SUBMISSIONS TO

The Honourable R. Roy McMurtry
Attorney General of Ontario

RE

Ross Dowson, the RCMP, and
the Principles of Prosecutorial
Discretion

FROM

Canadian Civil Liberties Association

DELEGATION

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The Canadian Civil Liberties Association is deeply concerned about the stay of proceedings which has been filed in this matter, at the direction of the Attorney General. The reasons which were given for this action could effectively contaminate our administration of justice with some dubious double standards. To the extent that the decision of the Crown not to prosecute depends upon the OPP investigation of the particular facts of this case, we are obviously unable to respond. We have neither interviewed the witnesses nor had access to the OPP report. But such considerations need not inhibit any member of the public from attempting to evaluate the broad grounds of public policy which have been invoked in justification of the Attorney General's decision. In our view, these grounds cannot support the Government's reluctance to prosecute. A fortiori, they cannot justify this intrusion on the right of civilians to lay charges on their own.

The Attorney General filed and distributed a memorandum which purports to explain the policy basis for the stay of proceedings. We have assumed that this memorandum contains a complete account of the Attorney General's policy on this matter and our ensuing comments respond accordingly.

The Attorney General's memorandum lays heavy stress on what it calls the "inherent contradiction" which allegedly affected the operations of the RCMP Security Service since the early 1960's. Essentially, this "contradiction" involved the issue of breaking the law in order to protect the interests of national security. According to the memorandum, the RCMP attempted on numbers of occasions, without success, to obtain the guidance of the federal government on this matter. The alleged failure of the federal government to provide this guidance appears to have been a critical factor in the Attorney General's action to stay these proceedings.

In our view, this is no justification at all. To whatever extent federal Cabinet Ministers failed to give the requisite guidance or even knowingly tolerated misconduct, they ought to be politically censured or possibly even prosecuted themselves. But this cannot excuse the unlawful conduct of any RCMP officer. Like the ordinary civilian, or perhaps even more so, police officers are presumed to know the law. Like the ordinary civilian, or perhaps even more so, police officers cannot be absolved simply because they may have superiors who are even more guilty. Indeed, in the post Nuremberg period, even obedience to a direct order of a superior will not excuse a subordinate for the commission of an offence.

The Attorney General's memorandum argues, however, that whether or not such factors could afford a legal defence, they should mitigate against a decision to prosecute. The memorandum points out that the impugned acts of the officers in this case formed part of a general RCMP operation known as "Checkmate". What these officers are supposed to have done was no worse than what was allegedly involved in other "Checkmate" situations. And it was certainly no worse than what has been imputed to their seniors and superiors in this very case. But a dearth of evidence with respect to the others precludes prosecutions against them. It would be unfair, argues the memorandum, to single out these officers.

To accept such reasoning is to enshrine a double standard in our legal system. Civilian wrongdoers have rarely been excused because of the knowledge that undiscovered other people are equally or even more guilty. Even within the same conspiratorial operation, junior members have been prosecuted in numbers of situations where the seniors could not be identified. Indeed, so often where civilians have been concerned, the only way juniors could avoid prosecution was to identify and testify against their superiors. Why should police officers enjoy a special immunity?

In this connection, it would be helpful to dispose of a recurring irrelevancy. Time and again when this matter has appeared in the media, it has been coupled with the Attorney General's alleged inability to obtain evidence from the federal authorities and the McDonald Commission. However meritorious the Attorney General's complaint may be in general, it has little application to the issues which have arisen in this case. The only withheld evidence which is mentioned in the memorandum concerns the issue of the "inherent contradiction" - what guidance, if any, did the federal government give to the RCMP. As indicated, there is no reason why any missing evidence on this point should make any difference to the exercise of prosecutorial discretion. Even assuming unwarranted failures or culpability on the part of the federal government, there should be no inhibitions about prosecuting members of the RCMP against whom there is otherwise sufficient evidence of wrongdoing.

Another factor which was cited as militating against prosecution concerns the consequences of an acquittal. An acquittal, it is believed, would give rise to the risk that the activities at issue would be perceived by the public and the police as either lawful or, if unlawful, acceptable. Moreover, an acquittal might result in the expansion of the law with respect to a "mistake of law" because of the reliance by the potential accused on a perceived existence of legal authority.

As far as police and public perceptions are concerned, we believe it would be better for the administration of justice to sustain an acquittal than to avoid a prosecution. While there may be a risk that an acquittal might appear to vindicate the impugned activities, the failure to prosecute would compound this risk. It would create the impression that the government condoned the wrongdoing. Any acquittal growing out of the "perceived existence of legal authority" is more likely to emanate from a jury making general findings of fact than from a judge enunciating a specific doctrine of law. It is unlikely, therefore, that the "mistake of law" defence would be expanded by an acquittal in such a case.

In this connection, the Attorney General's memorandum cited the American decision not to prosecute the CIA mail openers. Apparently the potential accused in that country "reasonably believed" that their "acts were authorized". Even if a reasonable mistake of law could be seen as a mitigating factor in this country, little sustenance could be drawn from the CIA case. American constitutional law is very complex. Until recently, it was generally believed that in national security cases the U.S. President could unilaterally authorize mail opening. Even when the Courts had occasion to correct this misapprehension, they explicitly avoided applying their decision retroactively. Moreover, it was generally acknowledged that the CIA mail openers reasonably believed that they were acting under Presidential instructions. To such extent, they could rely on a mistake of fact not law.

The illegalities which may have been committed in the "Checkmate" operation are not attributable to any comparable considerations. The question raised in the "inherent contradiction" was whether unlawful conduct could be justified in the interests of national security. Apart from imminent perils to life or limb, this issue concerns policy not law. In situations of the kind involved here, there is no reasonable basis to believe that, as a matter of law, national security could excuse whatever misconduct may have been involved.

There was some suggestion in the Attorney General's memorandum that in such circumstances, a clear statement that the impugned activity is unlawful would provide a greater deterrent with respect to such conduct in the future than would be achieved by any unsuccessful prosecution. On the contrary, there is reason for concern that a <u>failure</u> to prosecute will convey a signal that the government is afraid of a confrontation with the RCMP. To prosecute now, even unsuccessfully, conveys to the potentially delinquent officer that the government will not tolerate such conduct. At the very least, such officer will more likely realize that he will have to face the unpleasantness of a prosecution and, therefore, some risk of a conviction. But when the government believes the impugned conduct to be unlawful and decides nevertheless against prosecution, it could well make itself, the administration of justice, and the law look like "paper tigers".

It was also argued that it might be unfair to prosecute individual officers in those cases where the law breaking was a matter of official RCMP policy. According to this argument, what is primarily at issue is not the personal guilt of those who performed the acts but the official policy upon which they were based. In our view, it is not an either/or proposition. One of the effective ways to secure a change in an impugned policy is to prosecute those who unlawfully implemented it.

The central defect of the Attorney General's memorandum is its failure to take account of the public perception which is likely to emerge as a result of the posture it adopts. Large sectors of the public could well come to believe that there are double standards in this country, that civilian law breaking is punishable but RCMP law breaking is not. The most likely result would be an erosion of confidence in the administration of justice. To whatever extent some constituencies can break the law with impunity, others may be encouraged to believe they should be able to do likewise.

The failure to apply a single standard could threaten to unravel our voluntary infrastructures. Consider, for example, the position of the Canadian Labour Congress during the last strike of the Canadian Union of Postal Workers. Despite a common and bitter opposition to the special act of Parliament terminating the strike, the CLC declined to support CUPW at the point when the latter's action became unlawful. As the public knows, CLC President Dennis McDermott was vigorously attacked for his stand by significant elements of his own constituency. What will this country say to its Dennis McDermotts the next time they face such movements to defy the law? Indeed, so long as RCMP wrongdoers remain immunized, what can anyone say?

On the basis of the foregoing, the Canadian Civil Liberties Association respectfully requests that this prosecutorial policy be amended. To the extent that the memorandum at issue remains on the public record in its present form, it incurs a serious risk of undermining public confidence in the administration of justice. As far as this case is concerned, we believe that the Attorney General should withdraw the stay of proceedings. Of all the reasons which the memorandum has advanced against the proposed

prosecutions, the only potentially acceptable one concerns the allegedly inadequate case of legal guilt. As indicated earlier, we are in no position to pass judgment on the validity of the OPP investigation for such purposes. Nor have we attempted to negotiate the conflicting interpretations of the Criminal Code. In any event, however, such considerations would apply primarily to a decision of the Crown not to prosecute. They cannot as readily support such interference with a citizen's right to prosecute.

In the first place, the citizen might have uncovered material which remains unknown to the OPP. This is rendered possible in these circumstances because of the obviously strained relations between the Trotskyist group and the police at all levels. Secondly, conflicting interpretations of the Criminal Code should be resolved by proper judicial determination and not by peremptory executive fiat. In the circumstances, this means allowing the justice to hear the parties in the usual way. Thirdly, this interference with a private prosecution represents a relatively rare intrusion on the normal and historic rights of citizens. To the extent that it is allowed to stand, it risks exacerbating this apprehended double standard in the treatment of police and civilians. The government will appear not only reluctant to pursue but also eager to protect police wrongdoers.

Accordingly, the Canadian Civil Liberties Association respectfully requests the following measures:

1) the amendment of prosecutorial policy in accordance with the arguments advanced above,
2) the withdrawal of the stay of proceedings in this case.