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MEMORANDUM FOR THE CABINET:

General Inquiry into Security Methods
and Procedures

On March 7th, 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 general inquiry into the operation of our security procedures. At the request of the Prime Minister, the Security Panel considered 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 to be discussed and agreed 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 apart from the glare of publicity and the day to day pressures of partisan conflict.

The Security Panel has agreed that the attached draft terms of reference for the inquiry, together with the views and recommendations set out below, should be submitted to Ministers for consideration and approval.

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 from time to time threaten our development as a free independent and peaceful nation, while at the same time affording as full and complete 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 re-open decisions previously made, but in a positive way to determine whether, and if so, how, security procedures and their application should be adjusted to meet the requirements of present and foreseeable circumstances. The Commissioners should have adequate scope to examine all aspects of our security measures, including those relating to physical security. The primary emphasis, however, should be placed on those aspects of security methods and procedures which most significantly affect the lives and activities of people, whether as individuals or as members of groups or organizations.

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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, with the exception that proceedings are to be in camera unless the Commissioners decide, within the restrictions having to do with security contained in the terms of reference, that there is a good reason to make an exception at a particular hearing. 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 have tragic results for some individuals.
- (b) Success in personnel interviews on security matters in all departments and agencies depends on complete confidence that no disclosure of information will be made.
- (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. It has become abundantly clear in recent inquiries that the security or secrecy of anything cannot be guaranteed once hearings become public.
- (d) Canada has signed formal agreements with such friendly nations as the U.S. and the U.K., and with organizations such as NATO, which bind the country under international law to carry out mutually agreed security procedures in order to protect classified information exchanged in many fields to Canada's net benefit. Unless full security measures are in force throughout the life of the inquiry as recommended in the draft terms of reference, Canada will either breach its agreements, or may appear to our allies as having done so.
- (e) As the Commission is established at the discretion of the Governor in Council it would also be in his discretion to attach to the Commission such procedural conditions as these special circumstances require, including not only the provision for in camera hearings but for the safeguarding of secret documents and other secret information, the protection of both individuals and sources of information as well as the safeguarding of information affected by international agreement. The effect of the terms of reference must be to provide the same degree of security to information

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in the possession of the Commission as would be afforded it in departments and agencies normally handling similar material.

The Commissioners and their Staff

An inquiry of this order would appear to require three Commissioners. While it is 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. It should be clearly understood by the Commissioners-designate that they and all their staff will have to be screened for security and that arrangements will have to be made for the application of all security procedures normally in force in departments and agencies handling sensitive information.

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 co-operation 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, 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.

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In general, by proceeding in camera the Commission should also be able to benefit from the adoption of informal procedures in relation 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. A formalistic and legalistic approach might 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 by the Commission itself. In order to avoid these pitfalls, it will have to be clearly understood by departments and agencies that their files in relation to security must be available to the Commissioners, that they will be afforded as adequate security protection as would be the case in the department or agency, and that the avoidance of compulsion would depend entirely on mutual confidence, and full co-operation and assistance.

Where the Commissioners considered that evidence, as such, should be taken, more formal procedures could be adopted. Where, in limited instances, witnesses themselves might require protection against future action as a result of disclosure in camera to the Commission of information or methods, either of which might be actionable if inadvertently made public, consideration should be given to the provision of counsel to advise individuals who might need to take the protection of the Canada Evidence Act.

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

The Commission will undoubtedly be faced with demands 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 persons 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 the value of their services. 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.

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While some of these individuals will seek the widest publicity, others will desire, deserve, and must be assured the most scrupulous protection of their identity and personal privacy. 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.

(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 may be called 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. The Commission should sit in Ottawa only 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.

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(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. As indicated above, it is the view of the Security Panel that the Order in Council should be specific and definite and leave no room for pressure on the Commissioners. 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. 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 some regard for the probable concern of our allies and less friendly countries 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 reduce the obvious risks.

The Commission's Reports

As the inquiry may well take 18 months to 2 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. 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

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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 future.

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. The Commissioners will have to give the most careful consideration, in preparing this report, to possible ill consequences to Canadian interests if the published findings and recommendations appear to breach international agreements on security matters. It may be, at that stage, the Commissioners would request the co-operation and advice of those departments and agencies most familiar with such agreements.

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 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 and in the draft terms of reference, attached;
- (b) the Commission be composed of not less than three members, the Chairman to be a Judge of a superior court or an outstanding lawyer;

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- (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 and under the umbrella of all normal security precautions;
- (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 must not be, or be thought to 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.

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