *Commonwealth Crimes Act*

⁹⁵ A minor clarifying amendment was made to the *Official Secrets Act* (n 1) in 1950 following the Royal Commission's recommended review, another was made in 1974, and in 1985 a major revision renamed it the *Security of Information Act* RSC 1985, c O-5 (further minor amendment in 2001 added reference to international terrorism and current proposed amendments seek to add reference to foreign influence). Despite these changes, the main provisions of this legislation remain essentially the same as the current version of the *UK Official Secrets Act* (n 1).

⁹⁶ The 'PICNIC' surveillance program was launched in 1951 under order in council PC 3486: see Dennis Molinaro, "'In the Field of Espionage, There's No Such Thing as Peacetime': The Official Secrets Act and the Picnic Wiretapping Program" (2017) 98(3) *Canadian Historical Review* 457. These investigative practices continued after 1954, without clear legislative authority.

⁹⁷ *Emergency Powers Act* (n 14). While less sweeping than the preceding emergency transition legislation, 24 security related Orders in Council related to the RCMP and related government security initiatives, including PICNIC, were issued under the *Emergency Powers Act*.

⁹⁸ A comprehensive update of the entire *Canadian Criminal Code* (n 1) was recommended by the 1953 Canadian Royal Commission on Revision of the Criminal Code. The *Criminal Code of Canada* SC 1953-54, c 51 came into force in 1955, modernised language and modified penalties for treason, sedition was retained (reformers long called for its abolition), and espionage offences dropped in 1939 were restored, resulting in overlaps and inconsistencies with the *Official Secrets Act* (n 1).

were out of date, as the Australian government's limited jurisdiction over criminal law also presented complex challenges of coordination. However, it moved quickly on ASIO itself after the Espionage Commission confirmed its capabilities, and in 1956 its mandate, previously based on executive directive like MI5 and the RCMP security branch, was legislated.⁹⁹ The *Australian Security Intelligence Organisation Act 1979* (Cth) was consistent with the general terms established under Chifley and it regularised ASIO's budget and personnel, but during debate on the Bill, Evatt raised concerns about the Director-General's wide autonomy and lack of oversight and accountability, and Spry did indeed take full advantage to develop consultation processes he deemed appropriate and used his free hand over a stable budget to expand ASIO's operations. The 1955 espionage Commission's modest reform recommendation for the espionage offence followed inconclusive general Cabinet discussion in 1951 about amending the *Commonwealth Crimes Act*. Spry pressed the government on espionage, modernisation of the unauthorised disclosure, sabotage, treason, and sedition provisions, and for clarification of ASIO's legal authority to open mail and tap telephones and to avoid the unwieldy process of regular warrants with the police to support its covert surveillance.¹⁰⁰ Attorney-General Barwick presented modest draft espionage proposals in late 1957. A Bill to amend the *Commonwealth Crimes Act* espionage provisions was belatedly passed in early 1960, but passage of the separate *Telephonic Communications (Interception) Bill 1960* (Cth) to support covert surveillance was delayed by acrimonious debate to the end of the year.¹⁰¹

The pace of modest law reform did not slow the expansion of ASIO operations through the late 1950s and 1960s and a sustained pattern of security overreach against perceived security threats became evident, including the ALP and new ones such as protests against the Vietnam War and conscription. Suspicions that ASIO had files on staffers and Members of Parliament, including the Deputy Prime Minister, were confirmed after the ALP formed government in 1972. Accumulated concerns about ASIO's overreach and inter-agency relations were reviewed by the Hope Commission, headed by Robert Hope, Justice of the New South Wales Court of Appeal.¹⁰²

The RCMP security branch mandate remained a matter of executive directive with ministerial reporting to the Solicitor General. Concerns about covert RCMP

⁹⁹ *Australian Security Intelligence Organisation Act 1956* (Cth). The legislation has undergone various minor amendments and a major revision following the Hope Commission: *Australian Security Intelligence Organisation Act, 1979* (Cth).

¹⁰⁰ Horner (n 26) 389–90.

¹⁰¹ *Commonwealth Crimes Act* (n 1); *Telephonic Communications (Interception) Act 1960* (Cth) ('*Communications Interception Act*'). See *ibid* 390–4, 398–400: Labor MPs raised concerns about privacy and ASIO's nefarious aims, already known to have illegally searched the offices of ALP members and other organisations opposed to government.

¹⁰² Appointed in 1974, it survived the controversial 1975 dissolution of Whitlam's government. A series of reports from 1975 and 1977 took a forward-looking approach to depoliticise and enhance ASIO's accountability and improve its relations to other agencies: see John Blaxland, *The Protest Years: The Official History of ASIO, 1963–1975* (Allen and Unwin, 2016); CJ Coventry, 'Origins of the Royal Commission on Intelligence and Security' (MA Thesis, University of New South Wales, 2018).

activities at universities raised by Bora Laskin, then head of the Canadian Association of University Teachers, resulted in the 1968 ‘Pearson-Laskin Accord’ which limited campus activities to investigation of criminal offences and enquiries necessary for security clearances. The 1969 Mackenzie Commission on Security did not investigate allegations of overreach but noted the lack of legislated mandate and unclear accountability for the RCMP’s security operations, investigative warrant concerns, and overlaps between the *Canadian Criminal Code* and *Canadian Official Secrets Act*.¹⁰³ Its modest recommendations were abandoned as bombings, kidnappings and murder by the revolutionary separatist organisation, *Front de libération du Québec* (‘FLQ’) culminated in the 1970 October Crisis. In its wake, the RCMP security branch had a *carte blanche* to engage in disruptive interventions, including illegal and criminal acts, not only against Quebec separatists but opposition movements across Canada. This led to the McDonald Commission headed by Judge David McDonald, the disbanding of the RCMP security branch, and transfer of most of its responsibilities to the Canadian Security and Intelligence Service (‘CSIS’) in 1984, a civilian service similar to ASIO, with a legislated mandate, and closer ministerial, legislative, and independent committee oversight.¹⁰⁴

The Hope and McDonald inquiries were a belated reckoning with the excesses of the Cold War security state legitimated and empowered by the earlier Espionage Commissions. These later Royal Commissions on security and intelligence led to reforms that curbed immunities for illegal actions committed by security personnel, refined legislative mandates, improved ministerial oversight and coordination between related departments, and more robust legislative accountability by way of all party parliamentary and independent audit and committee review. These reforms have been accompanied by more robust accountability from the courts. They are beyond the scope of this article but represent a significant advance and have led to a more balanced approach between effective security and protection of procedural and political rights. However, the Hope and McDonald Commissions achieved little in the way of justice for the casualties of security overreach the previous three decades.

¹⁰³ *Report of the Royal Commission on Security* (Queen’s Printer, abridged, June 1969).

¹⁰⁴ Canadian Security Intelligence Service Act RSC 1985, c 23. The McDonald Commission was appointed in 1977 and like the Hope Commission, it issued a series of reports which continued until 1981: see C Ian Kyer, ‘The McDonald Commission Investigates the RCMP Security Service, 1977–83’ in Barry Wright, Susan Binnie and Eric Tucker (eds), *Canadian State Trials Volume V: World War, Cold War, and Challenges to Sovereignty, 1939–1990* (University of Toronto Press, 2022) 341. The RCMP’s ‘dirty tricks’ included use of informers and agents provocateurs in unions, arson and other crimes attributed to Quebec separatists, and break-ins at bookshops to access subscription lists and surgeries for medical records. Attempted private prosecutions and civil actions for damages were suspended during the hearings and there was no redress following the commission’s recommendations. On MI5 after the Maxwell Fyfe directive, its role during the final phases of decolonisation, development of counterterrorism operations in the 1970s, and 1989 passage of a legislated mandate with similar enhanced oversight and accountability: see Andrew (n 5).

In conclusion, the compromising of judicial independence was vividly demonstrated by the actions of Kellock and Taschereau at the 1946 espionage Commission. While Dixon's informal government advising in 1954 was considerably less egregious, it sits uncomfortably with his reputation for strict legalism and separation of powers concerns. These experiences are consistent with the broader historical patterns of judicial deference to government on security matters (eg, security legislation seldom challenged and applied widely, warrants freely issued for the collection of evidence, arrests, extended detention, and writs compelling witnesses with wide latitude to the Crown, police, and security agencies), deference that has often developed into outright judicial complicity with executive security responses during security crises. Defence counsel and juries, not judges, have most often been the most effective check on abuses of executive powers and prosecutorial expedients in cases involving political and security offences. The question remains whether this pattern has been broken with the development of further protections for judicial independence since the mid-20th century.

More recent government responses to international terrorism, migration, and cyber-security issues have widened judicial involvement in the administration of national security. Special security warrants have been extended to support new forms of electronic surveillance and new pretexts created for intelligence-gathering, arrest, and preventative detention. Judges deliberate on a widening array of warrants, as well as detention, deportation and extradition requests based on sophisticated electronic surveillance and intelligence-sharing within what became the 'Five Eyes' security partnership of the UK, US, Canada, Australia and New Zealand. Judicial review of administrative decisions by security agencies, rare before the 1980s, has grown with the emergence of statutory rights of appeal, and direct rights challenges under the Charter of Rights in Canada. There has also been increased direct judicial participation in the determination of security clearances, security certificates, and deliberations about extended detention and deportation. Greater judicial involvement in matters of security is arguably a 'double-edged sword'. Direct judicial oversight during security hearings, decisions, and operations can enhance accountability, serve as a check on overreach, protect rights and uphold the integrity of the rule of law, but only so long as judges are scrupulous in avoiding inappropriate executive consultation. In becoming more closely implicated in security processes, questions should continue to be posed about how judicial independence may be compromised and potential confusion around the separation of powers.

The parallels between the Cold War and the 'war on terror' and 'foreign interference' concerns, encompassing contemporary issues of cyber-security and expanding international migration, are certainly inexact, and good historians avoid 'presentism' or teleological projection of present-day standards to the past and *vice versa*. In addition to the recent development of more robust security oversight and accountability and more comprehensive judicial independence

guidelines, the interaction of legal and political cultures has changed. Figures such as Evatt, Latham, and Barwick, for instance, were capable public servants on both the left and right who moved freely between elite legal and political spheres, between the Courts and Government, with far less compunction than today. However, it remains the case that judges are human and are understandably flattered and motivated by a sense of duty when their expertise is called upon to serve important affairs of the state, but this can come at cost to the integrity of judicial independence. Mindful of the extrajudicial roles of Kellock and Taschereau and Dixon during the Gouzenko and Petrov affairs, we must also be aware how easily judicial independence may be compromised in security contexts.