

THIS DOCUMENT IS THE PROPERTY OF THE GOVERNMENT OF CANADA

CONFIDENTIAL

May 12th, 1966

MEMORANDUM FOR THE CABINET:

General Inquiry into Security Methods and
Procedures

On March 7, 1966, the Prime Minister announced in the House of Commons that, in the light of public concern which had been expressed about security matters in general, and in order to assist the Solicitor General in his new responsibilities, the government had decided to institute a judicial inquiry into the operation of our security procedures generally. Following that announcement, initial consideration was given the possible terms of reference for such an inquiry, as well as some of the problems deserving of study prior to its establishment. Certain of these problems and considerations, which are set out in some detail below, will require discussion with the Commissioners-designate prior to their appointment. It may also be desirable for the government at an appropriate stage to discuss the draft terms of reference with certain of the leaders of opposition parties in the House of Commons, with a view to achieving agreement that the inquiry will be conducted in an impartial and non-partisan manner.

The Security Panel, at the request of the Prime Minister, has examined the attached draft terms of reference for the inquiry, has fully considered the views set out below, and has made a number of recommendations which appear at the end of the memorandum.

General Nature of the Inquiry

In the most general terms, the purposes of the inquiry should be to provide sound guidelines for Canadian governments, present and future, as to the most desirable and effective means of ensuring Canada's safety against the encroachments of espionage and other subversive activities which may from time to time threaten our development as a free, independent and peaceful nation while at the same time affording as adequate protection to the rights of individuals as is possible. The inquiry should look essentially to the future, and examine the past, not in a retributive manner nor to reopen decisions previously made, but to use the examination in a positive way to decide whether, and if so, how, security procedures and their application might best be adjusted to meet the requirements of present and foreseeable circumstances. The Commission will obviously have to look at some cases in the past to see how procedures have been applied. It will be crucially important, however, to have it made clear that the inquiry is into methods and not into cases and that it is not a reopening or rehearing of cases now decided and closed.

. . . 2

005650

CONFIDENTIAL

- 2 -

The terms of reference, which are attached as an Appendix, have been drafted to provide adequate scope for a full and inclusive inquiry, leaving the Commissioners with broad discretion in their approach, both as to substance and procedure, with the exception that all proceedings be in camera. It seems clear that the best results will be achieved through an informal, persuasive and non-legalistic approach, although the Commissioners will always have full powers under the Inquiries Act should circumstances require their use. It is recommended in the strongest terms that the inquiry be required to be conducted in private for the following reasons:

- (a) The handling of security cases often requires the transfer or the removal of people who are security risks for personal reasons, but who are, in all other respects, respectable and useful citizens. Exposure of such cases could result in the ruin of lives and reputations. If hearings are in camera the identities of such persons who had been subject to action on security grounds would remain safe from public disclosure. Any possibility of publicity would give rise to great apprehension on their part, and any actual publicity could result in tragedies.
- (b) While allowing both organizations and individuals to make representations to the Commission, in camera proceedings would prevent the inquiry being turned into a sounding-board for cranks seeking publicity. They could always make public briefs or arguments they presented, but they would not enjoy a spotlight or forum.
- (c) This approach would assist in preserving the privacy of R.C.M. Police agents and informants whose anonymity has been guaranteed by solemn promises given by the R.C.M. Police. It has become clear in recent inquiries that there can be no guarantee of the security or secrecy of anything once hearings become public.
- (d) In camera proceedings throughout would minimize the risk of adverse reaction from friendly nations with which Canada has close and valuable ties in the related fields of security and intelligence. The exchange of information and intelligence is very much to Canada's net benefit and should not be imperilled.

It is recommended that the provision for in camera proceedings be placed in the Order in Council and be beyond doubt from the beginning. If the Commissioners have a discretion, experience indicates that pressures will be brought to bear on them so strongly by the press that there can be no guarantee of maintaining privacy. Most ordinary Royal Commissions do their work in camera when matters of confidence are involved, but special protections are needed in this case.

. . . 3

005651

CONFIDENTIAL

- 3 -

The Commissioners and Their Staff

An inquiry of this order would appear to require from three to five Commissioners. While it may be desirable that the Chairman be a senior judge or a lawyer of high reputation, the others should be chosen with due regard to the fact that security problems are essentially matters of judgement in relation to probable human behaviour, and not normally matters of the proof or disproof of the lawfulness of specific human acts. It would be an error to give the Commission too legalistic or judicial a character. The choice of Commissioners will be most important. The choice of senior staff for the Commission (Secretary, Counsel, etc.) will also be of very great importance, although it is eminently desirable that the major portion of the inquiry be conducted by the Commissioners themselves, in order to preserve a maximum of objectivity in the examination and in the results, as well as for reasons of security.

The Commission will probably take at least 18 months to complete and the Commissioners will have to be people who can devote most of their time over such a period to the work.

Procedures of the Commission

(a) - in relation to the Public Service

In order to achieve the most desirable results, the Commission will have to command the respect, confidence and full cooperation of all the individual public officials concerned, as well as that of their departments and agencies. The views and advice, as well as the past actions, of officials concerned with security matters will need to be examined fully and frankly. This can best be done through private and informal consultation and discussion by the Commissioners themselves with full notes being taken, rather than through the giving of evidence under oath in the circumstances of a court room. While there may be certain occasions when the Commissioners would consider it necessary to adopt a more formal approach in order to protect individuals, or in relation to an uncooperative official, department or agency, the general effect of introducing the machinery of compulsion would lead inevitably to the adoption of self-protective attitudes by officials and their departments alike, and the inquiry would become in their minds an inquisition. It is essential that it should not assume such a character if positive and useful results are to be obtained.

A formalistic and legalistic approach would lead to demands by officials and their departments for counsel, the adoption of rigidly defensive positions, the further disruption of departmental work, increased costs and a general loss of efficiency, both by the public service and the Commission itself. In order to avoid these pitfalls, it would have to be clearly understood by departments and agencies that the whole of their files in relation to security must be available to the Commissioners, and that the avoidance of compulsion would depend entirely on their providing full cooperation and assistance. In general, it is to be hoped that the Commission would see fit to adopt procedures in relation

. . . 4

005652

CONFIDENTIAL

- 4 -

to the public service similar to those which were adopted by the Commission in Britain presided over by Lord Denning in carrying out its researches. Where the Commissioners considered that evidence, as such, had to be taken, it could adopt more formal procedures. Where, in limited instances, witnesses themselves require protection against future action as a result of disclosure of information or methods, either of which might be actionable, consideration should be given to the provision of counsel to advise individuals who might need to give testimony under oath and take the protection of the Canada Evidence Act. Additionally, consideration may have to be given to the protection of public servants who, when appearing before the Commission, may feel compelled to express views contrary to policies and positions established by their Minister or by the government.

(b) - in relation to individual subjects of security cases

The Commission will be required, both at its own initiative and at the request (or demand) of individual persons within and outside the public service, to look into particular cases in which there is a presumption that the security of the state or the rights of the individual, or both, were improperly served. It will, however, (as already indicated) be essential that the Commission make clear that it is not going to review cases in the sense of re-opening them with a view to modifying the finding that was made or the action that was taken. It should look into cases only to gain insight into the ways in which they were handled, the principles applied, and the need (if any) for further protections, and so on. It can be expected on the one hand that a number of persons of the order of Pat Walsh and Calvin Macdonald will demand inquiry into, and restitution for, their "mistreatment" by agencies of government in the area of security operations. At the other extreme, the Commission may deem it desirable to look into the cases of outstandingly able and productive Canadians who, having manifested one human frailty or another which was deemed to threaten security, decided or were persuaded that they should leave the public service, despite their obvious value to the country. A variety of categories of cases will lie between these two, ranging from avowed but secret enemies of our system of government who will wish to use the inquiry for their own purposes, to persons whose only fault is that they have relatives behind the Iron Curtain. While some of these individuals will seek the widest publicity, others will desire, and deserve, the most scrupulous protection of their identity and personal privacy, and persons in each category may seek legal assistance to serve the ends which are most important to them as individuals. The most careful judgements by the Commissioners, together with the assistance of the departments and agencies concerned, will be required in dealing with these individuals if the public interest as well as their private interests are to be respected. It is in certain of these cases that the Commissioners may deem it desirable or necessary to set between themselves and the individuals concerned some of the mechanisms of legal procedure in order to carry out their terms of reference. In this connection consideration

. . . 5

005653

should be given to a problem which may arise if, as a result of re-examining individual files, the subjects of those files feel they have been publicly injured and make representations to have the issue removed from the hands of the inquiry and relegated to the courts.

(c) - in relation to public organizations which request to be heard, and the public in general

There is no doubt that a variety of public organizations will wish to put their views before the Commission, whether through written submissions or by the hearing of representative delegations. The organizations will probably range from the Communist Party of Canada through the various youth, "front", cultural and ethnic groups of communist persuasion to almost equally voluble and committed, although less numerous, groups of anti-communist or other "right wing" inclination. Between the obvious extremes will be a variety of equally concerned but probably more responsible groups such as the Royal Canadian Legion, the Canadian Chamber of Commerce, and the Canadian Association of University Teachers. It is also quite possible that at least some of the vaguely socialist and separatist-oriented groups in Quebec will wish to be heard. The Commission will have to decide at an early stage whether to limit such representations to written submissions or whether to permit a series of in camera hearings of a whole range of organizations who travel to see them. It would seem sensible to begin by receiving written submissions only, and for the Commission then to determine what further action was necessary. If the Commission were to sit in Ottawa only, it would help to ensure that only serious representations come forward. An additional advantage of in camera proceedings, if the leaders of known subversive organizations wished to appear before the Commission, would be that they could be examined by the Commission more pointedly than if the hearings were in public. The general publication of those submissions whose originators wished to publish them would undoubtedly stimulate public debate, and might lead to pressure for the hearings to become public. This would, however, be less if the Commission required submissions to be in by a certain date that was in advance of the holding of any hearings. This decision as to whom to hear and when would thus be divorced from any possible publicity given to the submissions. Submissions made in confidence would have to be scrupulously honoured in that respect.

(d) - in relation to the mass media

Despite the very great pressure there will be for the Commission to conduct a major portion of its work in public, the Security Panel is convinced that to yield to such pressure would create risks that ought not to be taken in the public interest. There is no question that security matters should be, to the extent possible in any set of circumstances, open to consideration and debate by the public at large. Equally, there is no question that security matters make "good copy", and are subject to a degree of distortion by the media, whether inadvertent or otherwise, which seriously limits the application of detached judgement to problems which require calm and objective consideration. As indicated above, it is the view of the Security Panel that the Order in Council should

. . . 6

005654

CONFIDENTIAL

- 6 -

be specific and definite and leave no room for pressure on the Commissioners. Their report could be public in part and at that point public consideration could be given to results and recommendations.

(e) - in relation to other countries

Depending upon the extent to which its deliberations are publicized, the work of the Commission will have a bearing on Canada's relations with other countries. There is the risk that the Commission's revelations, either during its inquiry or as a result of any public report, will cause our closest allies to reconsider the present arrangements by which Canada receives from them a substantial and very useful flow of political, economic, technical and defence information. There is also the risk that the Commission's proceedings and reports could adversely affect Canada's efforts to achieve more positive and productive political, economic and cultural relations with countries within the Soviet and Chinese communist spheres of influence. While some risks in each of these areas may prove necessary, it would seem that regard for the sensitivities of our present friends and our potential enemies alike would be prudent and wise. Periodic and judicious consultation with the United States, Britain, France and other allies, by the government and possibly by the Commission as well, would undoubtedly reduce the risks in the first area. In the other area, the very fact of the Commission's existence, as well as the manner in which it conducts its inquiries and makes its reports, could not only reduce the obvious risks but possibly provide opportunities for productive diplomacy.

The Commission's Reports

As the inquiry may well take eighteen months to two years to complete, provision might be made for the submission of confidential interim reports to the government on specific subjects in relation to which the Commissioners consider immediate action to be desirable. There must in addition be a published report of the Commission's findings and recommendations, which should be the subject of public and Parliamentary debate. It may also be desirable to have a comprehensive final report made to the government, of a classified nature and to be given very limited distribution in those organizations most directly concerned with security methods, procedures and policies. In this report the Commissioners could set forth with absolute frankness their findings, views and recommendations on the most delicate and contentious aspects of the problem. Such a report would be of particular value to the Department of the Solicitor General, if it is to assume an increasing responsibility in this area in the years to come.

Additional Considerations

Events which have already arisen from the proceedings of the present inquiries into the Spencer and Munsinger cases would seem to indicate the desirability of deferring the final establishment of the general inquiry into security methods and procedures until the current inquiries have been concluded and the reports studied and

. . . 7

005655

CONFIDENTIAL

- 7 -

debated. Apart from the dangers of distorting the purposes of the general inquiry by having it begin its work in the present atmosphere, there may well emerge from the present two inquiries considerations which should be taken into account in the terms of reference and procedures of the general inquiry. In addition, until some of the questions raised by the present inquiries have been resolved to some extent, there may be difficulty in getting the most able and desirable people to accept appointment as Commissioners for the general inquiry. As so much of the value of the inquiry will depend upon the quality of the Commissioners themselves, the timing of its establishment would seem important.

Recommendations

The Security Panel therefore recommends that:

- (a) the Commission should be given a broad mandate to examine security methods and procedures in their application, subject only to the protection of national, international and individual security and rights as set out in detail in this memorandum;
- (b) the Commission be composed of not less than three nor more than five members, one of whom should be a Judge of the Supreme Court of Canada or a senior court of appeal or an outstanding lawyer as Chairman;
- (c) if possible one of the Commissioners should have had experience in the security field, but, failing this, should be experienced in the workings of the public service;
- (d) as outlined in the draft terms of reference at Annex, the proceedings of the Commission should be held wholly in camera;
- (e) the inquiry should be conducted informally, the research being done by the Commissioners themselves, rather than by a research staff, with formal testimony under oath and with advice of counsel only when deemed essential by the Commissioners or when requested by persons appearing before the Commission for the protection of their rights and interests;
- (f) the Commission should not be a tribunal to review decisions made in individual cases in the past either in the public service or in defence industry;
- (g) the Commission should not be finally established until Mr. Justice Wells and Mr. Justice Spence have made their reports on the inquiries they are presently conducting into the Spencer and Munsinger cases.

R. G. Robertson,
Secretary to the Cabinet.

Privy Council Office,
O t t a w a.

005656