

Copy on S-1-22(c)

THIS DOCUMENT IS THE PROPERTY OF THE GOVERNMENT OF CANADA

S E C R E T

SP-239

July 6, 1970.

MEMORANDUM FOR THE SECURITY PANEL

Security Review Board

As agreed at a meeting of the Security Panel on November 3, 1969, a draft policy memorandum for the Cabinet recommending the establishment of a Security Review Board by Act of Parliament was prepared and circulated to members of the Panel for comment on February 10, 1970. Although an attempt has been made to redraft the policy memorandum in such a way as to reflect the comments received (see Appendix "A"), a number of significant conflicts and problems of policy and procedure remain outstanding.

(a) Immigration Policy

The Minister of Manpower and Immigration has indicated that he cannot support the recommendation of the Royal Commission, which is strongly upheld by the R.C.M. Police, that access to the Review Board should not be given to "persons without sponsors or nominators who enter Canada ostensibly as visitors and then request a change of status to that of landed immigrant." Although it is not clear whether the Royal Commission intended to include in this category independent applicants for admission at ports of entry, (who now have recourse to the Immigration Appeal Board, as do independent applicants for landing in Canada), the Minister takes the position that -

"persons ordered deported concerning whom no factual evidence has been presented should not arbitrarily be denied a review of their cases or have no recourse to appeal".

The Minister further considers that, as under existing immigration legislation all persons ordered deported have the right of appeal -

"it is doubtful whether Parliament would enact, or the Canadian public accept, legislation denying the right of appeal to a special group of persons. Such legislation would seem to deny any semblance of natural justice and might well be contrary to the Bill of Rights."

The R.C.M. Police, on the other hand, while agreeing that a landed immigrant should not be deported without the right to appeal, do not consider that a similar

... 2

SECRET

008364

right of appeal should be available to a person who is either in Canada applying for landed status, or at a port of entry seeking admission to Canada. It is their experience that the great majority of persons applying at ports of entry are "allowed forward without status", and if a security objection is raised, a valid deportation order is required to remove them, against which such persons have a right of appeal to the Immigration Appeal Board. In such cases, it is very seldom possible for the R.C.M.P. to bring forward factual evidence of a security nature upon which a deportation order might be based, because of the necessity of protecting the sources of the information involved, whether these sources are individuals or cooperative security agencies in other countries.

Despite earnest efforts by those concerned to resolve this conflict, it continues to exist. Its importance to the government lies in the fact that the majority of cases coming before the Security Review Board would be cases in which a security objection has been raised against the entry of persons to Canada in the immigration stream. While it may not be possible for the Security Panel to resolve the conflict, it is strongly recommended that the issues be placed before Ministers in such a fashion that resolution is possible, as without it there will be little point in establishing a Security Review Board at all.

(b) Categories of Persons who will have Recourse to the Review Board.

In the Security Panel's earlier discussion of categories of persons who would have recourse to the Security Review Board, it was tentatively agreed that some groups would have to be excluded. For example, the R.C.M.P. felt that existing machinery for redress of grievance under the R.C.M.P. Act and Regulations was adequate, and that Regular Members of the Force should not have access to the Board. The Public Service Commission considered that recourse to the Board should only be provided to persons being dismissed or demoted for security reasons, and not to those being transferred or denied promotion for similar reasons. Further, there is the question posed above as to which categories of applicants for entry to Canada should be given a right to have their cases reviewed by the Board. Questions were also raised as to whether academic consultants and industrial workers or classified contracts should be included.

On reflection, it would seem that to be publicly acceptable, and to serve the purpose envisioned by the Royal Commission -

("to provide for a meaningful review of the decisions of departments, preserve the requirement for governmental responsibility and decision, give adequate protection to sensitive information and sources yet provide a reasonably effective safeguard against arbitrary, hasty or ill-considered judgements"),

the facilities for independent review, and for a formal hearing at least in cases of proposed dismissal from the public service

S E C R E T

- 3 -

on security grounds, should be available as a final resort to any person who might be denied his rights or liberties because he could not, for security reasons, be given an opportunity to refute all of the evidence submitted against him.

If this principle is accepted, it would seem desirable that the legislation establishing the Board make clear that the avenue for independent review, where formal and judicial appeal is not possible for security reasons, is open to the broadest possible range of persons whose rights or liberties may be denied for the reasons stated above. In order to avoid frivolous or unjustified claims coming before the Board for review, it should be made equally clear that cases would be referred to the Board only after existing departmental and other mechanisms for review or appeal had been exhausted without a satisfactory resolution of the doubt which gave rise to the inhibiting decision, whether it was a decision to dismiss, suspend, demote, transfer, deny promotion, deny security clearance after appointment, deny entry to Canada, deport from Canada, or deny Canadian citizenship.

(c) The Function and Method of Operation of the Security Review Board.

As is suggested in (b) above, the legislation should make quite clear that the essential purpose of the Security Review Board is to provide facilities for review and advice to the bodies which have the power of final decision, and not to provide facilities for formal or judicial appeal against their decisions. Indeed, the whole purpose of establishing the Board by a special Act of Parliament rather than through an item in Estimates is to seek legislative sanction for the withdrawal of one of the basic requirements of natural justice, that a person be given "a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice". In other words, the function of the Board is to provide a kind of "honest broker's" assurance, to the individual concerned and to the public at large, that its scrutiny of governmental decisions in the sometimes murky area of "security" provides the best available substitute for the fulfillment of the requirements of natural justice in circumstances in which it is not in the public interest to make available to the individual, and to the public in general, all of the relevant information.

It has been suggested that, to avoid an unmanageable workload, excessive travel, and the possible jeopardy of sensitive information, the Board limit personal interviews with individuals concerned to those cases involving dismissal from the public service on security grounds--that is, cases as presently envisaged under Section 7 (7) of the Financial Administration Act, which provides for an "inquiry" and a "hearing" prior to dismissal. In accordance with this suggestion, other cases, whether they dealt with suspension, demotion, denial of promotion or clearance, transfer, denial of entry to Canada, deportation or denial of citizenship, would only involve a review of all available information

.... 4

SECRET

008366

AGC-1420_0003

S E C R E T

- 4 -

pertaining to the case, and the submission of advice to the authority with the statutory power of decision. While there is an attractive tidiness to this proposal, it may be desirable to provide the Board with some statutory discretion in determining itself those cases in which personal interview may be a necessary procedure in order to resolve, or assist in resolving, the doubt which has arisen. Indeed, it may be that many of the present problems which surround the operation of the Immigration Appeal Board may be solved by providing in the legislation that the Security Review Board would assume some or all of the functions of the Immigration Appeal Board in cases where the relevant information could not, for security reasons, be made available to it because that Board must, as a court of record, operate in the public view. It is assumed, of course, that the Security Review Board would act in camera because of the very nature of its function.

As the Board must necessarily have available to it all relevant security and other information in any case it considers, it will be essential that its members as well as its staff be satisfactorily cleared for security to the highest level, prior to appointment, and that its operations be conducted in accordance with standard security procedures as laid down by the government for application in all departments and agencies.

It may also be necessary to make clear in the legislation, as is already stipulated in the Cabinet Directive on Security, that in employment cases where a security doubt has arisen it is essential in the interest of security that administrative action to deny access to classified information be taken before a case is reviewed by the Board. This will in some cases cause the employee some hardship, as there may be some loss of effective employment between the time of, say, denial of security clearance, and the time of review by the Board and eventual decision by the proper authority. It will be necessary to consider what status the employee should have during this intervening period, and what recompense should be made for any loss he may suffer.

(d) Quebec Separatism

Although it may not directly affect the legislation, the government will have to decide before the Board goes into operation whether cases involving Quebec separatism will be referred to the Board for review. The policy question of what attitude the government proposes to adopt towards separatism is posed in Security Panel Document SP-238, covering "Personnel Security".

(e) Form and Substance of the Policy
Memorandum for the Cabinet.

Attached at Appendix "A" are the substantive portions of a draft policy memorandum for the Cabinet, revised to reflect, as far as possible, comments and proposals

.... 5

SECRET

008367

AGC-1420_0004

S E C R E T

- 5 -

submitted by members of the Security Panel based on the earlier draft, retaining the form in which the original was drafted by the Department of Justice. It is evident that a final draft cannot be prepared until the Panel, and probably the Cabinet Committee on Security and Intelligence, have considered and resolved the conflicts and problems discussed above, and others which will no doubt arise during discussion. The attached document is therefore intended as a framework within which the problems cited above might be discussed.

The Security Panel is therefore asked to consider, with a view to preparing a policy memorandum for the Cabinet proposing the establishment by legislation of a Security Review Board, and in light of the points raised above at (a) to (e) above, the following questions:

(a) Immigration Policy

- (i) whether a right of appeal against deportation should continue to be permitted to independent applicants for landing in Canada; and independent applicants at ports of entry;
- (ii) if so, should the Review Board be given the function of dealing, either decisively or in an advisory capacity, with those cases presently referred to the Immigration Appeal Board in which security is a major factor, but which cannot be satisfactorily resolved by that Board because it is a court of record.

(b) Categories of Persons Who Will Have Recourse to the Review Board.

- (i) Should it be recommended as a basic principle that the facilities of the Board, whether in terms of formal inquiry and hearing, or in terms of a "case review" of all the pertinent information, should be made available to any person who might be denied his rights or liberties because he could not, for security reasons, be given an opportunity to refute all of the evidence submitted against him;
- (ii) If this principle is recommended and accepted, what are the categories of persons in relation to public employment, entry into Canada or the granting of Canadian citizenship whose rights or liberties might be deemed to be infringed by action taken or proposed in security grounds.

(c) Function and Method of Operation of the Security Review Board.

- (i) Should the legislation stipulate precisely which categories of persons in each of the fields of employment, immigration and citizenship should be permitted personal access to the Board, or should the Board be permitted discretion to order personal appearance when the circumstances appear to make it desirable;

.... 6

SECRET

008368

AGC-1420_0005

S E C R E T

- 6 -

- (ii) In either case, should a personal appearance before the Board be deemed to constitute a formal hearing in the judicial sense (as presently envisaged by Section 7 (7) of the Financial Administration Act), or should the Board be permitted discretion to determine in the light of the circumstances of the case when a formal hearing is desirable, and whether personal appearance before it shall simply constitute a further step in clarifying factual information provided by the department or departments concerned;
- (iii) Can it be accepted as a basic principle that all information available to the R.C.M.P. or any other investigative agency involved, be made available to the Board, with suitable safeguards for the protection of the identity of specific sources of such information;
- (iv) Should the legislation, or regulations made under it, make clear that administrative action to preserve security may have to be taken in most cases before a person is heard or a case reviewed by the Board.

(d) Quebec Separatism

What recommendation can properly be made to the government as to the attitude it should adopt, in terms of policy and procedure, to the threat to security posed by the various aspects of Quebec separatism.

(e) Form and Substance of the Policy Memorandum for the Cabinet

In what manner should Appendix "A" (attached) be amended to provide the Cabinet Committee on Security and Intelligence and the Cabinet with clear recommendations or alternatives for the effective operation of the Security Review Board, and to provide the Department of Justice with adequate instructions for drafting the necessary legislation.

(f) Other Questions which may Arise During Discussion.

Attached at Appendix "B" is an estimate of the annual workload which the Security Review Board might be expected to have. This will, of course, vary depending on governmental decisions as to which categories of persons should be given a right of recourse to the Board.

D.F. Wall
Secretary of the Security Panel.

Privy Council Office.

SECRET

008369

AGC-1420_0006