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CONFIDENTIAL

March 5th, 1966.

MEMORANDUM FOR THE PRIME MINISTER:

Spencer case and security investigation

It seems apparent that the Cabinet on Monday morning should consider not only the terms of reference for the Spencer inquiry but also the position to be taken in the almost certain eventuality that there will be a motion (perhaps by the N.D.P.) for a complete inquiry into security procedures.

A. Spencer inquiry

If possible, I think it would be desirable for the government to be in a position when the House opens on Monday afternoon to table an Order in Council appointing a judge to carry out the Spencer inquiry. The terms of reference will be vitally important since the counsel acting for Mr. Spencer will undoubtedly try to extend them as widely as possible so as to include every aspect of the investigation and of the findings against Spencer. It is precisely this sort of thing that the government has repeatedly said it will not permit. In this connection it also has to be borne in mind that Mr. Rankin, according to R.C.M.P. information, is a communist and is in fact involved in some form of relationship with the communist party of the U.S.S.R. for services of some kind. The R.C.M.P. are sending us a report on this matter Monday morning.

There seem to me to be two possibilities about the terms of reference:

1. To draft them in the most simple possible way with reference to the actual telegram that Laxton and Spencer sent

It was on the basis of that telegram that the inquiry was agreed to and it would be hard for the Opposition to allege that the government was not carrying out its undertaking.

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Terms of this kind could, I think, be established by quoting in the recital to the Order in Council the entire text of the telegram, and in the operative part of the Order simply providing for the appointment of the judge to undertake an inquiry relating to those things that, in his judgment, are essential to the determination of the complaint stated in the recital to the Order. Perhaps the actual sentence of inquiry could be something like the following:

To examine the nature of the dismissal of George Victor Spencer as an employee of the Post Office Department, and the resultant deprivation of benefits associated with his position, namely pension and insurance benefits, with a view to determining whether or not, in his opinion, Mr. Spencer has been dealt with fairly, and to report accordingly.

Establishing the terms in this way would run the risk of extension of the inquiry into aspects of security. How far that extension went would depend on the kind of judge that was selected and on the kind of counsel that was retained to protect the interests of the government.

2. To draft the terms of reference in precise legal language in order to try to ensure that counsel for Spencer cannot press the inquiry into security matters.

I think this will be extremely difficult to do without incurring the risk of a whole new debate in Parliament on the allegation that the government is trying to rig the inquiry and to deny investigation into the very essentials that must be explored in order to determine the truth of the complaint and the equity of the treatment involved in the "dismissal".

I think the experience in connection with the Dorion inquiry has to be borne in mind. The government tried to draft the terms of the

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inquiry with care in order to define it with precision and passed an Order in Council accordingly. There was promptly a strenuous attack on the terms and they had to be revised - which appeared as a further inglorious defeat by the government after an attempt at concealment. It was only by getting an amendment that met with the advance approval of the N.D.P. that the government was able to escape from that hook. I suspect that Mr. Diefenbaker has been astute enough to realize that the government is still in a very awkward position on this particular question and that it is precisely for that reason that he declined to allow the estimates to get through yesterday.

While we clearly must take legal advice, my own inclination is to feel that the best course is the first one, relying for limitation on the selection of judge and counsel. My view in this regard is strengthened by the comments of Mr. Lewis and Mr. Fulton at p.2249. They will clearly be watching for any restrictive terms of reference and Mr. Fulton has pretty clearly given notice that they will not agree to a withdrawal of Mr. Lewis' motion to reduce the estimates of the Department of Justice unless they think the terms of reference are broad enough. It is conceivable that terms could be found that the N.D.P. would regard as satisfactory but it would be very difficult except by a close adherence to the telegram.

Other questions that will have to be considered on Monday are:

1. Who is to be the judge for the inquiry and who the counsel for the government?

The selection of Judge Dorion was undoubtedly a bad mistake and the counsel on the government side were not particularly astute. The selections are important.

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2. Should the Order in Council contain any instruction as to whether the inquiry is to be in camera?

I would think it should not. To have it in camera is to give the implication that it is to go into security. The whole point is that it is not.

3. To what extent is the government going to pay costs of counsel?

Presumably the costs of Mr. Spencer's counsel will have to be paid and obviously those of the government. What is to be done if the Opposition asks to be represented by counsel? I would think this ought to be refused but a decision should be taken.

#### B. Inquiry into security

In the light of Friday's developments, we must expect a demand for an inquiry into security procedures. While we had hoped to have such an inquiry in circumstances that could be divorced entirely from the Spencer case, it is my feeling that the new developments make it virtually impossible and certainly very unwise for the government to deny or try to defer an inquiry. Instead of allowing time to separate it from the Spencer case, the separation will now have to be achieved by having the completely isolated inquest on Spencer referred to above. If it is a general inquiry, his case would then be simply one among several. The reference to the Munsinger case makes it inevitable that the inquiry would have to go a far distance back. Mr. Diefenbaker argued (p.2206) that it should go back to 1944 - in other words to before the Gouzenko inquiry.

It appears to me that the questions that need consideration are:

1. Should the government take any early initiative?

If it did take an initiative, I think the apparent reversal of its recently negative position might be related to the mention of

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the Munsinger case and would be interpreted as an attempt to "get" Mr. Diefenbaker. I would think it might be better to be prepared to respond to an initiative from the other side - either from the Official Opposition or the N.D.P. The Official Opposition will not be able to oppose an inquiry; I think the government now cannot; and if an initiative is taken, the inquiry will result.

It might be, however, that you will think that the government should take the initiative. It has been in the position all along of appearing to resist inquiry and perhaps, notwithstanding the risk of appearing to be after Mr. Diefenbaker, it might be better for the government to move first.

2. What should the inquiry be about?

If the inquiry is about security procedures alone, it will be an inquest into methods of handling without necessarily taking into account the extent of the problem for which the procedures are designed. This would, I think, be unrealistic and to some degree unfair, both to the government itself and to the R.C.M.P. It would, moreover, miss the opportunity of using this inquiry in order to get an objective determination of the validity of some of the claims about the espionage situation which it is almost impossible for Ministers or the government to determine themselves. For both of these reasons, I think any inquiry should be about "the nature and extent of espionage and subversive activities in Canada, the extent to which threats to national security are involved, and the nature of measures adopted to combat them, having in mind both the security of the state and the rights of individuals". This would obviously have to be revised, but I think the scope should be something of this kind.

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3. What should the form of an inquiry be?

I would think it is clear that the inquiry must be by a judge - probably a judge of the Supreme Court. It would probably be best to have a single Commissioner along the lines of Lord Denning's inquiry. His selection would obviously be crucially important.

Mr. Diefenbaker suggested (p.2209) that the investigation should be "behind closed doors". I think it must be. It is a nice question whether there should be discretion with the Commissioner for any open hearings or whether all should be in camera.

4. What should be said as to how far back the inquiry is to go?

It seems to me that the best course would not be to select a year but to have the inquiry into procedures in security followed in this country since the conclusion of the war. The judge could then use his discretion and he would probably start with the report of the Gouzenko inquiry, which was appointed on February 5th, 1946 and reported on June 27th of that year.

As they may be of some assistance in your thinking about this problem, I am attaching photocopies of the opening pages of the report of the Royal Commission in 1946.

If preparation is to be made for an inquiry, it would be desirable to have a decision in principle on Monday, as a number of people should be consulted.

R.G.R.

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