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FEDERAL PART I COMMISSIONS OF INQUIRY:

A STUDY OF CERTAIN OF THEIR RIGHTS,

OBLIGATIONS AND PRIVILEGES

by

Harry R. Johnson

Thesis submitted to the School of Graduate
Studies and Research of the University of
Ottawa in partial fulfillment of the
requirements for a Master of Laws degree

October, 1984.

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UNIVERSITÉ D'OTTAWA
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Acknowledgement

I wish to express my appreciation to Professor Ed Ratushny, my thesis supervisor, for his assistance and support which was always perceptive and timely. I would also like to thank Nicole Manuel who was so helpful and patient in typing the numerous drafts of the thesis.

FEDERAL PART I COMMISSIONS OF INQUIRY:

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OBLIGATIONS AND PRIVILEGES

SUMMARY

The purpose of the paper is to study four aspects of Part I inquiries: their power to control their own proceedings; their privileges against defamation; their obligations with respect to findings of misconduct; and, the right to counsel before such inquiries.

The history of commissions of inquiry is briefly traced, with some greater detail being provided regarding the development of Part I and other applicable sections of the federal Inquiries Act. This is followed by an extensive review of the powers which exist to control the activities of Part I inquiries. The evolution is traced of the development in Canada and elsewhere of both the use of the prerogative writs to control such inquiries and the recently emerged doctrine of administrative fairness which is applied by the courts as the basis for such control.

Sections 4 and 5 of the Inquiries Act, being the source of commissioners powers to control their proceedings, are then examined as to the extent and nature of the authority granted by those sections, including the effect of the relevant provisions of the Charter. The need for such powers is then looked at in light of some potentially applicable sections of the Criminal Code. This is followed by an inquiry into the present need for such powers having regard to the changing role being assigned to commissions of inquiry and

the dangers for civil liberties inherent in their use. The conclusion is reached that on balance such powers ought not to be permanently enshrined in the statute.

Consideration is then given to the privileges against defamation currently enjoyed by the participants - commissioners, counsel and witnesses - in commissions of inquiry. It is recommended that the approach of examining a commission as a single entity in determining privilege be abandoned in favour of looking at the roles of the different classes of participants. The uncertainty of the current state of the law is underlined and the consequence of removing the coercive powers of commissioners is then analyzed.

The related sections of the Inquiries Act, 12 and 13, - which were designed to provide protection for those caught up in the activities of inquiries - are examined to determine the extent of the protection which they in fact do provide. The difficulties experienced by commissioners attempting to apply the "reasonable notice" provisions of s.13 are highlighted and solutions are proposed as to how and by whom such notices ought to be given.

This is followed by an analysis of the problems created for witnesses by the discretion left to commissioners, in certain circumstances, as to whether to allow a participant to be represented by counsel. Relevant sections of both the Canadian Bill of Rights and the Charter are considered and proposals are made for reform.

Finally, some general conclusions are reached. They are that, having regard to the modern role of Part I inquiries, the coercive powers ought to be removed. If, as may arise on rare occasions, there is the necessity for a commission of inquiry into misconduct, then in each such instance there should

be a special Act of Parliament introduced, spelling out in detail all the rights, obligations and privileges which are proposed for the commission and its actors. It is contended that only through such focus and full scale debate can there be any assurance that the proper relationship will be achieved between the interests of the state and those of the individuals affected.

FEDERAL PART I COMMISSIONS OF INQUIRY:
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TABLE OF CONTENTS

PART I	INTRODUCTION	120
1.	General	1
2.	Historical Background	4
3.	Jurisdiction to Review Activities of Commissions of Inquiry	10
PART II	POWER TO CONTROL PROCEEDINGS	23
1.	The Extent of the Powers	23
2.	Controls on the Exercise of the Powers of Compulsion	28
3.	The Need for the Powers	38
4.	Conclusion	50
PART III	PRIVILEGES AGAINST DEFAMATION	54
1.	Commissioners	54
2.	Witnesses	65
3.	Counsel	67
4.	Conclusion	68

(ii)

PART IV	CHARGES OF MISCONDUCT	71
1.	Application of Section 13 of the Inquiries Act	71
2.	Conclusion	76
PART V	RIGHT TO COUNSEL	79
1.	Application of Section 13 of the Inquiries Act	79
2.	Conclusion	89
PART VI	GENERAL CONCLUSIONS	92
NOTES		95
APPENDICES		
Appendix A	- INQUIRIES ACT	
Appendix B	- FIRST 51 PART I COMMISSIONS OF INQUIRY	
Appendix C	- MOST RECENT 51 PART I COMMISSIONS ON INQUIRY	

FEDERAL PART I COMMISSIONS OF INQUIRY:

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PART I INTRODUCTION

1. General

In a scathing attack on commissions of inquiry, in another time and another place, it was said:

Such Commissions must of course lack no powers. It is accordingly a universal rule that "they may call for every paper in the world and every human creature who possesses it; and do what they like to one or the other." Everything is done to make them "vexatious, omnipotent, and everlasting." But all is done from the most tender regard for the public good.¹

The purpose of this paper is to examine certain of the rights, obligations and privileges pertaining to commissions of inquiry appointed pursuant to Part I of the federal Inquiries Act² to determine whether all or a part of the criticisms expressed above could properly be directed towards such commissions (see Annex A for the full text of the Inquiries Act). The aspects to be studied fall into four broad categories.

First is the power to control the proceedings of a commission. This will include a consideration of the common law powers to cite for contempt, and the applicability to commissions of various sections of the Criminal Code of Canada.³ The second category relates to the legal privileges against defamation enjoyed by the participants in a commission: the commissioners themselves, counsel, and witnesses. The third aspect pertains to the obligations of a commission towards those persons against whom it proposes to make a finding of

misconduct. Finally, there will be a review of the rights of those appearing before commissions to be represented by counsel.

Considering the importance of commissions of inquiry, not only in the machinery of our government but also in the impact they have had in effecting major changes in the direction of our society, there has been surprisingly little scholarly writing about them. But even more significant is the dearth of examination of the extent to which the powers granted to such commissions infringe, or not, on the traditional procedural safeguards cherished by our system of law. It is to this latter point that this study is directed.

For some time, there has been a controversy as to whether there ought to be two regimes of law; one applicable to commissions of inquiry whose purpose is to study and make recommendations concerning policy matters only, and another to those whose responsibilities extend to inquiry into the conduct of individuals. In theory, the distinction between the two types of inquiries is obvious and has been made by many observers.⁴ Whether any practical steps can or ought to be taken in the light of this distinction is the point of contention.⁵

The Law Reform Commission of Canada recommended the repeal of existing legislation and passage of a new Act in which different powers are given to the two different types of commissions, called by them "advisory" and "investigatory."⁶

This paper, after reviewing the present situation regarding the powers and immunities associated with Part I inquiries, will propose a somewhat different solution - a solution which, it is submitted, will offer greater protection for individuals caught up in the inquiry process. The essence of the proposed

solution is two-pronged. First, Part I inquiries should not be granted any coercive powers nor should they be granted any special privileges beyond those enjoyed by other bodies carrying out administrative duties. The one exception to this would be that the reports of such commissions of inquiry should enjoy absolute privilege, they being statements of one officer of state to another in the course of his official duties.

Second, if it is felt that a commission, because of its proposed mandate, will require coercive powers, there should be a special Act tabled in Parliament by the government to deal with the particular situation. The Act should spell out the powers proposed to be granted as well as the procedural safeguards which the inquiry would be required to observe. It is submitted that such an approach offers the best guarantee, albeit not a perfect one, that the rights and interests of the persons involved will be protected.

In Canada, little attention has been focused on the nature of the body which is created, by virtue of the authority granted to it, when a Part I commission is issued. Some starkly bald statements have been made, such as:

To function effectively, investigatory commissions must be able to enforce the attendance of witnesses; enforce the production of documents and other relevant things; compel witnesses to give evidence; enforce adherence to rules of practice and procedure that may be established; and maintain order firmly.⁷

...

All participants in an investigatory commission, including witnesses, should have immunity from civil suit.⁸

...

...many inquiries have an investigatory task which can properly be discharged only if the commission has strong powers.⁹

Those statements were accompanied, however, by the following caveat:

A commission of inquiry should be regarded as an unusual institution which may seriously affect individual rights. ... The inquiry system must provide a means of conducting an inquiry with the least possible danger to individuals or organizations that may be caught up in the process.¹⁰

Before turning to present day Part I commissions of inquiry and the extent to which they pose a "danger to individuals or organizations", it is salutary to look briefly at the historical origins of such commissions.

2. Historical Background

It is now generally agreed among historians that commissions began immediately following the Norman Conquest, the first such inquiry being the Domesday Surveys conducted by order of William the Conqueror.¹¹ In the undifferentiated "curia regis" of the succeeding monarchies, where no distinction was made between the Crown's judicial, administrative and inquisitorial powers, royal commissions were the normal method of conducting the Crown's business. By exercise of the royal prerogative the monarch issued commissions to trustworthy individuals to carry out the duties spelled out in the commission, and the commission, itself, contained the necessary authority to perform those duties. Then, as now, everything which the Crown did was simply an exercise of the royal prerogative, except to the extent that such prerogative had been superceded by a statute assented to by the Crown. Failure to grasp this basic constitutional principal has resulted in some false judicial reasoning as applied to commissions of inquiry,¹² of which more will be said later.

Over the centuries following the Conquest, the barons, and subsequently the developing parliament, attempted to wrest control over administrative and

judicial matters from the Crown. They were aided in this pursuit, during the 16th and 17th centuries, by the Royal Courts, which were becoming increasingly independent of the Crown from whom they derived their authority. Because the Crown exercised its proactive authority through the issuance of commissions, the struggle was essentially one of curbing the Crown's jurisdiction to issue such commissions. Statutes were passed to accomplish this, prime examples being the Magna Carta, six statutes passed during the reign of Edward III, and the 1640 statute abolishing the Star Chamber.¹³ To these statutory provisions was added the weight of the common law through pronouncements such as those of Coke, C.J.¹⁴ It is apparently true that the effect of the various statutes was to preclude the Crown from issuing commissions which purported to exercise judicial or quasi-judicial functions. But not all royal commissions became illegal.¹⁵

For political reasons, commissions of inquiry fell into relative desuetude following the rebellion of 1688 and throughout the 18th century. There were, nevertheless, a number of prerogative commissions issued for administrative purposes during this period. During the same period there were also a number of commissions of inquiry issued pursuant to statutory authority. Clokie and Robinson point out that "[a] very noticable revival of the procedure by Commission of Inquiry took place after 1800. In the thirty-two years from 1800 to 1831 some sixty or more Commissions of Inquiry were appointed, some with statutory authority, most without,..."¹⁶ Following the Reform Act of 1832 the use of royal commissions of inquiry began to increase steadily. Since responsible government was now well entrenched there was not the same parliamentary antipathy to the use of the prerogative power for purposes of inquiry.

In 1838, a commission of enormous consequence to the future of Canada, the Durham Commission, was issued. Following upon the report of that Commission, the Act of Union was passed, uniting Lower and Upper Canada in 1840.

In 1846 the legislature of the newly united Canadas passed the first Act in Canada respecting public inquiries generally.¹⁷ After Confederation that legislation became part of the law of Canada by virtue of the Constitution Act, 1867. The following year, similar legislation, revised to take account of the constitutional division of powers, was passed by the federal Parliament as a new statute.¹⁸ Except for the changes to be mentioned below, that legislation survives as Part I of the present Inquiries Act.

The changes wrought to the original 1868 Act occurred in 1886, 1889 and 1906. In 1886 there were three amendments effected through the statute revision process.¹⁹ First, the reference to a "party" was deleted from the section which empowers commissioners to compel the attendance of "any party or witnesses". The significance of this deletion is difficult to discern. A more important amendment was that which, when describing the powers of a commission to enforce the attendance of witnesses and to compel them to give evidence, changed the analogical reference from a "Court of Law in Civil cases" to a "court of record in civil cases." The meaning of the phrase "court of record in civil cases" and the extent of the powers granted will be discussed later when dealing with the contempt powers of a commission. The third amendment in the 1886 revision deleted the words creating an offence for giving a wilfully false sworn statement to a commission. This latter change was to accommodate earlier legislation which had dealt with perjury and false statements generally, including those before commissions conducting inquiries.²⁰

The 1889 amendment²¹ reflected the changing attitude toward compelling a witness to give self-incriminating evidence. No longer was a witness before a commission excused from answering on the grounds that his answer might incriminate him. Rather, he was now compelled to answer but his testimony was not admissible in any subsequent criminal proceeding against him, except on a charge of having given or procured, or having attempted or conspired to procure the giving of, false evidence. In 1893 generic legislation dealing with questions of evidence was passed.²² It covered all proceedings and other matters falling within the legislative jurisdiction of the Parliament of Canada. Included in that statute was a section dealing with self-incriminating evidence similar to the section put in the inquiries legislation in 1889²³ but further extending the compulsion to testify to instances where it might tend to establish liability to a civil proceeding. In the 1906 revision of the statutes, the above-mentioned overlap respecting self-incrimination created by the 1893 evidence statute was resolved through the deletion of the redundant provisions in the newly-styled Inquiries Act.²⁴

The 1906 revision brought together the Act dealing with public inquiries, i.e. the 1868 Act as amended, and an 1880 Act²⁵ which covered departmental investigations. The former became Part I of the new Act and the latter was made Part II. Part I, with which this paper is concerned, has survived to the present with only two insignificant wording changes.

In the 1906 statute revision process, one important change was effected which appears to have gone unnoticed in the literature on the subject. Prior to 1906, the legislation was worded in such a way as to assume that public inquiries were created by use of the Crown prerogative and that the purpose of the

legislation was to enable the Governor in Council to confer on commissioners powers which he otherwise would not have the authority to confer, i.e. to compel witnesses to attend and give evidence. Thus, s.1 of the 1886 Act²⁶ read:

1. Whenever the Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof, and such inquiry is not regulated by any special law, the Governor in Council may, by the commission in the case, confer upon the commissioners or persons by whom such inquiry is to be conducted, the power of summoning before them any witnesses, and of requiring them to give evidence on oath, orally or in writing, or on solemn affirmation if they are persons entitled to affirm in civil matters, and to produce such documents and things as such commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. (emphasis added)

The 1906 revision, on the other hand, reads as though it is the legislation itself which authorizes the Governor in Council to create the inquiry as well as authorizing him to grant the powers to the commissioners. This can be readily discerned from ss. 2 and 3 of the revision,²⁷ which were substituted for the first part of the earlier s.1. They read as follows:

2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

3. In case such inquiry is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted. (emphasis added)

By virtue of the Act authorizing the 1906 revision the revised statutes became the law.²⁸

It appears, therefore, that through the device of statute revision there has been a reduction in the prerogative of the Crown. This is perhaps what has led to much of the confusion as to what instruments ought to be used to create a commission of public inquiry²⁹ and whether or not such bodies are "Royal" commissions.³⁰ If, as appears, the prerogative to appoint commissions of inquiry has been suspended by the legislation, then any commission of inquiry purported to be created by Crown prerogative subsequent to 1906 would have acted without legal authorization. The current practice is to pass an order in council authorizing the appointment of the commissioner(s) and specifying in detail the terms of reference and the powers to be enjoyed by the commissioner(s). Letters Patent under the Great Seal are then issued by the Governor General appointing the commissioner(s) and repeating exactly the provisions of the order in council as to powers.³¹

A new Part III was added to the Inquiries Act in 1912.³² It applies to both Part I inquiries and Part II investigations. Part III deals with three discrete matters, two of which will be discussed in this paper. Section 12 spells out the circumstances in which the commissioners may or must permit persons the use of counsel and s.13 imposes an obligation on commissioners not to make a "report" against any person until that person has been given reasonable notice of the "charge of misconduct alleged against him" and he has been given an "opportunity to be heard in person or by counsel".

Finally, a further change was made to the Act in 1934³³ with the addition of Part IV dealing with International Commissions and Tribunals. That Part is of no consequence to this study.

With this brief history as a background, and before turning to the four specific areas of examination mentioned at the outset, i.e., power to control proceedings, privilege against defamation, notice respecting a report of misconduct and right to counsel, it is necessary to examine generally the powers which exist to review the activities of commissions of inquiry and more particularly the applicability of the rules of natural justice and of administrative fairness.

3. Jurisdiction to Review Activities of Commissions of Inquiry

Part I commissions of inquiry have been granted broad powers for the purposes of conducting their inquiries. This immediately raises the question of the extent to which the exercise of those powers is subject to external review. The first step towards answering that question must be a determination of the constitutional nature of a commission of inquiry.

Clokie and Robinson, referring to the British situation, have provided the following definition:

A Royal Commission is no subordinate part of a larger body; it is in no sense a fraction or segment of Parliament, Courts, Privy Council, or Executive Departments.

...

When properly constituted a Commission is upon a formal equality with the other institutions of the state.

LeDain has confirmed that a Canadian Part I commission has similar status:

A commission of inquiry established under Part I of the federal Inquiries Act is an independent body which, as a matter of formal relations, is on an equal footing with the other institutions of government.³⁵

The consequence of this status is said to be that a commissioner "is not subject to anyone's direction or supervision".³⁶ If this bald statement was intended to encompass judicial review, it is obviously too general. It is more likely that the author intended to emphasize that, without more, no other part of the executive arm of government may give direction to a commissioner. Even that position must be tempered by acknowledging that decisions of commissioners may be abrogated, prior to the submission of their reports, by further orders in council amending the terms of reference or the powers of the commissioners granted in the original commission, or discharging the commissioners altogether.³⁷

A more complete and, for present purposes, more appropriate description of commissions has been provided by Hallett:

When clothed with coercive powers, ... Commissions ... are truly hybrid bodies. They are tools of the executive branch of government but have powers normally only associated with the judicial branch of government. They do not decide issues, make decisions or affect the legal status of persons as do courts, but in conducting some inquiries they act in a manner similar to that of courts. They are not part of the normal machinery of justice although they are sometimes used to investigate whether crimes have been committed, and in some circumstances the title "executive court" might not be completely inaccurate.³⁸

Since a commission of inquiry is, in effect, a creature of the executive arm,³⁹ there is nothing to prevent the Governor in Council from creating a second commission to review the work or decisions of an earlier one. In 1917 a federal commission of inquiry was set up to review the report of a provincial counterpart.⁴⁰ The executive would not be precluded from doing the same with respect to one of its own commissions. The legal consequence of

this would simply be, however, that the executive would then have two sources of advice - not that one overrules the other. This latter can be accomplished, if at all, only through judicial review.

In this context of the constitutional status of a commission of inquiry, it should perhaps be noted, in passing, that if a judge is appointed as a commissioner, while performing his functions under that appointment he is in no different position than anyone else receiving such an appointment. He enjoys no special judicial privileges or immunities nor does he have any of his usual judicial powers, at least for the purposes of the inquiry.⁴¹

The extent and nature of judicial review of the activities of commissions of inquiry has undergone a long, slow development.⁴² It has been caught up in the struggle by the courts to throw off the fetters imposed by the ancient prerogative writs, and also the difficulties of the courts in coming to grips with the repercussions of the mammoth increase in the interventions by the modern state in the lives of its citizens. The courts have been torn between carrying out their traditional role of protecting individuals against the excesses of the executive and retaining some kind of protective wall against the onslaught of cases which would burke them if there were no checks in place.

In the whole area of the judicial review of administrative acts judges have been moving circumspectly - feeling their way - in the hope of arriving at a reasonable balance. What follows is an attempt to trace these general developments as they have had an impact on commissions of inquiry.

At the outset it is perhaps well to keep in mind that at common law commissions of inquiry had no coercive powers.⁴³ Thus, even though the Royal Warrants creating British royal commissions through the exercise of the

prerogative still purport to grant the commissioners coercive powers to compel the attendance of witnesses and the production of documents, such grants are of no effect⁴⁴ and no attempts have been made in modern times to make use of them.⁴⁵ Only since 1921 have any commissions of inquiry in Britain been vested, by statutory authority, with coercive powers,⁴⁶ and the provisions of this statute are seldom invoked.⁴⁷

In Canada, Australia and New Zealand, on the other hand, commissions of inquiry have, over a long period of time, been automatically vested with statutory powers of coercion. There has thus been a much greater need in those countries for judicial definition of the legal nature of such commissions, and it is in those countries that the jurisprudence directly concerning them has developed.

To control the proceedings of the executive at common law, the judiciary developed a number of rules which were placed under the rubric of "natural justice". For many years following the development of those rules, there were two barriers standing in the way of their application to commissions of inquiry. First, it was said that commissions of inquiry were not suable entities and the only procedure whereby they could be brought before the courts would be through use of the prerogative writs of certiorari and prohibition.⁴⁸ But those writs were only available to review judicial or quasi-judicial acts and commissions' actions were said to be purely administrative. This proposition was affirmed in Canada with respect to commissions of inquiry as early as 1875 when the Appeal Side of the Quebec Court of Queen's Bench unanimously upheld, without reasons, the decision of a trial judge who had said:

Je refusai le bref de prohibition demandé, en m'appuyant sur les motifs suivants: que le bref de prohibition ne peut être adressé qu'à un tribunal inférieur, et que le commissaire ne pouvant pas être considéré comme un tribunal puisqu'il n'avait pas le pouvoir de juger, mais seulement de s'enquérir.⁴⁹ (emphasis in original)

In 1890 the Supreme Court of Canada, by a majority decision, confirmed this position in Godson v. the Corporation of the City of Toronto, a case dealing with a County Court Judge appointed as a commissioner under the provisions of the Ontario Municipal Act. Sir W.J. Ritchie C.J., whose reasoning was concurred in by Fournier and Taschereau JJ., said:

The proceeding before the county court judge was, in my opinion, in no sense a judicial proceeding. The city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case. The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially; he was in no sense a court; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted, and the appeal should be dismissed with costs.⁵⁰

In a dissenting judgment, which now appears to have been 90 years ahead of its time, Gwynne J. found that the commissioner was acting judicially and therefore subject to prohibition. His reasoning was that, based on several factors present in the case, the commissioner was "...invested with judicial functions... and was required to proceed in a judicial manner."⁵¹ The determining factors which he identified were: the matter was referred to the commissioner in his capacity as a judge; it involved a complaint of misconduct, malfeasance or breach of trust; an inquiry under oath was required; coercive

powers to obtain evidence, similar to those vested in a court, were granted to the commissioner; at the conclusion of the inquiry a report setting out the commissioner's judgment or opinion about the charges had to be submitted; and if that report was unfavourable it might harm the person accused either in his character or his finances.

In a 1978 trial decision in the Alberta Supreme Court,⁵² Miller J. traced the evolution since the Godson case of the use of the prerogative writs of certiorari and prohibition to control the proceedings of commissions of inquiry. He concluded that there are now four situations in which those writs (or their equivalent in Quebec, the writ of evocation) are available to a provincial superior court:

1. to review whether a commission's mandate is within the constitutional jurisdiction of the provincial legislature;
2. to review whether a commissioner is confining his inquiry to his terms of reference;
3. "when the commission in the exercise of its auxiliary power wrongfully impairs the liberty or goods of a person"; and,
4. "when the report of the commission of inquiry is susceptible of affecting the rights of a person."⁵³

The first three of the above grounds were subsequently confirmed by the Supreme Court of Canada in the Keable Commission case.⁵⁴ The fourth ground, which is where developments respecting "fairness" have been taking place, was also recently confirmed by the New Zealand High Court (Full Court)

where it was held:

...we are satisfied that dicta in earlier cases to the effect that a Commission of Inquiry is immune from certiorari or prohibition because it is doing no more than inquiring and reporting are now out

of date, and are not in accord with the Court's responsibility to ensure that all tribunals carrying out functions (either investigative or decisive, or both) which are likely to affect individuals in relation to their personal civil rights, or to expose them to prosecution under the criminal law, act fairly to those concerned.⁵⁵

It must be remembered, however, that Part I commissions of inquiry are within the exclusive jurisdiction of the Federal Court of Canada by virtue of ss.18 and 28 of the Federal Court Act.⁵⁶ Because the jurisdiction of that court is derived entirely from statutory law, the court's authority to grant relief must be found in the statutory provisions. Section 18(a) provides the Trial Division with jurisdiction, inter alia, to issue writs of certiorari and prohibition or to grant declaratory relief "against any federal... commission...". Several judicial pronouncements of the Trial Division in the 1970's had held that the court could not issue prerogative writs against federal commissions of inquiry in the following circumstances: to prohibit a finding of misconduct;⁵⁷ to quash a report of a commission for non-compliance with s.13 of the Inquiries Act;⁵⁸ and, to prohibit a commission from continuing its inquiry on the ground of alleged bias of the commissioners.⁵⁹ In each of those cases the basis for the decision was that the work of the commission was not judicial or quasi-judicial. In both the Re B case and the Landreville case the courts went on to hold, however, that based on s.18 of the Act the Trial Division could grant declaratory relief against a commission which was not exercising a judicial or quasi-judicial function. In the light of the subsequent Supreme Court of Canada decision in Martineau v. Matsqui Institution Disciplinary Board,⁶⁰ it is now clear that those earlier decisions precluding the use of the prerogative writs were not correctly decided.

Assuming, therefore, on the basis of the Martineau decision, that this first barrier to relief could be overcome there remained the second hurdle. Except in constitutional or jurisdictional cases, it was necessary to invoke something in the nature of a breach of natural justice to obtain any relief. But here, again, the courts had held that the requirements of the principles of natural justice applied only to judicial or quasi-judicial acts and did not extend to bodies exercising administrative functions.

The latest expression in Canada of this undiluted position was in the majority decision of the Supreme Court of Canada in the Howarth case.⁶¹ A scant four months later, in the Saulnier case⁶² that same court began to withdraw from its earlier rigid position and to apply more sophisticated reasoning to the determination of whether a commission was required to adhere to the principles of natural justice. A unanimous court held that because the commission's report "may have important effects on the rights of persons dealt with in it," a writ of evocation was available to review the commission's decision. The Quebec Court of Appeal had held that because the action of the commission was administrative and not quasi-judicial the rules of natural justice did not apply. The Supreme Court of Canada seemed content not to attempt to characterize the nature of the commission as administrative or quasi-judicial but simply to find that because the commission's recommendation would normally be acted upon by the Minister to whom it was made, and because that recommendation would impair the rights of the applicant, the rules of natural justice did apply.

In the Cotroni⁶³ case in 1977 the Supreme Court of Canada granted a motion for a writ of evocation against the Quebec Police Commission when the

latter improperly exercised its statutory power to commit for contempt. In the present context, the significance of the case is that, once again, the court did not attempt to characterize the commission as administrative or quasi-judicial before arriving at a decision.

Further amplification of the court's thinking was provided in 1978 in the Keable case.⁶⁴ Mr. Keable had been appointed as a commissioner by the Quebec government and was thus given, by statute, for the purposes of executing his commission, the powers of a Superior Court judge. In the purported exercise of those powers the commissioner issued subpoenas requiring the Solicitor General of Canada to testify and to produce documents. Commenting on the authority of the court to review those acts of the commissioner the court said:

Assuming the Commissioner's report will not amount to any judicial or quasi-judicial determination, what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents. It is conclusively established by the recent judgement of this Court in Cotroni v. Quebec Police Commission, that the validity of the conviction of a witness for contempt by a commissioner with similar powers is subject to judicial review.⁶⁵

The court could thus be seen to be moving away from the strictures of classification when the rights of individuals were being affected.

A complete break with the past was finally effected by the Supreme Court of Canada in the Nicholson case in 1978.⁶⁶ By a bare majority, the court held that although a police commission was performing an administrative function it nevertheless had a duty to act fairly. Laskin, C.J., speaking for the majority, traced the development of this novel concept in the English courts. He spoke of "[t]he emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice..."⁶⁷ and concluded:

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.⁶⁸

The language used by the Chief Justice when discussing "natural justice" and "fairness" raises some questions about the meaning of those words which are left unanswered, particularly in the light of subsequent decisions.⁶⁹ Are there two distinct but related concepts - "natural justice" and "fairness" - the former applicable to judicial or quasi-judicial functions and the latter to administrative functions. It will be noted that a third element also appears to have been introduced in the first quote above - "traditional" natural justice. Is that a third concept?

The Chief Justice said that he accepted

...for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham*... "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".⁷⁰

but he also recited the celebrated quote by Lord Morris of Borth-Y-Gest in *Furrell v. Whengarei High Schools Board*⁷¹

...that "natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But... the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration".⁷²

It is interesting that the Vice-Chancellor, in a later case, appears to have moved closer to the position of the Lord Morris of Borth-Y-Gest. He said:

I do not think that much help is to be obtained from discussing whether 'natural justice' or 'fairness' is the more appropriate term. If one accepts that 'natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word 'justice' and to use instead terms such as 'fairness', or 'the duty to act fairly'.⁷³

It is submitted that the current position in Canada is similar to that set out by the New Zealand High Court (Full Court) in Re Royal Commission on Thomas Case, cited earlier:

There is at present some academic debate as to whether the obligation to observe "natural justice" is something distinct from the obligation to "act fairly". The expression "natural justice" is one that is not precise and probably should not be defined. It has two arms, these being embodied in the maxims "nemo iudex in causa sua" and "audi alteram partem". The procedure required to be adopted by any given tribunal to ensure that those concepts are properly applied will vary according to the tribunal and the function that it is performing.⁷⁴

In 1946 a prestigious Part I commission of inquiry comprised of two justices of the Supreme Court of Canada included in its report comments about the "status of a Royal Commission" and said that such a commission "...is not subject to, or under the control of the Courts."⁷⁵ That conclusion is now clearly out of date.

The current law with respect to judicial review of Part I commissions of inquiry would appear to be as follows. By virtue of s.18(a) of the Federal Court Act all such commissions are subject to review by the Trial Division of the Federal Court of Canada through the issuance of writs of certiorari and prohibition and, where the circumstances are appropriate, through the granting of a declaration. This relief is available even though the function of such commissions is characterized as administrative rather than judicial or quasi-judicial. The relief will be granted not only if the commission lacks constitutional authority or exceeds its mandate, but also if it fails to exercise properly its auxiliary coercive powers, or is not fair in the procedures it employs and thus adversely affects the rights of some person. The consequence of these last two grounds for relief will be examined, as appropriate, in relation to the four areas of concern which will be surveyed.

In addition to the "traditional" type of judicial review discussed above, potential new bases for reviewing the actions of Part I inquiries may have been created by the Canadian Bill of Rights⁷⁶ and the Canadian Charter of Rights and Freedoms.⁷⁷

Section 2(d) of the Bill of Rights reads, in part:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to authorize a ... commission ... to compel a person to give evidence if he is denied counsel...

This subsection would appear to place a limitation on the power of a Part I inquiry commissioner to compel testimony.

Section 7 of the Charter provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section may be applicable in two distinct situations.

First, it is arguable that the section could be used to strike down a decision of a commissioner, pursuant to s.12 of the Inquiries Act, to deny a person the right to be represented by counsel while that person's conduct is being investigated but prior to a charge being made against him. Second, the section may be available to prevent a commissioner from compelling a person to testify if that person's conduct is being investigated.

It is also possible that, by virtue of s.11(d) of the Charter, a commissioner's decision to find a person in contempt could be challenged on the ground that the commissioner did not constitute, in those circumstances, an "impartial" tribunal.

These questions relating to the Bill of Rights and the Charter will be looked at in greater detail, later, in the context of the detailed review of the subject areas.

PART II POWER TO CONTROL PROCEEDINGS

Section 4 of the Inquiries Act empowers commissioners to summon witnesses and requires those witnesses to give evidence under oath and to produce documents. To enforce those results, the commissioners are given, in s.5, "the same power...as is invested in any court of record in civil cases." The consequences of this statutory power are, therefore, made a product of the common law rules respecting courts of record.

The extent of these common law and statutory powers, the controls on their use, and the need for them or the desirability of having them, form the subject matter of this Part. In this context, several sections of the Criminal Code, dealing with the giving of evidence, which may be applicable to the proceedings of commissions of inquiry will also be examined.

1. The Extent of the Powers

As indicated earlier, although Royal Commissions created by the prerogative were, and in Britain to this day continue to be, granted powers in the Royal Warrant to compel attendance and to produce documents, that purported authority is of no effect.⁷⁸ A brief historical summary of the Canadian statutory developments respecting these same powers was also provided earlier.⁷⁹ It is beyond question that the sole source of authority for such powers must now be found in the statutes.

Sections 4 and 5 of the Inquiries Act are couched in broad terms.

They read:

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

It will be noted that s.4 is not entirely clear in the extent of authority which it purports to grant to the commissioners. The qualifying clause at the end of the section appears to give the commissioners the right to decide what is "requisite to a full investigation of the matters" for which they have been mandated. Does that clause apply only to the production of "documents and things" or does it also apply to summoning witnesses and "requiring them to give evidence"? In either case, are the decisions of commissioners reviewable by the Courts?

In the Keable case,⁸⁰ the provincial inquiry had, by statute, "with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term".⁸¹ The Supreme Court of Canada, in interpreting that provision, held:

The commissioner does not enjoy the status of a superior court, he has only a limited jurisdiction. His orders are not like those of a superior court which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack...⁸² (emphasis added)

Similar restrictions presumably apply to federal Part I inquiries. The Keable case was concerned with constitutional questions. The conclusion from it seems to be that inquiries, be they provincial or federal, are limited in the witnesses they may summon, in questions they may ask and in documents they may require to be produced, by all the usual constitutional constraints, whether arising out of the statutory constitutional division of powers or by the general common law respecting the constitution.

Therefore, stemming from the reasoning in Keable, it appears that a Part I inquiry commissioner could not require a witness to answer questions or produce documents which dealt with matters falling within exclusive provincial jurisdiction. Nor, it seems, could he compel a federal or provincial minister of the Crown to testify, since the Crown is immune from discovery, and an inquiry is in the nature of a discovery.⁸³ This was apparently not the view of Spence J, when acting as a Part I commissioner, although his language is not as clear as it might have been. He said in his report:

Early, in discharge of my duties as directed by the Privy Council Order, I determined that I would exercise the power conferred by section 4 of the Inquiries Act to require the attendance of such persons as I deemed proper to give testimony before the Commission. After careful consideration, however, I determined that Members of the Privy Council should be an exception to that rule. I did not deem it proper to require such Members to give evidence as to the discharge of their duties as such, whether or not they were presently Members of Parliament or of the Cabinet.⁸⁴ (emphasis added)

He seemed to be implying that he had the authority but chose not to exercise it.

The commissioners conducting the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission) did not show the same hesitation as Spence J, and they summoned numerous members of the Privy Council to give evidence under oath and to produce documents.⁸⁵ All of those summonses were complied with and there was no challenge in the courts to their authority to issue them. Had there been such a challenge it would likely have been successful on the strength of the reasoning in Keable.

With the exception of Ministers of the Crown in their official capacity, there is no reported case of any other class of witnesses being excluded from the requirement to appear and be sworn by a commission. It is clear that the rules of evidence applicable in courts of law do not apply to commissions of inquiry.⁸⁶ That being so, it is a natural extension that, in the absence of a specific statutory provision or some Crown prerogative, any person may be required to appear before a Part I inquiry and be sworn.

Assuming, then, that there are no constitutional barriers to the witness being called and sworn, are there any limitations on what questions he may be required to answer. Certainly, the fact that a witness's answer to a question may tend to criminate him does not relieve him from the obligation to answer.⁸⁷ The report of the Ontario Royal Commission Inquiry into Civil Rights concluded:

Whether the common law privileges [against giving evidence] apply to statutory investigations depends upon the language used in conferring the investigatory powers and the limitations placed thereon. For example, the powers conferred by the Public Inquiries Act are confined to the "power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as are vested in a court in civil cases". This language imports the disabilities of a court and preserves common law and statutory privileges through the adoption of "the powers vested in any court in civil cases".⁸⁸

Since similar language is found in s.5 of the Inquiries Act, all the evidential privileges enjoyed in a "court of record in civil cases" would be extended to Part I inquiries. Examples of the types of privileges covered would be those respecting solicitor-client communications,⁸⁹ and police-informant communications.⁹⁰

As indicated in the quote from the Keable case above, a commissioner's decisions with respect to "...the extent of the questioning permissible, and the documents that may be required to be produced,..." are reviewable by the courts. This general proposition would bring into play the question of relevancy.

The report of the Gouzenko inquiry stated that a commission "...is the sole judge of its own procedure, and may receive evidence of any kind in its discretion,..."⁹¹ If that was intended to mean that there were no limits on the evidence which could be compelled it is no longer a valid position. It is now clear that commissioners are limited to compelling the introduction of evidence which is relevant to their terms of reference.⁹² In the Mulholland case, Lord Denning, M.R. said that the test is whether "...it was a question that ought to be answered to enable proper investigation to be made?"⁹³ If not, there is no compulsion to answer. A similar conclusion was reached recently by a Canadian court with respect to a question proposed to be asked by a federal Part II commissioner.⁹⁴

To sum up, a Part I inquiry commissioner may require the introduction of evidence provided that such evidence relates to matters within federal constitutional jurisdiction, that it falls within the terms of reference of the commission, that no extant Crown prerogative protects it against introduction, and that no privilege could be claimed against its introduction in a "court of record in civil cases".

2. Controls on the Exercise of the Powers of Compulsion

Quite apart from the question of the circumstances in which a commissioner may exercise his powers, there has been some confusion in the past as to whether such powers had any "teeth". The commissioners in the Gouzenko inquiry said that:

Under the Inquiries Act, Commissioners are given power by the sections above quoted [ss.4 and 5] to compel a witness to speak, and to impose sanctions in case of a refusal.⁹⁵

An opposite conclusion was reached by the Commissioner appointed to inquire into the Rivard affair. He reported:

In the course of this inquiry I have realized that the Judge, presiding a Royal Commission set up under the "Inquiries Act", does not have all the powers which are ordinarily his in the exercise of his judicial duties.

He cannot decide whether there has been contempt of Court either in his presence, or outside his presence. This lack of powers, as I found on several occasions, leads to situations that are most embarrassing to the Judge and which prevents [sic] the normal conduct of the inquiry.⁹⁶

This latter view was "read with interest" by the commissioner in the Munsinger affair,⁹⁷ and later endorsed by a commissioner appointed pursuant to Part II of the Inquiries Act.⁹⁸ This endorsement perhaps discloses some confusion in that commissioner's mind since there are specific provisions in Part II of the Inquiries Act respecting enforcement,⁹⁹ and no powers similar to those given to a Part I commissioner by s.5 are given to a Part II commissioner.

No case respecting s.5 has been brought before the courts so it is necessary to turn for guidance to jurisprudence dealing with the legislation of other jurisdictions and to scholarly writing. Section 5 equates the powers of a

Part I inquiry commissioner to a "court of record in civil cases". The effect of such a provision has been examined in detail in a background paper prepared for the Law Reform Commission of Canada.¹⁰⁰ The author concludes that federal tribunals (among which she includes Part I inquiries) which are granted court of record status are deemed to be inferior courts of record unless they are given superior court status by statute.¹⁰¹ The consequence of this deemed status is said to be that the tribunal has power to punish for contempt, but only for contempt in the face of the tribunal.¹⁰² What effect does this have on the three powers given to Part I commissioners by s.4, i.e. to summon witnesses, to require them to give evidence under oath or on affirmation, and to require them to produce documents and things?

Failure to comply with a commissioner's order with respect to the latter two matters would clearly be contempt in the face of the commission¹⁰³ and thus within the jurisdiction of the commission to deal with. The more difficult problem presents itself when a potential witness refuses to appear in response to a summons. An early decision of the Appeal side of the Quebec Court of Queen's Bench dealt with that province's legislation which purported "to confer upon commissioners...the same power as is vested in Courts of law in civil cases to enforce the attendance of witnesses and compel them to give evidence".¹⁰⁴ The respondent had been sworn by the commissioners and had refused to answer one of the questions put to him. The court concluded that by virtue of the legislation the commissioners had "...the power to punish by fine or imprisonment, or both, any contempt of their authority by any person summoned as a witness refusing to appear or to answer questions put to them concerning the matter being the subject of such inquiry...".¹⁰⁵ The case does not purport to deal, except by 'obiter', with the situation of a person refusing to appear. Nevertheless, the case was

subsequently said, by the Ontario Court of Appeal, to have "...held) that [the commission] therefore possessed the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning matters which were the subject of such inquiry...".¹⁰⁶ (emphasis added).

This latter case dealt with the powers given, by statute, to the Ontario Municipal Board. The Board was not only given "...all the powers of a court of record..." but also "...all such powers...as are vested in the Supreme court with respect to the...attendance and examination of witnesses..."¹⁰⁷ Again, this case dealt with the authority of the Board to compel a witness already before it to answer certain questions. The court chose to read down the language of the Act "...to a degree adequate to the end intended to be served by the legislation..."¹⁰⁸ and consequently held that notwithstanding the reference to the "powers" of the "Supreme Court", the Board's powers were limited to those of an inferior court of record, which were said to be to punish for contempt in the face of the court "...but not for a contempt not committed in the Court's presence".¹⁰⁹ This interpretation adequately dealt, of course, with the problem of a witness refusing to answer a question, but not with that of a witness refusing to appear. This latter situation finally came before a Canadian court in 1974.¹¹⁰

In Hawkins, the Tenancies Board had been given the powers of a commissioner appointed under the provincial public inquiries legislation. That latter legislation granted to commissioners powers similar to, but not exactly the same as, those contained in s.4 of the federal Inquiries Act. The power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things was the same "...as is vested in the Supreme Court

or a judge thereof in civil cases,..."¹¹¹ The Board issued a summons to Hawkins who evaded service of it. He was then arrested, by order of the Board, and brought before it where he was sentenced to imprisonment for contempt. On an application by Hawkins for orders of 'certiorari' and prohibition, the Supreme Court, Trial Division, held that "...the Board was legally justified in apprehending him".¹¹² The Judge went on to hold, however, relying on the reasoning in the Diamond case,¹¹³ that the "...alleged contempt of Hawkins in failing to appear before the Board, does not constitute an offence committed in the face of the Court"¹¹⁴ (emphasis added). Therefore, the Board had no jurisdiction to punish him for contempt. In a subsequent Supreme Court of Canada decision, which confirmed categorically that only superior courts have inherent jurisdiction to punish for contempt committed 'ex facie curiae', it was said that the contempt of Hawkins was his deliberate avoidance of service of the subpoena.¹¹⁵ This interpretation is difficult to square with the language of the court in Hawkins, as quoted above.

In England, the question of what constitutes contempt in the face of the court remains confused. The authors of Borrie and Lowe's Law of Contempt point out that the "...principal definitional difficulty is the relevance of the geographical location of the offending act."¹¹⁶ They are of the opinion that "doubts may be raised" about including as contempt in the face of the court misconduct by witnesses failing to appear.¹¹⁷ The law in Australia appears equally uncertain. In a Western Australian case¹¹⁸ in 1929 the Court of Appeal of that state found that the failure of a witness to return to a Court of Arbitration on time for the afternoon session was not "...wilful contempt in the face of the court..." as specified in the governing statute, in that such failure to appear was not "in the face of the court". On the other hand, in

1982 the New South Wales Court of Appeal decided that contempt in the face of the court extended "...to encompass conduct outside the actual court room" even if it "...requires some evidence to be put before the court,...".¹¹⁹ The court limited its decision, however, to such contempts committed by "strangers" and designed to disrupt or prejudice or interfere with proceedings then before the court.¹²⁰

In the New South Wales case, the court specifically disagreed with the dissenting judgment of Laskin J. (as he then was) in McKeown v. the Queen.¹²¹ McKeown was a case in which a lawyer had failed to appear in court, on behalf of a client, on the prescribed date. He was summarily convicted for contempt of court and sought to appeal his conviction relying on s. 9 of the Criminal Code.¹²² That section provided for an appeal against punishment, but only if the contempt was "in the face of the court". The three judges in the majority held that the contempt was "in the face of the court" and no appeal against conviction was, therefore, available. In the C.B.C. et al v. Quebec Police Commission et al case, mentioned above,¹²³ the court said that it is possible to distinguish the Hawkins¹²⁴ decision, cited earlier, from the McKeown decision by interpreting the former as a case of contempt for avoidance of service of subpoena rather than for failure to appear. Although this attempted reconciliation was 'obiter', it takes on added significance by the fact that it was concurred in by six justices including Laskin C.J. and Spence J, both of whom had rendered strong dissents in McKeown in which they expressed the view that the failure of the lawyer to appear was not contempt in the face of the court.

Thus, although there is no case directly on point respecting s.5 of the Inquiries Act, it seems likely, based on the analogous decision in McKeown and the interpretation placed on Hawkins in C.B.C. et al v. Quebec Police Commission et al, that the failure of a witness to appear in response to a summons of a Part I commission will be construed as contempt in the face of the commission and therefore punishable by the commissioners.

It should perhaps here be made explicit, albeit parenthetically, that the power of Part I commissioners to punish for contempt is solely in relation to the summoning of witnesses and the production of documents. There is no provision in the Inquiries Act granting them broader authority to otherwise control their proceedings.

The Inquiries Act does not provide any appeal mechanism from a conviction for contempt by a Part I commissioner. The appeal provisions of s. 9 of the Criminal Code are restricted to summary convictions for contempt by a "court, judge, justice or magistrate". Therefore, any challenge to a conviction for contempt by a Part I commissioner must be by way of application for a prerogative writ. It is not necessary, however, to wait for the alleged contempt to take place and the conviction to be registered, before an application may be brought.¹²⁵

The prerogative writ to be selected and the court in which it must be sought if a challenge is to be brought to a conviction and sentence by a commission for contempt causes several problems. If the application is brought prior to conviction, as was done in the Keable case,¹²⁶ it seems clear that the application must be to the Trial Division of the Federal Court pursuant to s.18 of the Federal Court Act.¹²⁷ The relief sought would be either a writ

of prohibition or a writ of certiorari depending on the circumstances. If the commission has found the contempt, whether before or after imposition of sentence, except as noted below the procedure would appear to be the same as prior to conviction. In all of the above cases, on the return of the writs, questions of jurisdiction relating to the mandate of the commission could be raised as well as issues of procedural fairness and natural justice.¹²⁸

If the sentence has been imposed new considerations arise. When the punishment is a fine, as indicated above, resort would be to the Federal Court for a writ of prohibition or certiorari. But if the punishment is imprisonment and the convicted person is actually confined another remedy, 'habeas corpus', is available. Since the Federal Court has not been given the authority to issue a writ of 'habeas corpus' (except with respect to Canadian military personnel outside Canada), the application would normally have to be to the superior court of the province in which the contemnor is incarcerated.¹²⁹

However, at common law, the writ will not be granted if the conviction was made by a court of competent jurisdiction. As Harvey notes,¹³⁰ this was made clear by Lord Denman in Carus Wilson's Case¹³¹ where he said:

But, when it appears that the party has been before a Court of competent jurisdiction, which Court has committed him for contempt or any other cause, I think it is no longer open to this Court to enter at all into the subject matter.

Picher seems to suggest¹³² that the federal jurisdiction is governed by the 1866 Act of Upper Canada¹³³ concerning 'habeas corpus' rather than by the common law. If she is so suggesting she would appear to be wrong since the effect of s.125 of the Constitution Act of 1867 was simply to carry over the 1866 Act as part of the law of Ontario and not as a law of Canada.

The common law position would, therefore, apply to a contempt conviction by a Part I commissioner because the constitutional jurisdiction is federal and, by virtue of the decision of the Supreme Court of Canada in In re Storgoff,¹³⁴ the writ forms part of the proceedings in which it arises. Since s.5 of the Inquiries Act gives Part I commissioners the powers of a court of record, which is the source of the power to commit for contempt, a writ of 'habeas corpus' would not lie to review the commission's decision. The cases have, however, made a distinction between superior courts of record and inferior courts of record and as was noted earlier, a Part I inquiry is deemed to be an inferior court of record. With respect to the latter, the writ will lie on a question of jurisdiction,¹³⁵ and as noted above, the matter of jurisdiction includes questions of procedural fairness and natural justice. Whether affidavit evidence or certiorari in aid may be used to support the 'habeas corpus' applications remains for final decision by the Supreme Court of Canada in the Re Miller and the Queen appeal.¹³⁶

Mention was made at the end of Part I of this paper of the possible applicability of s.2(d) of the Canadian Bill of Rights and ss.7 and 11(d) of the Canadian Charter of Rights and Freedoms to the powers of a commissioner to compel a witness to attend and give evidence.

The relevant wording of s.2(d) of the Bill of Rights seems to be clear and unambiguous. It says that "...no law of Canada shall be construed or applied so as to (d) authorize a...commission...to compel a person to give evidence if he is denied counsel...". There is no judicial authority interpreting the section as it affects commissions. Tarnapolsky points out that it applies to persons who are "merely witnesses" and that it arises only when a

person is compelled to give evidence.¹³⁷ Thus, it would seem that the powers under ss.4 and 5 are inoperative vis-à-vis a person whose conduct is being investigated if a commissioner exercises his authority under s.12 to deny counsel to that person.

Section 11(d) of the Charter reads:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

The first issue which arises is whether a summary finding of contempt amounts to being "charged with an offence". Judicial opinion is divided. An Alberta Court of Queen's Bench decision has held that it does.¹³⁸ A Quebec Superior Court decision has held the opposite.¹³⁹ The Ontario Court of Appeal has assumed, without specifically so holding and without any reasoning or examination of authorities, that a contempt conviction falls within the purview of s.11(d).¹⁴⁰ The latter court held, however, that summary proceedings for contempt in the face of the court do not infringe the right, in s.11(d), to a hearing by an "impartial tribunal". Again, no authorities were cited and no reasoning provided. This case arose out of words spoken by an accused to a provincial court judge after the latter had committed him for trial following a preliminary hearing.

Whether the courts would be as willing to uphold the authority of a non-judicial body, such as a Part I inquiry, will have to await the appropriate circumstances. A strong argument could be made that many commissioners, unlike judges, almost by definition, are not impartial and therefore their contempt powers ought to be struck down by s.11(d).

A more promising avenue, which would provide at least partial relief from the rigours of ss.4 and 5, arises out of an interpretation which has been given to s.7 of the Charter. That section, it will be recalled, provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In R.L. Crain Inc. et al v. Couture and Restrictive Trade Practices Commission et al,¹⁴¹ the court held that it was a principle of fundamental justice that a person not be required to testify against himself. It then held that the provisions of the Combines Investigation Act¹⁴² which compelled a person to give evidence with respect to his own conduct which was under investigation, were contrary to s.7 because they amounted to requiring a person to incriminate himself. The court elaborated on the distinction which it perceived between witnesses, other than the accused, being compelled to testify in a criminal case and witnesses appearing before an administrative inquiry. It said:

The removal of the privilege from witnesses in criminal proceedings reflects a policy that the incidental incrimination of a witness must not be allowed to thwart the legitimate purpose of the proceedings: the just determination of the guilt or innocence of the accused.

An administrative inquiry, on the other hand, may be directed at uncovering illegal activity on the part of the witness. The denial of that witness's privilege against self-incrimination in this situation may result in the witness being compelled to assist in an investigation into his criminal activity.¹⁴³

The court limited its conclusion, however, to inquiries in which "...at least one of the purposes...is to assist in the eventual criminal prosecution of specific suspects."¹⁴⁴

By analogy, those Part I inquiries, one of whose purposes is to investigate the alleged unlawful conduct of individuals,¹⁴⁵ might well be found to contravene s.7 if they attempted to compel witnesses to testify or produce documents. It seems unlikely, however, that the protection of s.7 could be extended to other commissions where the conduct of the individuals is not alleged to be illegal, in a criminal sense. This follows from the decision in MacBain v. Canadian Human Rights Commission,¹⁴⁶ where it was determined that "the right to life, liberty and security of the person" does not include interference with one's good name, reputation or integrity.

3. The Need for the Powers

In order to examine whether the powers granted by ss.4 and 5 of the Inquiries Act are necessary it is helpful first to consider what other remedies are available to cover the same situations envisaged in ss.4 and 5. There may be such remedies in the Criminal Code.¹⁴⁷

Section 107 of the Code provides, 'inter alia', that:

"Judicial proceeding" means a proceeding
(d) before... a person or body of persons
authorized by law to make an inquiry and take
evidence therein under oath...

By virtue of s.4 of the Inquiries Act, a Part I inquiry would appear to fall four-square within the Code definition. If it does, and there are no cases directly on point,¹⁴⁸ several relevant sections of the Code would be made applicable to Part I inquiries.

Sections 120, 124 and 125, which deal, respectively, with perjury, giving contradictory evidence and the fabrication of evidence would all clearly be applicable. They do not, however, cover the specific matters dealt with in

s.4 of the Inquiries Act. It is possible that s.127(2) of the Code could be invoked in the situations encompassed by s.4. That section reads:

Everyone who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence, and is liable to imprisonment for ten years.

The difficulty with making it applicable is the reference to "the course of justice". It is unlikely that the proceedings of a Part I inquiry would be seen as part of the course of justice. There is 'dicta', however, which might lead to a contrary view. In the Diamond case, Schroeder J.A., in speaking about a matter which he considered "irrelevant" to the decision, said that if a person attempted to dissuade a witness from giving evidence before the Ontario Municipal Board or to interfere with the testimony, that conduct might come within the purview of the sections of the Criminal Code dealing with attempts "...to obstruct, prevent or defeat the course of justice".¹⁴⁹

More promising is s.636.(1) which states:

A person who, being required by law to attend or remain in attendance for the purpose of giving evidence fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.

By reason of s.625, which makes all of Part XIX applicable to "...a proceeding to which this Act applies", and of the definition of "judicial proceeding", noted above, s.636(1) would probably apply to a Part I inquiry. This becomes problematical, however, if reference is had to the following two subsections, 636(2) and (3), dealing with enforcement and penalty. Those subsections confine themselves to "A court, judge, justice or magistrate...". In addition, the forms set out in the code obviously contemplate court proceedings and nothing

else. Thus, as far as Part I inquiries are concerned, there may be a power under s.636(1) to convict for contempt but no specified machinery for carrying it into effect.

Two other sections of the Criminal Code might be found to be applicable. The first of such sections is s.115(1) which reads:

Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

It is possible that failure to comply with the summons of a commissioner to appear, or failure to give evidence or to produce documents or things as required by a commissioner under s.4 of the Inquiries Act could be found to constitute an offence under s.115(1). The argument more likely to prevail, however, is that the wilfull omission would apply to what the commissioner requires to be done rather than to something which an "Act of the Parliament of Canada..." requires to be done. The same argument could not be raised to a charge under s.116(1) which says:

Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

It has been held, by the Supreme Court of Canada, that neither s.8 of the Criminal Code, which preserves the power of a court to punish for contempt, nor the inherent powers of a court to punish for contempt fall within the exception in the section of those instances where "...some penalty or punishment or other mode of proceeding is expressly provided for by law..."¹⁵⁰ However, since

Part I commissioners gain their authority from s.5 of the Inquiries Act, it may well be that disobedience of a commissioner's order under s.4 does fall within the exception in s.116(1).

The conclusion that can be drawn with respect to the Code offences is that, although one or more of them may be made applicable to the situations envisaged in s.4 of the Inquiries Act, they were not tailored for that purpose and consequently require some liberal interpretation of the language to make them fit. Since the result of any such interpretations would be contrary to the interests of the individual charged it is submitted that it would not be desirable to use the sections for those situations. Thus, if there is a need for the powers at all, reliance must currently be placed on s.5 of the Inquiries Act.

But are the powers necessary at all? And if they are needed, are there alternative ways of granting them which would offer greater protection to individuals against whom they might be applied? Most commentators have concluded that in certain situations the powers are required.¹⁵¹ Why, when the common law in its wisdom concluded that it was inadvisable for executive inquiries to have such powers, there should be almost universal support for them remains unexplained. It would be difficult, if not impossible, to determine the extent to which past Part I inquiries would have been hindered in carrying out their mandates without the powers they enjoyed under ss.4 and 5. The fact that there have been no reported cases of contempt convictions for failure to comply with Part I commission of inquiry subpoenas could suggest that there have been very few instances where witnesses felt very strongly about not wanting to testify.

In Britain, royal commissions do not normally have any such coercive powers. This has not been felt to be a deterrent to their carrying out their mandates, except in rare instances.¹⁵² There is, in Britain, the option of proceeding under the Tribunals of Inquiry (Evidence) Act, 1921,¹⁵³ which makes the powers available. That route had been followed on fifteen¹⁵⁴ or sixteen¹⁵⁵ occasions between 1921 and 1975, and in only one instance was it necessary to invoke the enforcement procedure.¹⁵⁶

Public inquiries legislation in the Canadian provinces,¹⁵⁷ as well as comparable legislation in New Zealand,¹⁵⁸ and in the Commonwealth and states of Australia,¹⁵⁹ all contain powers somewhat akin to those found in ss.4 and 5 of the Inquiries Act. In some of those jurisdictions different methods have been employed to try to protect against abuse of their powers by overzealous commissioners. With the exception of Ontario where the only power enjoyed by a commissioner is to refer the matter to the Divisional Court for decision, the Canadian provinces have given full authority to the commissioners in the first instance with judicial review left to the process described earlier. In Britain, the process for tribunals granted powers pursuant to the Tribunals of Inquiry (Evidence) Act 1921 is similar to the Ontario situation, i.e. the tribunal must refer the matter to the court for final determination.

In the antipodes, several jurisdictions have adopted different combinations of proceedings. Australian Commonwealth commissioners and Western Australian commissioners may order the apprehension and detention of a witness who fails to attend, but refusal to be sworn or to answer a question or to produce a document is simply made a punishable offence. In New South Wales and New Zealand, if the commissioner is a judge of the Supreme Court he retains all the authority and powers of such a judge, but in addition, failure to appear,

refusal to be sworn or testify or to produce documents are all made offences punishable by fine. In New Zealand, there is an additional twist in that if the commissioner is not a Supreme Court judge than he is vested with all the powers of a magistrate. In the State of Victoria, if a person fails to comply with a summons with an order to be sworn or testify or produce documents, the commissioner may certify that fact to the Attorney General. The latter may, in his discretion, then apply to the Supreme Court for an order requiring that person to show cause why he should not be found guilty of an offence, the punishment for which is fine or imprisonment.

Regardless of the procedures provided for enforcement and the procedural safeguards adopted in that context, the underlying assumption of the legislation of all the jurisdictions is that the executive arm of the state requires these coercive powers in order to carry out its responsibilities. Proposals such as those of the Law Reform Commission of Canada¹⁶⁰ are simply variations on the theme.

Only recently have there been any attempts at in-depth analysis of the social purpose which commissions of inquiry are designed to serve. Until now, the question which has been asked has always been: "What powers are required in order for the inquiry to arrive at the truth?"¹⁶¹ The question now beginning to be posed is: "What purpose do these inquiries serve?" Doern concludes that there are six distinct purposes:

- (a) to secure information as a basis for legislative policy, (b) to educate the public or the legislature, that is, to generate pressure for intended legislation, (c) to sample public opinion, the "trial balloon" function, (d) to investigate the judicial or administrative branches of the government, (e) to permit the voicing of grievances, and (f) to enable the government to postpone action on a politically embarrassing question.¹⁶²

He points out, with respect to purpose (d), that "...very recently there has been some concern about the protection of legal rights in royal commission 'inquisitions'".¹⁶³ Since he goes on to point out that all six purposes really boil down to one: "to secure information as a basis for policy",¹⁶⁴ it is difficult to understand why he limits the concern with legal rights to only the one purpose: (d). It must be acknowledged, however, that the problem is most likely to arise in the context of a commission having that purpose. Doern's basic concern is to examine the roles of commissions of inquiry vis-a-vis the other executive arm apparati such as departments and agencies. He detects a trend away from commissions as "judicial inquests" and "...to the use of broadly based social science research staffs instead of the public hearing as the prime method of gathering evidence...".¹⁶⁵ Regrettably, he does not pursue this theme further in the direction of its consequence for the necessity of coercive powers.

Earlier, Hodgetts had shown a similar disposition simply to mark the distinction between the two types of investigation conducted by royal commissions, which he described as follows:

First, there are the unique, non-recurring issues that crop up as a result of an unexpected occurrence - a riot, fire, flood or landslide - or a particular crisis which may affect a ministry (e.g. the C.P.R. Scandal or the Bren Gun Inquiry). For this category, the 'ad hoc', flexible features of royal commissions, coupled with their prestige and the reassuring element of judicious impartiality, would appear to be ideally suited.

...

"The second category of subjects includes broader social and economic problems...".¹⁶⁶

He then says that "...royal commissions appear to be the most neutral devices we possess for calming the public mind by getting at the unvarnished facts."¹⁶⁷

He does not, however, pursue the question of what powers ought to be granted to obtain those "unvarnished facts", and what the consequences might be for civil liberties.

LeDain, on the other hand, looks at "...three faces of public inquiry which interest [him]":¹⁶⁸ for determining policy; for reviewing an exercise of political judgment; and, for determining guilt or innocence. With respect to the latter type of inquiry he says:

The issue is the extent to which we are going to allow guilt to be determined by an inquisitorial form of justice - the extent to which inquiry may be used to undermine the protection which the accused should have in the criminal law process.

Basically, what is involved here is the right of a man who is liable to criminal prosecution to have his guilt or innocence established through the criminal law process and not through a wide-ranging public inquisition in which he can be compelled to incriminate himself. In this area, inquiry usurps or undermines the function of the judicial process in the ordinary courts.¹⁶⁹

His concern is not with coercive powers generally but only with the effect they have on a person who is, or may be accused. Indeed, he concludes, without any supporting argumentation, that:

...there is the need for powers of investigation or inquiry of various kinds to throw light on many issues which do not necessarily relate to criminal liability. It is important that they not be frustrated in their general purpose.¹⁷⁰

On the strength of that conclusion he says:

We need to re-think the whole question and consider first, whether we agree in principle that there should be protection in an inquiry for a person who may be put on trial and then devise the necessary rules and procedures to ensure an effective implementation of this principle.¹⁷¹

This concern, expressed by LeDain, for the witness who may subsequently find himself charged on the basis of the same facts about which he has been compelled to testify before an inquiry, has been the main focus of discussion about whether the powers of compulsion ought to exist and if so what measures ought to be in place to ensure adequate protection for the rights of a potential accused.

Some authors who have accepted the challenge "to rethink the whole question" have come to the same conclusion as LeDain. Proulx, for example, first parses commissions of inquiry into the same two categories as Hodgetts had done:

...celles qui sont utilisées à titre consultatif par un gouvernement qui veut obtenir toutes les données d'un problèmes avant de légiférer...172

and

...ces commissions où il est donné comme mission aux commissaires d'enquêter sur des faits, de faire rapport et de recommander certaines mesures à la lumière des faits obtenus.173

He dismisses the first category as not creating any difficulties for witnesses. With respect to the second type he proposes the granting of immunity from subsequent prosecution. The formula he proposes is as follows:

...Si un témoin s'objecte à répondre pour le motif que ses réponses peuvent l'incriminer, nul ne peut le contraindre à répondre à moins qu'il soit expressément signifié au témoin qu'il sera exempté de toute poursuite criminelle relative aux faits qu'il divulguera, sauf évidemment une poursuite pour parjure dans le cours de ce témoignage.174

His concluding reasoning is worth repeating:

En droit criminel, nous sacrifions parfois la découverte de la vérité en voulant sauvegarder d'autres valeurs jugées plus importantes, comme par exemple le secret professionnel entre l'avocat et son client, les communications privilégiées entre mari et femme. Pourquoi ne serons-nous pas prêts à favoriser davantage la découverte de la

vérité devant une commission d'enquête en accordant des garanties meilleures au témoin? Le prix de la vérité ne vaudrait-il pas le droit au silence ou l'immunité contre toute poursuite en faveur du témoin?¹⁷⁵

Ratushny devotes a full chapter to consideration of the problems presented by compelling potential accused to testify before commissions of inquiry.¹⁷⁶ He demonstrates the danger for civil liberties of this practice by reference to numerous abuses which have occurred in the Province of Quebec. He concludes as follows:

Is the problem really serious enough to warrant a response? After all, section 5(2) of the Canada Evidence Act does not seem to have worked too badly in the past. The technique of calling a suspect as a witness at another inquiry is not new in Canada. It has been available for a good many years and examples can be found of its use in the past. Why is there suddenly such a problem?

The problem is one of scale. Within the last few years this technique has been increasingly integrated into the criminal process in some jurisdictions. Is it not simply a matter of time before the technique will be utilized to the full extent of its availability in all parts of Canada? At that point we will have abandoned our criminal process completely in favour of an essentially inquisitorial system.¹⁷⁷

He too favors a formal procedure for granting immunity in law.¹⁷⁸

Since the Report of the British Royal Commission on Tribunals of Inquiry in 1966¹⁷⁹ it has been clear that in Britain there is a policy of not charging witnesses with respect to actions about which they are compelled to testify before a tribunal of inquiry. In typical British fashion, they appear to have solved the problem practically, without facing it on a theoretical level. The Law Reform Commission of Canada, on the other hand, faced the issue squarely and concluded that a witness before a commission should enjoy no more

protection than a witness in a court of law,¹⁸⁰ and in particular should have no immunity from prosecution.¹⁸¹ This latter position echoes the view of other commentators. In commenting on LeDain's position, quoted above, Willis said:

In the final section of the paper - the public inquiry to determine guilt or innocence - Dean LeDain is worried about something that ought, I know, to worry me but doesn't, as it so happens, worry me at all - the predicament of a man who, being under suspicion of criminal conduct, is compelled to answer questions at a public inquiry about his part in the affair and thereby sometimes provide the prosecuting authorities with "leads" to evidence against him. After all, it is said, he could, if he were directly charged with a criminal offence in the first place, tell the police that he wasn't saying anything and just abstain from going into the box at his trial. Like most "sound lawyers", LeDain sees cases like Whitelaw as a threat to the suspect's God-given privilege against self-incrimination, which indeed they are. Not being a "sound lawyer", I agree with Bentham and many of the present judges in England in thinking that it is the privilege against self-incrimination itself, God's gift to the criminal and his legal aid lawyer, that needs modification in the interests of justice for the victim and society generally.¹⁸²

More dispassionately, perhaps, Menzies sees it as a logical outflow of Royal Commissions that charges be laid. He stated:

There is nothing more necessary for democracy than that there should be an effective way of enquiring into charges of abuse in high places, so that those who occupy those positions who are innocent may have the advantage of their innocence being established and, secondly, that those who are not innocent should have their conduct investigated and, if necessary, following the Royal Commission, that there should be some criminal proceedings.¹⁸³

It is ironical that Menzies, after pointing to the high level of position of the persons involved as the rationale for conducting an investigation by way of Royal Commission, concludes that criminal proceedings are appropriate; whereas Salmon, using the same justification for the appointment of tribunals of inquiry, came to the opposite conclusion. Salmon, in the article cited earlier, said:

In all countries, certainly in those which enjoy freedom of speech and a free Press, moments occur when allegations and rumours circulate causing a nation-wide crisis of confidence in the integrity of public life or about other matters of vital public importance. No doubt this rarely happens, but when it does it is essential that public confidence should be restored, for without it no democracy can long survive. This confidence can be effectively restored only by thoroughly investigating and probing the rumours and allegations so as to search out and establish the truth. The truth may show that the evil exists, thus enabling it to be rooted out, or that there is no foundation in the rumours and allegations by which the public has been disturbed. In either case, confidence is restored.¹⁸⁴

The Royal Commission, which he chaired, concluded:

...from a practical point of view it would be almost impossible to prosecute a witness in respect of anything which emerged against him in the course of a hearing before a Tribunal of Inquiry.¹⁸⁵

The Canadian experience has been somewhat at odds with the conclusion reached by the Salmon Royal Commission. Following the Gouzenko Inquiry numerous charges were laid and in at least two of the ensuing trials, the actual testimony of the accused given before the inquiry was introduced against them at the trial.¹⁸⁶ More recently, a number of witnesses who testified before the McDonald Commission¹⁸⁷ were subsequently charged.¹⁸⁸ In one of those cases, R. v. Daigle,¹⁸⁹ defence counsel argued that the accused's right or

privilege against self-incrimination had been infringed, and that because of the publicity accompanying the commission hearings the accused could not obtain a fair trial before an impartial tribunal. The trial judge rejected that argument in the particular case but added:

There may be extreme cases where the publicity generated by a commission is so prejudicial that an impartial trial would be impossible at that time or in that place.¹⁹⁰

4. Conclusion.

It is submitted that even if a full panoply of protective measures were introduced, such as those proposed by Henderson,¹⁹¹ to ensure as much as possible that civil liberties are not infringed, it is still not appropriate or necessary under any circumstances that the executive arm of government have the power to coerce individuals to testify, whether or not against their own interest or that of others, except according to the elaborate set of rules which has been developed within the legal system. Particularly when under stress, governments have an alarming tendency to forget that it is a premise of the modern liberal, democratic state that the individual has the right not to be coerced by the state unless the state can demonstrate that the continued well-being of the state requires such coercion. Such a need has been clearly demonstrated with respect to the functioning of the criminal and civil law systems. It has not been so demonstrated with respect to commissions of inquiry, and the experience of the common law was that it was not necessary.

What useful social purpose has been served in the past, by compelling testimony before commissions of inquiry, which could not just as easily have been accomplished through thorough police investigation of possible offences? In balancing values in the criminal justice system we have concluded that the

police, in the course of their inquiries, should not have any coercive powers to compel responses from witnesses. We also decided many years ago to get rid of the one offence directed against refusal to cooperate pro-actively in the investigation of offences i.e. misprision of felony. Yet we insist on retaining the anachronistic coercive powers with respect to commissions of inquiry.

Those who have examined the historical development of Part I inquiries, such as Hodgetts,¹⁹² Doern,¹⁹³ and Courtney,¹⁹⁴ have all concluded that the trend is away from the use of royal commissions to investigate specific instances of wrongdoing and towards their employment by the government as tools for examining matters of broad social concern. Courtney sums up this shift as follows:

The trend, therefore, of recent royal commissions has been away from investigations of importance only to a limited number of people or a restricted geographic area toward those of significance to the Canadian people as a whole. The changing pattern may be characterized as one away from "intensive" inquiries of only limited significance to one of "extensive" inquiries of national significance. The effect of the changing pattern has been to turn the royal commission of inquiry into an investigatory technique suitable for publicizing group sentiments on a national basis and for formulating national objectives. The modern royal commission has become, in effect, a vehicle by which individuals, groups and governments are permitted to state their views on matters of concern to the nation as a whole.¹⁹⁵

In the light of the modern investigative tools available to the police and of the changing role of commissions of inquiry, the time would appear to be ripe to remove from the Inquiries Act the compulsory powers, contained in ss.4 and 5, which have such a potential for abuse of civil rights. If a matter subsequently comes along which is of such moment that these powers are required

then let there be a special Act of Parliament granting the powers for the matter in question. As things stand now, or as long as any reasonably simple system is in place which enables the government to bestow such powers, a government under siege or in difficulty or an opposition which "smells blood" will, respectively, be sorely tempted to grant or press for the granting of such powers, while ignoring or remaining oblivious to the dangers inherent in their use.

If the arguments enunciated above, against compelling witnesses to testify and produce documents, are valid with respect to commissions inquiring into alleged wrongdoing, they are 'a fortiori' valid with respect to commissions whose function is simply to look into matters of general social interest or concern. At the very least, witnesses who appear before such commissions under compulsion are unlikely to prove useful. At the worst, they will be hostile and their appearance may do more to damage the work of the commission than to assist it. Resort should be had to other tools to do the job such as research projects and, in certain instances, private consultation. The state should neither have permanently in place nor invoke coercive powers in such circumstances. Such powers should be used against individuals only in situations where the essential functioning of society is in play and equally effective alternatives do not exist.

An experienced ~~counsel~~, having considerable experience with public inquiries, came to the following conclusion:

It is arguable that at least in matters which have an evident criminal or civil law connotation, the appropriate forum is a Court of Law and that only large issues upon which a government seeks public input with a view to enacting general legislation should become the subject of Royal commissions and Inquiries.¹⁹⁶

If that proposed approach were adopted there would be no need for the coercive powers of ss.4 and 5.

PART III

PRIVILEGES AGAINST DEFAMATION

Problems with respect to defamation during the proceedings of a Part I inquiry could normally be expected to arise in those types of inquiries which are directed to the examination of a particular act or event about which there are suspicions of wrongdoing. Nevertheless, the potential for defamation exists in all types of inquiries. In commissions of inquiry dealing with controversial social policy issues heated exchanges can readily take place between participants, be they commissioners, counsel or witnesses. In such situations defamatory remarks can easily be uttered. Fortunately, instances are rare where a person defamed has pursued his remedy. Indeed, there are no reported cases dealing specifically with defamations occurring during Part I inquiries. Nevertheless, there have been cases in analogous proceedings and it is therefore worth examining whether the current law is appropriate to the circumstances which might arise.

Since different considerations may apply to each of the three groups of participants, i.e. commissioners, counsel and witnesses, they will be examined separately to determine whether the law does, or ought to, treat them discretely.

1. Commissioners

Commissions, unlike courts, are essentially political vehicles. They are often used by the participants as a forum for advancing extremely partisan positions. The commissioners, themselves, are often no exception. In fact commissioners are often, if not usually, chosen by the government because of their partisanship. The law has wisely decided to recognize this by insisting

that bias on the part of a commissioner does not disqualify him from carrying out his duties.¹⁹⁷ Given that commissioners may be selected expressly because of their bias, it is to be expected that their bias will at least occasionally be reflected in their demeanour towards the other participants, either during the proceedings or in their reports. Are they, then, as the law stands, entitled to protection against defamation if they cross over the line from what is reasonable, if biased, comment to what is clearly defamatory? The answer is neither clear nor simple.

At the outset, the distinction must be made between the immunity granted by absolute and by qualified privilege. If commissioners have absolute privilege they are protected against action or suit under all circumstances for whatever defamatory comments they might publish. If their privilege is only qualified, however, it will not apply if it can be proved that they were actuated by malice.¹⁹⁸

Absolute privilege has been found to apply to a number of distinct situations. Although the basis for the privilege varies in each of these situations, the underlying principle is the same for all of them. The principle is that the "public interest"¹⁹⁹ or "public policy and convenience"²⁰⁰ requires that in such situations the defamer be protected.

Two of the situations to which absolute privilege attaches may be relevant to commissioners. The first such category relates to statements made during judicial or quasi-judicial proceedings. The most succinct, and now classic, definition of this immunity is that of Kelly C.B. in Dawkins v. Lord Rokeby where he said:

The authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether

against judges, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.²⁰¹

With respect to Part I inquiries this raises the question, as it has with respect to a number of other bodies, as to whether they are tribunals within that definition.

Unfortunately, this definitional question has, in many cases, deflected consideration from where, it is submitted, it ought to be concentrated, which is on the underlying principle of public interest. This has had such consequences as Lord Diplock's strained attempt to set out the ten criteria which he applied in arriving at his decision as to whether the tribunal under consideration in Trapp v. Mackie fell within the absolutely protected category or not.²⁰²

Another unfortunate consequence of this concentration on the relationship between the tribunal concerned and a court of law is that it has tended to result in inadequate consideration being given to the differing roles and situations of the various participants in the activities of the tribunal. Once the tribunal has been found to be covered by the protection, that protection has been seen to apply to all the participants. It may be that if reference is had to the underlying principle of "public interest" certain participants, such as witnesses who are compelled by law to testify, should receive greater protection than commissioners, who are not under a compulsion to speak, except perhaps, to ask questions. Still further, it might be contended that the public interest requires that commissioners who are judges should receive greater protection than those who are not.

In Canada, the common law respecting defamation and questions of privilege applies to Part I inquiries. In a number of other jurisdictions, which will be examined shortly, statutory rules have been developed to clarify the rather confused state of the common law. A brief review of some of the cases will demonstrate the state of that confusion.

When considering tribunals other than what might be described as "pure" courts of law the most pertinent and oft-cited decision is that of the Judicial Committee of the Privy Council in O'Connor v. Waldron.²⁰³ In that case, a commissioner, appointed pursuant to the federal Combines Investigation Act, had defamed one of the counsel during the course of the proceedings. The commissioner claimed absolute privilege. The Judicial Committee held that he did not have an absolute privilege. They set out the determining rule as follows:

The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act?²⁰⁴

The fact that the commissioner, under the statute, had the power "...to enter premises and examine the books, papers and records of suspected persons..."²⁰⁵ seems to have been a major factor in the Committee's decision. Also, that the Commissioner's report determined "...no rights, nor the guilt or innocence of anyone" and it did not even "initiate any proceedings" was considered extremely relevant.²⁰⁶ Their Lordships went so far as to say that a tribunal exercising administrative functions even though it is required to act judicially is not covered by the protection, it being "...immaterial whether it is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders made for the purpose of effectuating its inquiries".²⁰⁷

The Judicial Committee expressly approved of both the reasoning and the decision of Hodgins J.A. who had dissented in the Ontario Court of Appeal.

In his decision the latter said:

The law of qualified privilege...seems to me an adequate protection for any one acting under a commission such as this. As commissions such as the one in question are frequently issued in Canada to Judges and others to inquire into social, economic, and professional matters, and in some cases into questions which in working out may touch some political issue or party, it is to my mind advantageous that an authoritative pronouncement should be arrived at, and that that can only be done by sending the case to trial.²⁰⁸

Although it did not do so, the Judicial Committee might usefully have referred to an earlier decision of the New Zealand Supreme Court, 'in banco', in Jellicoe v. Haseldean.²⁰⁹ That was also a case in which a commissioner had defamed a counsel appearing before him. The commissioner had been appointed by the Governor in Council, pursuant to the prerogative power, to inquire into charges made by a prisoner. By virtue of a statute, the commissioner had authority to summon witnesses and to examine them under oath. Thus, the commissioner in that case was even more akin to a Part I inquiry commissioner than was the commissioner in O'Connor v. Waldron.²¹⁰

By a 3:2 decision the New Zealand court held that the commissioner was not protected by absolute privilege. Each of the three judges in the majority was careful to point out that the alleged defamation was not made by a witness and that if it had been the result might well have been different.²¹¹ The

significance of that opinion, albeit that it is 'obiter', is that it is not the tribunal itself which gives the characterization leading to the immunity, but rather, the role of the particular participant whose conduct is being examined. In addition, the Chief Justice pointed out that the role of the commissioner himself may be segmented so that he may enjoy absolute privilege for things said in his report but not for utterances during the hearings.²¹²

Some recent Australian cases are also worth reviewing. In Tampion v. Anderson,²¹³ McInerney J. had for consideration, inter alia, whether certain comments in the report of the defendant were actionable. The defendant had been constituted by order in council as a Board of Inquiry. The court held that a statute granting like protection to him to that enjoyed by a Supreme Court judge was applicable. This conclusion was sustained on appeal.²¹⁴ The trial judge went on to hold, however, that even if the statute had not provided protection, the defendant would have had absolute privilege at common law. The judge did not distinguish between defamatory statements in a report and defamatory statements ~~in~~ the course of the proceedings although he was dealing with the former. He chose, instead, to rely on the close affinity between the Board of Inquiry and a court of justice and particularly that it conducted its proceedings in a similar manner to such a court.²¹⁵ He relied for this conclusion on an earlier decision of his court in Bretherton v. Kaye & Winneke.²¹⁶

In this latter case, which dealt with an alleged defamation by an inquiry counsel in his opening statement before a similarly constituted Board of Inquiry, the court had held that the counsel was entitled to absolute privilege. In his reasons for judgment Gillard J. analyzed the reasons for advice in O'Connor v. Waldron²¹⁷ and the reasons of the House of Lords and

the English Court of Appeal in the earlier cases of Dawkins v. Lord Rokeby²¹⁸ and Barratt v. Kearns,²¹⁹ in both of which witnesses before inquiries had been found to have absolute privilege. Gillard J. confessed to having some difficulty in reconciling the general language in the Privy Council advice with the decisions in the other two cases.²²⁰ He perhaps would not have had that difficulty if he had noted that one concerned the statements of a commissioner and the other two concerned witnesses who in one way or another were under a compulsion to testify.

In a recent South Australian Supreme Court decision²²¹ in which a written statement to the Secretary of a Royal Commission was in issue, the court held that the occasion was not one of absolute privilege in spite of the fact that the statement was given pursuant to the directions of the commission. The court pointed²²² out that it was bound by the principle enunciated in O'Connor v. Waldron²²³ and emphasized that in that latter case "the court regarded as inconsistent with the exercise of a judicial function the power to enter premises and to examine books, papers and records of suspected persons".²²⁴ A similar power was granted to the Royal Commission with which the court was concerned in the instant case. Again, the court, in agonizing over apparently conflicting decisions, focussed on the general language relating to the characteristics of the tribunal and its similarity to a court of justice, rather than on the fundamental principle behind absolute privilege and its applicability to the position or role of the person claiming it.

Finally, a brief comment is in order regarding the decision of the House of Lords in Trapp v. Mackie,²²⁵ mentioned earlier. Although this case concerned statements by a witness before an inquiry set up by the Secretary of State for Scotland pursuant to the provisions of the Education (Scotland) Act

1946, the reasoning is already being used as a landmark for determining whether absolute privilege attaches to an inquiry, generally.²²⁶ This, in spite of the fact that both of the law Lords who gave reasons were careful to state that their reasoning applied to "witnesses" before such inquiries.²²⁷

It will be noted that in the only two cases in which comments by a commissioner during the course of the inquiry were in issue - Jellicoe v. Haseldean and O'Connor v. Waldron - absolute privilege was held not to apply. In the one case where it was said to apply to a commissioner or board of inquiry - Tampion v. Anderson - the statement was contained in the report itself.

This latter situation, i.e., defamations alleged to be contained in a report, is the second of the two categories of absolute privilege affecting commissioners. It is worth examining since it raises different considerations from the first category which covers statements made during the course of the proceedings. One of the recognized categories to which absolute privilege attaches is statements made by one officer of state to another in the course of his official duties.²²⁸ The rationale for this immunity is said to be that to expose such an officer to an action would be "...prejudicial to the independence necessary for the performance of his functions as an official of State."²²⁹

In Tampion v. Anderson,²³⁰ mentioned above, the court held that the board member conducting the inquiry had absolute immunity by statute. However, in discussing the common law position respecting the tort of misfeasance in public office by the board member, the judge said:

Even though [the board member] was appointed by the Governor in Council and was required to report to the Governor or, alternatively, the Governor in Council the nature of the functions committed to

him by the Order in Council, which appointed him, do not, in my opinion, bring him within the concept of a public officer.²³¹

If that is good law, could an inquiry commissioner's report be considered to be made by an "officer of state" so as to bring him within the absolute privilege? The judgment in the case could probably be distinguished on the basis that the question for resolution was whether the board member was a public officer, whereas he might well have been found to be an "officer of state" had that been the point in issue.

Mellor, J. in the Exchequer Chamber, said in Dawkins v. Lord Poulet²³² that the report of a major general to his adjutant-general regarding the conduct of one of his officers was entitled to absolute privilege for the same reason that judges enjoyed such a privilege i.e. "...to prevent them being harrassed by vexatious actions."²³³ It has been suggested by the High Court of Australia that this decision is restricted to military relationships, partially because of the uniqueness of the overriding considerations affecting military affairs.²³⁴

The Federal Court of Appeal affirmed, in Dowson v. The Queen,²³⁵ that three conditions must exist to give rise to this category of absolute privilege:

- a) the statement must have been made by one officer of state to another officer of state;
- b) it must relate to state matters; and
- c) it must be made by an officer of state in the course of his official duty.²³⁶

In that case, a statement made by the Solicitor General of Canada, through his agent, to the Attorney General of Ontario, through the latter's agent, was held to be covered by absolute privilege. Similarly, a report by the Australian High Commissioner in the United Kingdom to the Prime Minister of Australia was also found to be within the bounds of absolute privilege.²³⁷

Having regard to the three conditions spelled out by the Federal Court of Appeal and the decisions in the McIsaacs²³⁸ and Chatterton²³⁹ cases it is difficult to imagine that the report to the Governor in Council of a Part I inquiry commissioner, who has been appointed under the Great Seal of Canada, would not enjoy absolute privilege.

It is submitted that it is desirable that the roles of the various classes of participants in commissions of inquiry be examined separately in determining whether their statements should have the immunity of absolute privilege. There has been some movement by the common law in that direction in some of the cases cited above. Nevertheless, there remains a large residue of opinion that it is the nature of the tribunal which is the determining factor.

In some other jurisdictions, statutory provisions have been enacted to clarify the state of the law. In New Zealand, for example, the law propounded in Jellicoe v. Haseldean²⁴⁰ has been codified. Commissioners are protected for anything they say during the inquiry or in their report as long as they act 'bona fide'.²⁴¹ This has been interpreted as giving them qualified privilege.²⁴² If they are Supreme Court judges, however, they have the immunities of such a judge which includes absolute privilege against defamation.²⁴³ Counsel and witnesses are granted similar privileges and immunities to those they would have if in a court of law,²⁴⁴ i.e., absolute privilege.

In England, the statute concerning tribunals of inquiry makes no provision in this regard respecting commissioners although it does provide absolute privilege to witnesses.²⁴⁵ The Salmon Royal Commission recommended that such immunity be extended to commissioners and to counsel, both for what is

said during a hearing and what is said in the commissioner's report.²⁴⁶ It should be noted that even if this amendment were made it would only extend the protection to the limited number of tribunals which fall under the Act, and not to the more numerous Royal Commissions of Inquiry outside the statute's purview. The Report of the Committee on Defamation, made in 1975, recommended that there be no change in what it perceived to be the common law respecting privilege before quasi-judicial tribunals or inquiries, i.e. if the body is "recognized by law" and in "exercising judicial functions conducts its procedure in a manner similar to a court of law absolute privilege attaches to all statements made in the course of its proceedings and to its findings. Otherwise only qualified privilege attaches".²⁴⁷

The Defamation Act of New South Wales provides absolute privilege for all participants for statements made in the course of an inquiry²⁴⁸ and in addition, in a separate section, for statements made in an official report of the results of an inquiry.²⁴⁹ In the State of Victoria, as a result of the decisions in Bretherton v. Kaye & Winneke²⁵⁰ and Tampion v. Anderson,²⁵¹ examined above, a statutory amendment was passed making it abundantly clear that all parties to an inquiry are to enjoy the same privileges and immunities for their activities as if they had taken place in an action in the Supreme Court.²⁵²

The Australian Commonwealth legislation gives commissioners, counsel and witnesses the same protection and immunity as judges and witnesses, respectively, in the High Court.²⁵³ In Douglass v. Lewis²⁵⁴ the court relied on the absence of any such legislation in South Australia to support its view that absolute privilege did not attach to commission proceedings in that state. It could as easily be argued that the statutory provisions were enacted simply to codify and clarify the existing common law.

Canadian provincial legislation presents a patchwork of approaches. In Newfoundland, Prince Edward Island, Ontario and Saskatchewan, the matter is not dealt with in legislation, at least not in the relevant inquiry or defamation Acts. Manitoba has no statute concerning public inquiries generally. In Alberta, British Columbia, Nova Scotia and Quebec, the protection of commissioners is equated to that of judges of the superior court of the province.²⁵⁵ New Brunswick has granted a protection to commissioners which appears to lie somewhere between qualified and absolute privilege. It extends protection to "...any act...unless it appears that the act was done by the commissioner without reasonable cause, and with actual malice, and wholly without jurisdiction."²⁵⁶ Nothing is said in any of the provincial Acts about the privileges of other participants.

2. Witnesses

As noted in the discussion above, generally at common law witnesses have been granted absolute privilege. This seems to have been based at least partially on the sense of the judges that if a person is compelled to testify he should not then be exposed to any type of subsequent action as a consequence of what he says. In Dawkins v. Lord Rokeby²⁵⁷ the defendant had been obliged by military law to obey the order given to him to testify before the military court of inquiry and to provide a written statement to it. The ten judges in the Court of Exchequer Chamber based their reasoning that such witnesses required absolute protection on the language of Willes J. in an earlier case between the same parties. That judge had said:

...there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would

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speak in fear of litigation; and no man who is called on to give evidence would be safe from some troublesome action being brought against him.²⁵⁸

The Court of Exchequer Chamber then said that the defendant in the case was, like a witness in a court of justice, "...compellable to appear and give evidence, and punishable in case of refusal."²⁵⁹ It would, they said, be "unreasonable" and "unjust" not only that he be liable to severe punishment for failure to answer but also, if he does answer, to be subject to an action for damages if his "answers happen to reflect upon the character of another."²⁶⁰ The decision was upheld in the House of Lords²⁶¹ where emphasis was placed, however, on the military nature of the court of inquiry.

Barrett v. Kearns²⁶² involved an ecclesiastical inquiry ordered by a bishop pursuant to statutory authority. The duty of the commissioners was to inquire and report: a duty very similar to that of a Part I inquiry commission. The commissioners had power to compel the attendance of witnesses and the production of documents. In fact, the evidence was not taken on oath as it should have been but this was held not to affect the outcome. Both judges in the Court of Appeal, relying on Dawkins v. Lord Rokeby, held that witnesses before such an inquiry were entitled to absolute privilege. They did not discuss the position of any of the other participants.

The most recent high level pronouncements directly on point are found in the House of Lords decision in Trapp v. Mackie, mentioned earlier.²⁶³ Both of the law Lords who gave reasons, with whom the remaining three agreed, stated that the characteristics of the tribunal in question had to be examined carefully to determine whether absolute privilege applied to witnesses appearing before it, and they pointedly commented that the presence or absence of any

particular characteristic was not conclusive.²⁶⁴ Lord Diplock held that the task involved "...balancing against one another public interests which conflict" and that "In such a task legal technicalities have at most a minor part to play."²⁶⁵

Following the reasoning of Lord Fraser, it might even be appropriate to examine each Part I inquiry separately to determine what sort of privilege attaches. He said:

In each case the object of the tribunal, its constitution and its manner of proceeding must all be considered before the question can be answered.²⁶⁶

In view of the great variation between the objects, mandates and procedural rules of different Part I inquiries this case may well be authority for not treating them as a single class for purposes of determining questions of privilege.

As noted earlier, witnesses have been granted statutory absolute privilege in several commonwealth jurisdictions, but to date no Canadian jurisdiction has chosen to so legislate.²⁶⁷

3. Counsel

Counsel appearing before commissions have tended to be the forgotten participants. The only reported cases directly involving counsel appear to be Bretherton v. Kaye and Winneke²⁶⁸ and Tampion v. Anderson and Just.²⁶⁹

In the latter, the court held that the State of Victoria statute providing immunity to the three classes of participants - commissioners, counsel and witnesses - governed the situation. The court went on to hold that even if the statute did not apply, counsel had absolute privilege at common law as had been found earlier in the Bretherton case.

In Bretherton, the Court said that the reason for absolute privilege is not to protect defamers "...but rather as a matter of public policy to encourage persons on such occasions to speak in the interests of the community freely and without any inhibitions or fear of consequences."²⁷⁰ The court equated the board of inquiry counsel in the case before it to counsel before courts of law who, it was said, must be able to proceed "fearlessly and independently and without fear of being sued for defamation."²⁷¹ He must be "unfettered by fear of consequences."²⁷² Significantly, however, the court said that the conclusion in the case before it with respect to the absolute privilege of counsel would not necessarily apply to all boards of inquiry.²⁷³

4. Conclusion

It is not at all clear how the courts would approach the question of what privilege ought to be applied to a defamatory statement made by a participant in a Part I inquiry. The reasoning applied in analogous cases has been inconsistent and often confused.

On the one hand, it has been said that if the body is performing an administrative function, even if it must act judicially, the privilege is only qualified.²⁷⁴ But bodies whose duty was simply to report with recommendations and which had no decision-making power have been held to have absolute privilege.²⁷⁵

On the other hand, it has been said that, rather than examining the nature of the body in which the defamation occurred, it is more appropriate to look at the rôle of the participant who made the statement.²⁷⁶ This position would seem to be supported by two other factors. First, the underlying

public policy respecting privilege, as it has been stated in the cases, is different for the three classes of participants. Second, where there is legislation on the question it has often been made applicable to only one or another of those classes.

The Law Reform Commission of Canada has proposed that commissioners and counsel be given absolute privilege because their work "...should not be impeded by fear of frivolous civil suits."²⁷⁷ Witnesses, they say, should only be given qualified privilege, to permit "...recourse to those who may be the object of malicious remarks...".²⁷⁸ That is the extent of the report's reasoning in each case!

When a commission is charged, as it sometimes is under the present legal regime, with inquiring into specific acts of alleged unlawful or improper conduct it is important that commissioners and counsel not be fettered in their pursuit after truth by the potential of lawsuits alleging malicious defamation. Also, as with courts of law, there is a greater public interest in not having commission proceedings and decisions re-hashed in subsequent court proceedings than there is in providing a remedy to an individual who has been maliciously defamed. The recommendations of the Salmon Commission that commissioners and counsel participating in tribunals of inquiry be granted absolute privilege was accepted without reservation by the British government.²⁷⁹

Similar logic applies to the protection of witnesses testimony in such proceedings, but with the force of the additional reason that witnesses must be encouraged to speak fully and openly without fear of being subject to subsequent lawsuits testing their intent.

In Part II of this paper it was suggested that Part I commissions of inquiry be relieved of their coercive powers, and that only in extreme cases and by special Act of Parliament should such powers be bestowed on a commission. If that recommendation were followed there would seem to be no reason why any of the participants in a Part I inquiry should have any greater privilege than is extended to others performing administrative tasks.

That would mean that with respect to statements made during the course of the proceedings all the participants would have qualified privilege. Any statements made by the commissioners in their reports would, however, continue to enjoy absolute privilege for the reasons indicated earlier.²⁸⁰ On balance, these results would be in keeping with the role and purposes of most modern Part I inquiries.

Part IV CHARGES OF MISCONDUCT

1. Application of Section 13 of the Inquiries Act

Section 13 of the Inquiries Act has caused a great deal of consternation to those who have been obliged to interpret it in the course of their duties. The amendment introducing the section was made in the Senate by the opposition.²⁸¹ The section reads:

No report shall be made against any person until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard in person or by counsel.

The original intent of the section appears to have been to clarify s.12 to ensure that the right to a hearing and to counsel existed.²⁸² The problem with the section, however, has been in the mechanics of its application with respect to giving the notice and the nature of the hearing to be provided.

When, for example, must the reasonable notice be given, and by whom? And what is meant by "full opportunity to be heard"? Does the right to be heard include the right to introduce new evidence; or to have previous evidence reintroduced for purposes of cross-examination? What form must the notice take and must the notice be specifically given if the terms of reference of the commission clearly spell out that its purpose is to inquire into the alleged wrongdoing of clearly identified persons? These are some of the issues which will now be examined.

There is general agreement that before a commission report alleging misconduct by any identifiable person is submitted to the Governor in Council, any person against whom the allegation is made should be afforded an opportunity to present his case to the commissioners.²⁸³ This has not always been done.

The former Mr. Justice Landreville challenged the report of Rand J.²⁸⁴ on the basis that it contained allegations of misconduct against him of which he had not been given notice. The trial judge implied in his reasons that if the terms of reference had clearly stated the alleged misconduct it would not have been necessary for further notice to have been given to Landreville.²⁸⁵ This point appears to have been conceded by Landreville's counsel.²⁸⁶ On the strength of that failure to comply with s.13, the court issued a declaration of such non-compliance. The court also suggested that, in the face of an allegation of misconduct, Landreville would have had the right to call witnesses to rebut the allegation.²⁸⁷ The judge also supported Landreville's contention that when the commissioner reached his decision to allege misconduct by Landreville he should have reconvened the Commission hearings, given notice of the charge of misconduct and allowed Landreville to call witnesses to answer the charge.²⁸⁸

Counsel for Landreville argued that this procedure, which he submitted ought to have been followed by the commissioner, should apply whether the allegation of misconduct is made by the commissioner or by someone else.²⁸⁹ The court, however, did not comment on this aspect. This is an important point because the charge of misconduct is often made first by the commission counsel. If the person against whom it is made then has an opportunity to rebut it and the charge is subsequently repeated in the report of the commission, can the person be heard to argue that he ought to have been given notice that the commission, itself, was going to charge him with misconduct and that he ought to have been given the opportunity to make further representations?

In the Report of the Commission of Inquiry relating to the Department of Manpower and Immigration in Montreal the commissioner, Madame Justice L'Heureux-Dubé, describes the difficulties she had with applying s.13 and the procedures she adopted to try to overcome them.²⁹⁰ The procedure followed by her was to have commission counsel advise each witness, after completion of the hearings, that he would be making a charge of misconduct against the witness at a specified sitting of the commission. Following that sitting, the witness was sent a letter by the commissioner, and given a copy of the transcript of counsel's submissions. The letter set a date for the witness to appear and be heard with respect to the allegations. This letter was stated to be the "official notice pursuant to Section 13". This procedure was copied from the one employed by the Commission of Inquiry into Matters Relating to One Gerda Munsinger.²⁹¹ It was based on the interpretation of s.13 by the commissioner in that latter inquiry, with which L'Heureux-Dubé J. agreed, that the charge of misconduct contemplated in s.13 does not refer to the findings in the commissioner's report, but rather, to charges made by others before the commission. This view does not accord with that expressed in the Landreville case, mentioned above, but it is supported by another commissioner, Davis, J., who was the sole commissioner in the Bren Gun Inquiry.²⁹² The latter considered that he was not able to express an opinion in his report about the conduct of any of the persons involved because there had been no charge of misconduct.²⁹³ He obviously did not feel that it was proper for him to make the charge himself.

The danger of interpreting the section to mean charges of misconduct made by persons other than the commissioners is pointed out by Fyfe in his article on the Gouzenko inquiry.²⁹⁴ He says that it gives "...a person

called before the Commission no opportunity of knowing what conclusions the commissioners have drawn from the evidence of previous witnesses and, 'a fortiori', no opportunity of knowing whether or not the Commissioners are even considering making a report which will allege a charge of misconduct."²⁹⁵ Having commission counsel level the charge of misconduct does not overcome this criticism unless it is assumed that counsel is speaking on behalf of the commissioner, in which case the exercise is just a charade.

On the other hand there is something unseemly, if not more improper, about having a commissioner make a charge of misconduct and then invite the person against whom the charge has been made to appear before him to try to talk him out of it. As the Gouzenko Inquiry commissioners said: "We do not think the statute so irrational".²⁹⁶

One way out of this dilemma would be to have commission counsel provide a notice which is worded in such a way as to make it clear that the commissioners have informed him that they consider that the charge of misconduct mentioned in the notice has been alleged before them, that they propose to deal with that allegation in their report, and that they will afford the recipient an opportunity to be heard with respect to the charge. This is admittedly a somewhat artificial and therefore not entirely satisfactory solution since allegations in reports are usually the product of the commissioners' interpretations of the facts. Nevertheless, it does go some way towards eliminating the unattractiveness of the other solutions.

The McDonald Commission pointed out a further difficulty in the application of s.13.²⁹⁷ If the alleged misconduct amounts to what the commissioners conceive to be an illegality, and the giving of the notice and

subsequent representations under s.13 are done publicly, the person whose conduct is in question would likely not be receiving fair treatment. This is so because the publicity accompanying those proceedings would be likely to affect his chances of receiving a fair trial. Such a possibility is inherent in the whole process of Part I inquiries set up to look into possible illegalities, but the risk of unfairness is enhanced if the s.13 process is conducted publicly. For that reason, the McDonald Commission conducted all its s.13 proceedings, including the giving of notices, in private, and recommended to the Governor in Council that its conclusions with respect to specific acts not be made public until the conclusion of all criminal and disciplinary proceedings.

The judge in the Landreville case said that the language of s.13 entitled the person charged to call witnesses to refute the charge. This view is contrary to an earlier decision of the Ontario High Court which held that the phrase "opportunity to be heard" meant "...an opportunity to be present and to make such statements referable to the charge and notice as the applicants see fit."²⁹⁸ The court also decided that "full" opportunity to be heard did not "include the right to see and examine all witnesses."²⁹⁹

In Part V of this paper there is a discussion of the effect of the new doctrine of administrative fairness and also of its relationships to s.7 of the Charter on the right to counsel and the role of counsel.³⁰⁰ The general position set out there should be equally applicable to the question of the nature of the hearing which must be provided. Each case must be considered discretely and a determination made as to what provisions ought to be made to ensure that fairness and fundamental justice are dispensed.

2. Conclusion

The wording of s.13 has caused, and continues to cause, a great deal of difficulty, both in terms of its interpretation and also in the mechanics of its application. Since its passage in 1912 there has been very little judicial interpretation and guidance. The views expressed by commissioners, some of them members of the Supreme Court of Canada, have been conflicting. Some commissioners have leaned over backwards to be fair to the persons charged with misconduct. Others, such as Rand J., have been far less scrupulous. Once a commissioner has submitted his report, normally the damage has been done. Even if he has ignored s.13 altogether, there is not much that the wronged person can do to remedy the situation. Perhaps that is why there is so little judicial interpretation of the section.³⁰¹

Removal of the coercive powers of commissioners would not solve the problems associated with s.13. Commissioners appointed to inquire into general social policy questions might still be motivated to level charges of misconduct in their reports, or during commission hearings others may make such charges. Fairness demands that the persons affected be made aware of the possibility of such charges and be allowed to present their case before the report is submitted. Judicial review after the fact pursuant to the developing law relating to administrative fairness is of no more value than is the right to a declaration such as was granted in Landreville.

The only satisfactory solution is to re-think and re-write s.13. The Law Reform Commission of Canada report, cited earlier, recommended passage of a modified version of the existing section, and the addition of a new subsection which would give commissioners discretion to allow persons against whom

misconduct has been alleged to call witnesses.³⁰² This latter subsection would add nothing to the existing law since commissioners have always been in control of their own procedures. The proposed modification to the section would limit its application to allegations contained in the report itself. To cover off the question of adverse testimony, another new section is recommended. This section would give to any person complaining that testimony was adverse to him the right to be heard on the matter and, with the permission of the commissioner, to examine witnesses.³⁰³

These Law Reform Commission recommendations would go only part way to solving the problems created by the present section. For example, they do not cover the situation of counsel making allegations of misconduct, nor of any such misconduct alleged in the terms of reference of the commission. Admittedly it is unlikely that specific allegations in the terms of reference would not be completely dealt with during the hearings of the commission. Nevertheless, the possibility exists that they would not.

It is submitted that no matter what the source of the allegations the person against whom they are made should be given notice of them and should have the right to make representations; and he, at least, should have an absolute right to testify with respect to the matters raised in the allegations. If commissioners intend to make the allegations in their report, and the persons against whom they are to be made have not previously had notice of them, the commissioners should be required to give notice of their intention specifying precisely what it is that they intend to allege. As in all other instances, the person should be entitled to make representations and give evidence in an attempt to convince the commissioners that they ought not to proceed with their

allegations. Commission reports must not be confused with trial judgments in this regard. There is no appeal, and once the report is in there is no useful remedy to have it corrected. Also, none of the complex procedural court rules and practices exist which have been developed over centuries to protect against unfounded conclusions.

The statute should also prescribe a uniform procedure for the giving of notice. It should provide that such notice must be given in writing as soon as is reasonably possible after the allegation is made to the commissioners, or if it is the commissioners who formulate the charge of misconduct in the first instance, as soon as they come to their initial conclusion in that regard. It should also be provided that the notice is to be given by commission counsel or if there is no commission counsel by the senior officer serving the commission and that the notice contain all the essential details of the allegations and what the misconduct is said to be.

PART V

RIGHT TO COUNSEL

1. Application of Section 12 of the Inquiries Act

Section 12 of the Inquiries Act sets out the law applicable to representation by counsel before Part I inquiries. It reads:

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel.

As with s.13 discussed in the previous Part of this paper, s.12 was added to the statute in 1912. Prior to that time no statutory right to counsel existed.

No doubt the amendment was introduced because of the reluctance of the courts to find a common law right to be represented by counsel before either judicial or administrative bodies. That reluctance has extended even to appearances before inferior courts of criminal jurisdiction. For example, in 1831, in Collier v. Hicks et al, Lord Tenterden C.J., said:

...in general, the ends of justice will be sufficiently well attained in these summary proceedings by hearing only the parties themselves and their evidence, without that nicety of discussion, and subtlety of argument, which are likely to be introduced by persons more accustomed to legal questions.³⁰⁴

Parke J., added:

In the Superior courts, by ancient usage, persons of a particular class are allowed to practice as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them.³⁰⁵

Almost a century and a half later, in 1975, Clement J.A., in an Alberta Court of Appeal majority judgment in Re Gilberg and the Queen dealing with proceedings before a provincial court of criminal jurisdiction, held that:

The fundamental justice for an accused is a fair trial; counsel is not always a necessary concomitant to a fair trial...306

The prevailing judicial view at the time of passage of s.12 was probably that expressed somewhat later by McDonald C.J.B.C., who said:

Though no doubt accused persons have a legal right to counsel in all ordinary Courts of law and in police courts by Statute in Canada, I point out that this is by no means an inherent right in all judicial tribunals, even in those with criminal jurisdiction. The authorities indicate that this is only a legal right in tribunals resembling the ordinary Courts of laws, and even by implication the right may be excluded in judicial tribunals whose powers are at all unusual... If the board is not a judicial but an administrative tribunal then the matter is even clearer.307

Thus, it is fairly certain that without the passage of s.12 there would have been no right to counsel under any circumstances,³⁰⁸ at least until the recent developments respecting the doctrine of administrative fairness, discussed earlier in Part II. The effect of that doctrine on the s.12 right to counsel will be examined later.

Unfortunately, in spite of the apparent good intentions of Parliament in passing s.12, the wording of the section raises a number of problems. It gives commissioners discretion to allow representation by counsel to a "person whose conduct is being investigated", but it provides no criteria to guide commissioners in exercising that discretion. Although the discretion of the commissioners to deny counsel is removed if a charge is made against a person

"in the course" of an "investigation", the section does not say whether the report of the commission is to be considered as part of the "investigation". What if, as happened in the Landreville inquiry,³⁰⁹ the commissioner decides to level a charge against a witness in his report and that charge had not been made during the proceedings of the commission? Should a person charged in that way have been denied an absolute right to counsel if he had had a suspicion that such a thing might occur?

Still further, is the right to legal representation the same thing as a right to standing? For example, could a commissioner agree to give a party the right to participate in hearings of the commission yet, if no charge is made against him, deny him the right to be represented by counsel? The confusion between the concepts of standing and representation by counsel is manifest in one of the rulings of the McDonald Commission.³¹⁰ That Commission rendered its decision with respect to applications for standing before the Commission by reference to ss.12 and 13 of the Inquiries Act. It even said: "Subject to sections 12 and 13, it is within the discretion of the commission to decide who shall be granted standing."³¹¹ The considerations applicable to standing and to representation by counsel are clearly severable and in many aspects distinct. They should therefore not be confused in this manner. It is submitted that the McDonald Commission simply misinterpreted the sections. However, some clarification is now required.

Another difficulty with the wording of s.12 is in determining the meaning to be attached to the word "charge". As Fyfe points out, it could mean the "laying of a criminal information" but, as he says, that is rather unlikely.³¹² Is it the equivalent of a "charge of misconduct" in s.13? The debate in the Senate when the amendment was introduced would suggest that that is the

case, but it is not free from doubt. In any event the courts will not refer to that debate if required to interpret the section. As Fyfe also notes, one judge has used the word "allegation" interchangeably with "charge" when discussing s.12.³¹³ That, at least, eliminates any suggestion that it is the equivalent of a criminal charge but it does nothing further to clarify the meaning to be ascribed.

It is difficult to imagine that a person would want to be represented by counsel unless he has some suspicion that his conduct is under investigation. If he has such a suspicion, whether well founded or not, what valid reason can there be for denying him the right to counsel in such a situation? Why should a discretion be given to the commissioners to decide this question?

The sort of abuse that can result from not making this an absolute right are nowhere better displayed than in the proceedings of the Gouzenko inquiry. The commissioners there decided that certain witnesses would be required to answer questions prior to being allowed to consult counsel despite repeated requests to be allowed to do so. Those witnesses were clearly persons whose conduct was being investigated - in fact, they were being detained in custody pursuant to powers exercised by the Minister of Justice under an order-in-council. They were also subsequently charged with serious offences arising out of the same facts.

The commissioners, in their report, made no effort to justify their decision to deny counsel, other than the following:

In some instances we considered it expedient, in the exercise of the discretion given us by the statute, not to accede immediately to the request of a witness for representation, although in most instances we did so upon the request being made.³¹⁴

The impression left by the commissioners is at odds with the facts. Of the thirteen alleged spies who were arrested and detained under the order-in-council, all were initially compelled to appear before the commission without counsel.315

The thinking of at least two of the witnesses about this aspect is worth noting. One of them, who had been detained for 32 days prior to his appearance without being permitted to speak to his lawyer, said:

I do not know the intricacies of the law; I may be being led into a trap, for all I know, and that is why I am asking for counsel.316

Another expressed what must have been the view of most Canadians when he said:

It is the basic right of every Canadian citizen to have access to legal counsel; therefore I ask you for access to legal counsel.317

Both of these witnesses were eventually granted the right to consult counsel, but not without considerable resistance from the commissioners. The procedure followed by those commissioners violated two of the cardinal principles, laid down by the Salmon Commission, for the protection of an individual, i.e., that "[h]e should be given an adequate opportunity of preparing his case and of being assisted by legal advisers", and "[h]e should have the opportunity of being examined by his own solicitor or counsel..."318

In examining the lessons to be learned from this facet of the Gouzenko inquiry it is important to distinguish between witnesses who are under arrest or detention and those who are not. The particular plight of the Gouzenko Commission witnesses who were under detention and denied the right to counsel was probably resolved by s.2(c)(ii) of the Canadian Bill of Rights which reads:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian

Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(c) deprive a person who has been arrested or detained

(iii) of the right to retain and instruct counsel without delay.

This protection has been reinforced by s.10(b) of the Charter which provides:

10. Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay...

Nevertheless, the Couzenko inquiry does demonstrate the attitude which commissioners, even judges of the Supreme Court of Canada, may take towards the right to counsel during the hearing stage when they feel that they are in the best position to judge whether a witness needs, or ought to have, counsel, and they have the discretion to decide in that regard.

In addition to the protection provided to persons detained or arrested, as was mentioned in Part II,³¹⁹ s.2(d) of the Bill of Rights provides protection to witnesses who are compelled to testify before a commission. There remains, however, the situation of the individual whose conduct is under investigation, who has not been summoned to testify, and who has been denied the right to be represented by counsel at the inquiry hearings.

Fortunately, the new doctrine of administrative fairness may enable the courts to exercise a measure of control over commissioners with respect to the hearing stage. In Dubeau v. National Parole Board, the Court held that an administrative board must allow "... the presence of legal counsel at a hearing

in cases where fairness requires it."³²⁰ In a subsequent case in the same court - the Federal Court, Trial Division - the decision of a Presiding Officer of an Inmate Disciplinary Court to deny counsel to an inmate charged under the Penitentiary Regulations was reviewed. The judge held that the decision was a discretionary one and remitted the matter to the Presiding Officer for reconsideration "giving due thought and attention" to certain sections of the regulations and also to what the judge considered "... of marked importance, the question of fairness to the applicant."³²¹

The question was considered again in Re Laroche and Beirsdorfer. The Federal Court of Appeal made a general statement with respect to the question of legal representation and the rules of natural justice:

There is no general or absolute right to legal representation before an administrative tribunal that is required to act in accordance with the rules of natural justice. Whether the right to legal representation should be recognized in a particular case would appear to depend on whether, having regard to the nature of the issues involved and the hearing required, the denial of the right to legal representation would deny the person affected a fair opportunity to present his case. Where the case calls for an oral hearing at which there is to be an opportunity to adduce evidence and to cross-examine witnesses then a right to legal representation ought as a general rule to be granted. But the Courts have indicated that they will consider whether it is appropriate to impose the additional burdens of cost, delay and technicality that generally result from legal representation on the particular decision-making process...³²²

In a further recent case,³²³ again involving an inmate disciplinary court, the Federal Court, Trial Division, had occasion to consider the effect of s.7 of the Charter on the right of the inmate to be represented by counsel before such a disciplinary court. The judge held that the principles of fundamental justice did not give an inmate an absolute right to counsel. In this regard, he said,

the Charter did not change the common law and the court must continue to examine the circumstances of each case to determine whether natural justice - which he equated with fundamental justice - and fairness required the presence of counsel.

Once it is decided that a person should be allowed "to be represented by counsel", the question remains as to what rights such representation includes. This issue was faced squarely in a case arising under the federal combines legislation. The Federal Court of Appeal drew an analogy between the role of counsel under that legislation and under the Inquiries Act. The court said that it is a right of counsel to examine and cross-examine: to question his own "so-called" client and other witnesses. The court limited the right, however, to matters which affect, or may affect, the client.³²⁴

The use by the court of the words "so-called" when referring to the client points up another problem which affects counsel. Does he, or should he, have the right to examine his client in chief or should his role be limited to a sort of cross-examination or supplementary examination after commission counsel has completed his examination? Since the manner in which evidence is elicited can have a considerable effect on the interpretation which the commissioners choose to put on it, which in turn can affect the decision whether or not to level a charge of misconduct, the answer to this question is of some importance.

It has been strongly asserted that all witnesses are commission witnesses and their evidence is to be led by commission counsel and then be subject to cross-examination by other parties.³²⁵ The opposite position was taken by Lord Salmon who felt that counsel should be able to examine his own client first, followed by cross-examination by commission counsel and others and

then by re-examination if necessary.³²⁶ This is a matter which is presently left to the procedural rules developed by each inquiry.³²⁷ The McRuer Commission suggested that discretion should be left to the commissioners but then recommended certain principles based on a mixed regime depending on who was being examined.³²⁸

The various problems inherent in s.12 indicate the need for reform. Lord Denning said that if a person's livelihood or his reputation is endangered he should have the right to speak through counsel.³²⁹ The McRuer Commission felt that "...parties whose rights are involved should be entitled to be represented by counsel unless there are exceptional circumstances." This was limited, however, to appearances before tribunals which, unlike Part I inquiries, have the power to make decisions. According to McRuer, witnesses, as distinct from parties, should only be entitled to have counsel present to advise them with respect to statutes relevant to the effects of giving evidence and to state objections in that regard.³³⁰

The Quebec Bar Committee recommended for commissions of inquiry³³¹ a statutory provision similar to that passed in Ontario consequent upon the report of the McRuer Commission. The Ontario legislation provides that a commission "shall" give an opportunity to any person to give evidence, to call witnesses, and to examine or cross-examine witnesses, if that person can satisfy the commission "...that he has a substantial and direct interest in the subject matter of its inquiry."³³² Working Paper #17 of the Law Reform Commission of Canada is categorical in this regard. It says: "It is imperative that all those appearing before a commission have the right to be represented by a counsel."³³³ This was followed through in the Commission's recommendations in its report.³³⁴

The argument against granting an absolute right to counsel seems to be that it will cause delays and thus added inefficiency and expense, especially if the right is abused. This has been countered by Whitmore who says:

Perhaps there is some delay; but this seems to me to be a cheap price to pay for fairness in administration.³³⁵

The Quebec Bar Committee's rebuttal is similar. It says that there is no reason to fear undue delay as long as each party's right to cross-examine and to call evidence is limited to the questions in which he has an interest.³³⁶ Both Whitmore and the McRuer Commission point out that to deny counsel is to discriminate against the illiterate or inarticulate person.³³⁷

Steps have been taken in some jurisdictions to provide greater opportunity to individuals to be represented by counsel. The Ontario solution was mentioned above. In New Zealand, the Commissions of Inquiry Act 1908 was amended in 1980 to provide that any party or other person who is entitled to appear before a commission may do so in person or by counsel.³³⁸ This amendment has been criticized for its failure to deal with such questions as the right to examine and cross-examine witnesses and the payment of counsel fees.³³⁹

The Australian Commonwealth legislation, despite comprehensive amendments in 1980, continues to give commissioners complete discretion whether to allow any person to be represented by counsel.³⁴⁰ The New South Wales Act, which was also recently amended, in 1982, gives commissioners full discretion to determine who shall be entitled to appear, as to whether counsel will be allowed, and also as to the right of counsel and others to examine or cross-examine.³⁴¹

The inquiries Acts of six provinces - Alberta, New Brunswick, Newfoundland, Nova Scotia, Quebec and Saskatchewan - are silent on the question of right to counsel. British Columbia and Prince Edward Island have identical provisions,³⁴² copied from ss.12 and 13 of the federal Act. It may be that s.34 of the Quebec Charter of Human Rights and Freedoms³⁴³ englobes the activities of provincial commissions of inquiry. It provides:

Every person has a right to be represented by an advocate or to be assisted by one before any tribunal.

2. Conclusion

Even if, as was proposed earlier in Part II, the coercive powers of commissioners were eliminated, s.12 would still not be adequate protection for the individual against the arbitrariness of commissioners bent on arriving at the facts regardless of the consequences for civil liberties. It would solve the problem as far as witnesses are concerned since each potential witness would be free to negotiate his own terms for appearance, which could include the right to his own counsel. It would not, however, assist the individual whose conduct is being investigated but who has not yet been called as a witness.

Section 2(d) of the Canadian Bill of Rights precludes a commissioner from attempting to compel a witness to testify without the assistance of counsel. The provisions of s.2(c)(ii) of the Canadian Bill of Rights and of s.10(b) of the Canadian Charter of Rights and Freedoms would also, of course, now cover the situation of a witness who is being detained, as were the Gouzenko inquiry witnesses. But the federal Charter protection does not extend to the right to counsel 'simpliciter', as does the Quebec Charter.

If the coercive powers are not removed, the proposals of the Law Reform Commission of Canada are at least a start in the right direction. They provide that any person appearing before a commission has the right to be represented by counsel.³⁴⁴ In addition, under those proposals a person would have a right to be heard if he complained that testimony already given "may adversely affect his interests." Unfortunately, the Law Reform Commission would then leave it to the discretion of the commissioners whether such a complainant or his counsel could examine witnesses.³⁴⁵ It is submitted that it would be more satisfactory if a commissioner were obliged to allow such examination whenever the interests of the complainant were involved. In the event of disagreement between the commissioner and the complainant about whether the complainant's interests are involved, resort could be had to the courts to resolve the matter.

The problem with the Law Reform Commission proposals is that in dividing commissions into two categories - advisory and investigatory - and then attempting to apply some common provisions, such as the right to be heard and to be represented by counsel, the purposes get confused. The persons who require the right to be represented by counsel are those whose personal rights are in danger, not simply those whose interests may be adversely affected by previous testimony. Counsel are imperative to ensure the protection of legal rights. Counsel may be desirable for purposes of advancing various interests but that is a wholly different question and should be treated separately. This has been partially recognized by the Law Reform Commission when it recommended the retention of a slightly modified version of the current s.13.³⁴⁶

As long as witnesses are compelled to attend and give evidence under oath they should have an absolute right to counsel to advise them and to make legal representations during the course of their testimony. If a person's rights, whether or not he is a witness, are affected or are likely to be affected by the activities of the commission he should have the right to be represented by counsel before the commission and to examine and cross-examine witnesses when his rights are in play. The commissioners' decision as to whether or not his rights are involved should be reviewable by the courts.

Also, a witness should be entitled to be examined first by his own counsel. There is something faintly feudal about not only compelling a witness to testify but also subjecting him to examination and cross-examination by commission counsel before he has an opportunity to present his evidence with the aid of his own counsel. When commissions are set up to investigate alleged misconduct and the very persons whose conduct is being investigated are required to testify it is spurious to say that such persons are witnesses for the commission. Depending on the way the testimony is brought out a person's reputation and his future could be ruined forever - particularly in this age of instantaneous, 'headline' type, electronic news reporting.

PART VI GENERAL CONCLUSIONS

Was Smith's assessment of commissions, quoted at the beginning of this paper, an accurate reflection of the dangers inherent in Part I inquiries? The intent of his words, if not the intemperate language, bears a striking similarity to the measured comments of a very thoughtful provincial inquiry commissioner who said:

The Commission of Inquiry is an institution with a great potential for injustice. Our system of law prides itself on its protection of the individual. It requires the guilt of a person accused of crime to be proven beyond a reasonable doubt. It permits an individual to be silent in the face of accusation. It erects an elaborate palisade of evidentiary rules to guard the citadel of individual rights. The Public Inquiry, however, often seems to be the negation of each of these protections.

The justification given for the Public Inquiry is that in rare and exceptional circumstances the public good requires this process even though the price exacted for it is the sacrifice of individual rights. The very statement of the price demonstrates how rarely the procedure should be used.³⁴⁷

It is the thesis of this paper that the way to eliminate the dangers of this game is not to reduce the schedule of games being played, but rather, through changing the rules of the game.

The earlier discussion in Part II³⁴⁸ examined the social purposes of Part I commissions of inquiry. It was noted that there has been a shift in the purposes which such commissions are designed to serve.

It took nearly 30 years, for example, for the first 51 Part I inquiries to be held (see Annex B). From the subject matter titles it would appear that 20 of them were set up to investigate the misconduct of individuals.

Since the beginning of 1965, on the other hand, there have been 51 Part I inquiries created (see Annex C). Of those, 13 involved an examination of the conduct of individuals. Among those 13, only eight could be said to be directed at alleged intentional misconduct: and only two of them were within the last ten years. This data bears out the conclusions of the informed commentators as elaborated in Part II. The change in the social purpose of commissions of inquiry is obvious. The question is therefore: How should the system be re-structured to reflect this changing nature of Part I inquiries and also to correct the abuses, both potential and real, of the current system? It is submitted that two fundamental changes must be effected.

First, it must be recognized that the role of most modern-day inquiries is to examine and make recommendations with respect to broad social issues referred to them by the government. To be effective, such commissions must have the support and the cooperation of the constituency to which they must turn in seeking assistance and advice. In such a situation coercive powers are not only useless but could even prove to be counter-productive. Although those inquiries are seeking after a truth, of sorts, it is not the kind of truth which is best attained through machinery designed to coerce results. It is "truth" which is arrived at through dialogue, research, consultation, and in rare circumstances perhaps evidence under oath, in a cooperative atmosphere - not through compelled testimony, and rigid, formal rules of procedure designed to ensure adequate safeguards for those required to give evidence under coercion. Nothing more is needed for the creation and effective operation of such inquiries than ss.2,3 and 11 of the present Inquiries Act.

There will always be, however, rare instances where there will be a need for inquiries into cases of alleged blameworthy conduct and where the

normal machinery of state, such as investigations by established investigatory agencies or litigation before the courts, will not be adequate to meet the needs of the state. This will require the second of the two proposed changes.

When such an event arrives, the government should submit to Parliament a special Act designed to set up the inquiry and to govern its proceedings. The duties, powers and immunities of the participants should be spelled out in the Act as should the procedures which the commissioners must follow to safeguard the interests of all those involved. Questions such as the power to compel testimony and the production of documents, of the manner in which allegations of wrongdoing are to be made known to those against whom such allegations are directed, and of the rights of participants to counsel and the role to be played by those counsel, should all be dealt with in detail.

It will be argued that such Acts of Parliament require valuable parliamentary time which might not be available for this purpose. A brief glance at recent history points up the fallacy of this argument. The endless parliamentary time consumed in the debates preceding and during the course of recent Part I inquiries, such as the Dorion (Rivard), Wells (Spencer), Spence (Munsinger) and McDonald (R.C.M.P.) Commissions, which were set up to deal with alleged wrongdoing, might more constructively have been applied to debating the powers, duties and immunities which ought to have been assigned to those commissions.

A special Act would serve to focus the debate, not only in Parliament but in the media and the public. This is a time-honoured and good method of ensuring, in the light of all the circumstances, that the proper balance is struck between the needs of the state in conducting the investigation and the protection of individual rights and interests.

NOTES

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3. R.S.C. 1970 c. C-34.
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Cartwright, T.J. Royal Commissions and Departmental Committees in Britain. London: Hodder and Stoughton, 1975, pp.224-226;
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Canada. Commissions of Inquiry, Working Paper 17. Ottawa: Law Reform Commission of Canada, 1977.
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6. Canada. Advisory and Investigatory Commissions. Ottawa: Law Reform Commission of Canada, 1979.
7. Commissions of Inquiry, Working Paper 17, supra, note 4, p.32.
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9. Ibid, note 6, p.6.
10. Ibid, p.6.
11. Clokie, H.D. and Robinson, J.W. Royal Commissions of Inquiry. Stanford University, California: Stanford University Press, 1937, p.28;
Wraith and Lamb, supra, note 4, p.17;
Cartwright, supra, note 4, p.32;
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12. Clough v. Leahy (1905) 2 C.L.R. 139 at 156.

13. 16 Car. 1, c.10 (U.K.). For a detailed review of these statutes and their effects see Clokie and Robinson, supra, note 11, pp.26-46, and Mummery, D.R. "Due Process and Inquisitions." 97 L.Q.R. 287 (1981).
14. Clokie and Robinson, supra, note 11, p.45.
15. Ibid, and Mummery, supra, note 13, p.308.
16. Clokie and Robinson, supra, note 11, p.57.
17. Statutes of the Province of Canada, 1846, c.38. The "Hansard" of the day has no record of any debate on the measure.
18. 31 V., c.38.
19. R.S.C. 1886 c.114.
20. 32-33 V. c.23, R.S.C. 1886 c.154, s.4.
21. 52 V. c.33.
22. The Canada Evidence Act, 1893, 56 V. c.31.
23. Ibid, s.5.
24. R.S.C. 1906 c.104.
25. S.C. 1880 c.12.
26. Supra, note 19.
27. Supra, note 24.
28. S.C. 1903, c.31, s.8.
29. Commissions of Inquiry, Working Paper 17, supra, note 4, p.10.
30. Sellar, W. "A Century of Commissions of Inquiry." (1947) 25 Can. Bar Rev. 1 at 2.
Macdonald, R.A. "The Commission of Inquiry in the Perspective of Administrative Law." (1980) 18 Alta. L.R. 366 at 368.
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33. S.C. 1934 c.37.

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43. Attorney General of the Province of Quebec et al. v. Attorney General of Canada et al [1979] 1 S.C.R. 219 at 244.

Attorney General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. [1914] A.C. 237 at 257.

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49. Belleville v. Doucet (1875) 1 Q.L.R. 250 at 251.
50. (1891) 18 S.C.R. 36 at 40.
51. Ibid, at pp.47-8.
52. Royal American Shows Inc. et al v. Laycraft J. [1978] 2 W.W.R. 169.
53. Ibid, pp.180-3.
54. Attorney General of the Province of Quebec et al v. Attorney General of Canada, supra, note 34, at pp.225-6.
55. Re Royal Commission on Thomas Case [1980] 1 N.Z.L.R. 602 at 615. An appeal from this decision was dismissed by the N.Z.C.A., supra, note 31.
56. S.C. 1970 (2nd Supp.), c.10.
57. Supra, note 48.
58. Landreville v. The Queen [1973] F.C. 1223.
59. Copeland v. McDonald et al (1978) 88 D.L.R. (3d) 724.
60. [1980] 1 S.C.R. 602.
61. Howarth v. National Parole Board (1974) 50 D.L.R. (3d) 349.
62. Saulnier v. Quebec Police Commission et al (1975) 57 D.L.R. (3d) 545.
63. Cotroni v. Quebec Police Commission [1978] 1 S.C.R. 1048.
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65. Ibid, p.225.
66. Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311.
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72. Supra, note 66, p.326.
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91. Supra, note 75.
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119. Registrar, Court of Appeal v. Collins [1982] 1 N.S.W.L.R. 682 at 707-8
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121. (1971) 16 D.L.R. (3d) 390.
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139. A.G. of Quebec v. Laurendeau (1983) 145 D.L.R. (3d) 526.

140. R. v. Pereira, unreported, registry #302/83, September 22, 1983.
141. (1984) 10 C.C.C. (3d) 119 (Sask. Q.B.).
142. R.S.C. 1970, c. C-23.
143. Supra, note 141, p.153.
144. Ibid, p.154.
145. See text accompanying notes 162-6, infra.
146. Unreported F.C.T.D., registry #T-638-84, May 9, 1984.
147. Supra, note 3.
148. In Re Schumiatcher (1961) 36 C.R. 171, Judson J., as a single judge of the Supreme Court of Canada hearing a 'habeas corpus' application, held that proceedings before the Saskatchewan Securities Commission fell within the definition of judicial proceeding in s.107 quoted in the text.
149. Supra, note 102, pp.335-6.
150. R. v. Clement [1981] 2 S.C.R. 468 at 477-8.
151. See for example, Salmon, supra, note 47 at p.16; Law Reform Commission of Canada Report on Advisory and Investigatory Commission, supra, note 6 at p.6; Ontario. Report of the Royal Commission Inquiry into Civil Rights, supra, note 88, p.430; Callard, K.B. Commissions of Inquiry in Canada 1867-1949, unpublished paper prepared for Privy Council Office, 1950, p.13; Courtney, J.C. Canadian Royal Commissions of Inquiry, 1946 to 1962: An Investigation of an Executive Instrument of Inquiry, unpublished Ph.d. dissertation, Department of Political Science, Duke University, 1964, at p.89; Rapport du Comité d'étude du Barreau du Québec sur les commissions d'enquête. (1976) 36 R. du B. 545 at 558; Henderson, supra, note 5, p. 530.
152. Cartwright, supra, note 4, p.144.
153. Supra, note 46.
154. Cartwright, supra, note 4, p.143.
155. Wraith, supra, note 4, p.212.
156. Salmon, supra, note 47, p.16.
157. R.S.A. 1980 c.P-29, ss.3 and 4; R.S.B.C. 1979 c.198, ss.4 and 5; R.S.N.B. 1973 c.I-11, ss.4,5 and 6; R.S. Nfld. 1970 c. 314, s.3; R.S.N.S. 1967 c.250, ss.3 and 4; R.S.O. 1980 c.411, ss.7 and 8; R.S.Q. 1977 c.C-37, ss.9, 10 and 11; R.S.S. 1978 c.P-38, ss.3 and 4; and, R.S.P.E.I. 1974 c.P-30, ss.3 and 4.
158. Commissions of Inquiry Act 1908, ss.4,9 and 13, N.Z. Statute 1974, v.3, p.2267.

159. See, for example: the commonwealth Royal Commissions Act 1902-1973, ss.5,6 and 6B, Acts of Parliament 1901-1973, v.10, p.437; Royal Commissions Act 1968, Statutes of Western Australia, 17° E.II. c.65, ss.9,10,13,14 and 16; Evidence Act 1958, Victoria Acts of Parliament 1958, No. 6246, ss.17,19 and 20 (cited and analyzed in Hallett, supra, note 4, pp.93-108); Royal Commissions Act, 1923, No. 29, ss.8,9,10,11,16,18,19 and 20, N.S.W. Statutes, v.12.
160. Supra, note 6.
161. See, for example, Salmon, supra, note 46, p.15; Black, J. "Commissions, Witness and Counsel". [1981] N.Z.L.J. 17; Henderson, supra, note 5, p.494.
162. Doern, G.B. "The Role of Royal Commissions in the General Policy Process and in Federal-Provincial Relations." (1967) 10 Can.Pub.Admin. 417 at 421.
163. Ibid.
164. Ibid.
165. Ibid, p.424.
166. Hodgetts, J.E. "Should Canada be De-Commissioned?" (1964) 70 Queen's Quarterly 477 at 478-9.
167. Ibid, p.479.
168. Supra, note 4, p.95.
169. Ibid, p.91.
170. Ibid, p.95.
171. Ibid, p.94.
172. Proulx, M. "La protection du témoin contre l'auto-incrimination devant une Commission d'enquête." (1979) 39 R. du B. 580 at 582.
173. Ibid.
174. Ibid, p.604.
175. Ibid, p.605.
176. Supra, note 87, c.7.
177. Ibid, p.404.
178. Ibid, pp.400-2.
179. Cmnd. 3121.
180. Supra, note 4, p.41.
181. Ibid, p.37.

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183. Menzies, D.I. in reports of proceedings in (1955) 29 A.L.J. at p.264.
184. Supra, note 47, p.1.
185. Supra, note 179, p.27. See elaboration of this conclusion given by Lord Salmon in Ratushny, supra, note 87, pp.397-8.
186. R. v. Smith [1947] O.R. 378 (Ont. C.A.); R. v. Mazerell [1946] O.R. 763 (Ont. C.A.).
187. Supra, note 85.
188. See, for example R. v. Vermette (#5) (1983) 3 C.C.C. (3d) 36; R. v. Daigle (1983) 32 C.R. (3d) 388. There were numerous others charged whose cases were not reported in the law reports.
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191. Supra, note 5, p.530.
192. Supra, note 166.
193. Supra, note 162.
194. Supra, note 151, and Courtney, J.C. "In Defence of Royal Commissions." (1969) 12 Can.Pub.Admin. 198.
195. Ibid, p.200.
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199. Ibid; Carter-Ruck, P.F. Libel and Slander. London: Faber & Faber, 1972, p.130.
200. McEwen, R and Lewis, P. Gatley on Libel and Slander (7th edition). London: Sweet & Maxwell Limited, 1974, p.160.
201. (1873) L.R. 8 O.B. 255 at 263. (Exch. Ch.).
202. [1979] 1 All E.R. 489 at 495.
203. [1935] A.C. 76.
204. Ibid, p.81.

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207. Ibid, p.82.
208. [1931] O.R. 608 at 620.
209. (1903) 22 N.Z.L.R. 343.
210. Supra, note 203.
211. Supra, note 209, pp.356, 363, 366-7.
212. Ibid, p.356.
213. [1973] V.R. 321
214. [1973] V.R. 715.
215. Supra, note 213, p.334.
216. [1971] V.R. 111.
217. Supra, note 203.
218. Supra, note 201 and (1875) L.R. 7 H.L. 744 (H.L.).
219. [1905] 1 K.B. 504.
220. Supra, note 216, p.120.
221. Douglass v. Lewis (1982) 30 S.A.L.R. 50.
222. Ibid, p.57.
223. Supra, note 203.
224. Supra, note 221, p.58.
225. Supra, note 202.
226. See, for example, Douglass v. Lewis, supra, note 221 and Duncan & Neill on Defamation, supra, note 198, pp.80-1.
227. Supra, note 202, pp.492, 494-5 and 496.
228. Duncan & Neill on Defamation, supra, note 198, p.75; Gatley on Libel and Slander, supra, note 200, p.160; Libel and Slander, supra, note 199, p.133; New Zealand. Recommendations on the Law of Defamation: report of the Committee on Defamation. Wellington: Government Printer, 1977, p.43.
229. Chatterton v. Secretary of State for India in Council (1895) 2 Q.B. 189 at 191.

230. Supra, note 213.
231. Ibid, p.337.
232. (1869-70) 5 Q.B. 94.
233. Ibid, p.116-7.
234. Gibbons v. Duffell (1932) 47 C.L.R. 520 at pp.526 and 531-2.
235. (1981) 124 D.L.R.(3d) 260. (leave to appeal to S.C.C. denied)
236. Ibid, p.269.
237. McIsaacs and Sons Limited, and Others v. Cook [1925] 2 K.B. 391.
238. Ibid.
239. Supra, note 229.
240. Supra, note 209.
241. Supra, note 158, s.3.
242. Recommendations on the Law of Defamation, supra, note 228, p.44.
243. Supra, note 158, s.13.
244. Ibid, s.6.
245. Supra, note 46, s.1(3).
246. Cmnd. 3121, p.30.
247. Cmnd. 5909, p.51.
248. Defamation Act, 1974, no.18, s.18.
249. Ibid, s.19.
250. Supra, note 216.
251. Supra, notes 213 and 214.
252. Victoria Act no. 8190. For a discussion of the events leading up to the passage of the amendment and its effect see Hallett, supra, note 4, pp.309-19.
253. Royal Commission Act, 1902 (Cth), as amended, s.7.
254. Supra, note 221, p.59.
255. R.S.A. 1980 c.P-29, s.4; R.S.B.C. 1979, c.198, s.12; R.S.N.S. 1969 c.250, s.4; R.S.O. 1977 c.C-37, s.16.

256. R.S.N.B. 1973 c.I-11, s.12.
257. Supra, note 201.
258. Ibid, p.265.
259. Ibid, p.267.
260. Ibid.
261. Supra, note 218.
262. Supra, note 219.
263. See text accompanying notes 202 and 225, supra.
264. Supra, note 202, pp.495 and 499.
265. Ibid, p.495.
266. Ibid, p.499.
267. See text accompanying notes 244, 245, 248 and 252, supra.
268. Supra, note 216.
269. Supra, note 213.
270. Supra, note 216, p.116.
271. Ibid, p.125.
272. Ibid.
273. Ibid.
274. Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 Q.B. 431.
275. Dawkins v. Lord Rokeby, supra, note 201; Barrett v. Kearns, supra, note 219; Trapp v. Mackie, supra, note 202.
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277. Supra, note 6, p.36.
278. Ibid.
279. Cmnd. 5313, p.13.
280. See text accompanying notes 228-39, supra.
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283. See for example, Report of the Royal Commission Inquiry into Civil Rights, supra, note 151, pp.464-6; Rapport du Comité d'étude du Barreau du Québec sur les commissions d'enquêtes, supra, note 151, p.557; the underlying assumption in Henderson, supra, note 5, pp.524-5; Law Reform Commission of Canada Report #13, supra, note 6, p.40.
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290. Supra, note 98, pp.10-12 and 185-7.
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293. Ibid, p.35. Relevant excerpts from the report are set out in Sellar, supra, note 30, pp.22-24.
294. Fyfe, M.H. "Some Legal Aspects of the Report of the Royal Commission on Espionage" (1946) 24 Can.Bar.Rev. 777.
295. Ibid, p.784.
296. Supra, note 75, p.318.
297. Supra, note 85, pp.1205-8.
298. Advance Glass and Mirror Co. Ltd. et al v. Attorney General of Canada and McGregor [1950] 1 D.L.R. 488 at 491.
299. Ibid, pp.491-2.
300. See text accompanying notes 320-3, infra.
301. Apart from the Landreville case and the Advance Glass case, the only other reported decision appears to be Re The Imperial Tobacco Co. et al v. McGregor [1939] O.R. 627. The latter two were both cases arising out of the Combines Investigation Act which incorporates the provisions of s.13 by reference.

303. Ibid, p.38.
304. 2 B&D 663, 109 E.R. 1290 at 1292.
305. Ibid, p.1293.
306. (1975) 53 D.L.R. (3rd) 441 at 453.
307. Rex and Minister of National Defense for Naval Services v. Pantelidis, (1943) 1 W.W.R. 58 at 69-70.
308. Report of Gouzenko inquiry, supra, note 75, p.675.
309. Supra, note 284.
310. Supra, note 85, pp.1169-74.
311. Ibid, p.1170.
312. Supra, note 294, p.783.
313. Ibid.
314. Supra, note 75, p.676.
315. Batten, J. "Joe Sedgwick and Gouzenko's Spy", Canadian Lawyer, Sept. 1982, p.11.
316. Bothwell, R. and Granatstein, J.L. The Gouzenko Transcripts. Ottawa: Deneau, 1982, p.294.
317. Ibid, p.312.
318. Supra, note 246, p.18.
319. See text accompanying note 137.
320. [1980] 6 W.W.R. 271 at 283.
321. Minott v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Penitentiary et al. [1982] 1 F.C. 322 at 337.
322. (1982) 131 D.L.R. (3d) 152 at 171.
323. Re Howard and Presiding Officer of Inmate Disciplinary Court (1984) 8 C.C.C. (3d) 557.
324. Irvine et al v. Restrictive Trade Practices Commission et al [1982] 1 F.C. 72 at 81-2.
325. Owen, supra, note 196, p:9.
326. Supra, note 47, p.18.

327. See, for example, the procedural rules developed by L'Heureux-Dubé, J. for her Part II inquiry, supra, note 98, pp.12 and 173-5.
328. Supra, note 88, pp.450-2.
329. Pett. v. Greyhound Racing Association Ltd. [1968] 2 W.L.R. 1471.
330. Supra, note 88, pp.215-6.
331. Supra, note 151, pp.556-7.
332. R.S.O. 1980 c.411, s.5(1).
333. Supra, note 4, p.34.
334. Supra, note 6, p.16.
335. Whitmore, H. "The Role of the Lawyer in Administrative Justice" (1970) 33 Modern L.R. 481.
336. Supra, note 151, p.556.
337. Supra, note 335, p.485; Supra, note 88, p.215.
338. N.Z. Statutes 1980, No.2, s.4A(3).
339. Black, T. "Commissions, Witness and Counsel" 1981 N.Z.L.J. 17.
340. Supra, note 159, s.6F.A.
341. Supra, note 159.
342. Supra, note 157.
343. R.S.O. 1977 c.C-12.
344. Supra, note 6, p.16.
345. Ibid.
346. Ibid, p.17.
347. Alberta, Report of a Public Inquiry on Royal American Shows Inc. and its Activities in Alberta 1978, p.A-4. (Mr. Justice James H. Laycraft, Commissioner).
348. See text accompanying notes 161-71.

The Present *Inquiries Act*



CHAPTER I-13

An Act respecting public and departmental inquiries

SHORT TITLE

Short title 1. This Act may be cited as the *Inquiries Act*. R.S., c. 154, s. 1.

PART I

PUBLIC INQUIRIES

Inquiry 2. The Governor in Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof. R.S., c. 154, s. 2.

Appointment of commissioners 3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted. R.S., c. 154, s. 3.

Powers of commissioners 4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. R.S., c. 154, s. 4.

Idem 5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. R.S., c. 154, s. 5.

PART II

DEPARTMENTAL INVESTIGATIONS

Appointment
of commis-
sioners

6. The minister presiding over any department of the Public Service may appoint at any time, under the authority of the Governor in Council, a commissioner or commissioners to investigate and report upon the state and management of the business, or any part of the business, of such department, either in the inside or outside service thereof, and the conduct of any person in such service, so far as the same relates to his official duties. R.S., c. 154, s. 6.

Powers of
commission-
ers

7. The commissioner or commissioners may, for the purposes of the investigation, enter into and remain within any public office or institution, and shall have access to every part thereof, and may examine all papers, documents, vouchers, records and books of every kind belonging thereto, and may summon before him or them any person and require him to give evidence on oath, orally or in writing, or on solemn affirmation if he is entitled to affirm in civil matters; and any such commissioner may administer such oath or affirmation. R.S., c. 154, s. 7.

May issue
subpoena or
summons

8. (1) The Commissioner or commissioners may, under his or their hand or hands, issue a subpoena or other request or summons, requiring and commanding any person therein named to appear at the time and place mentioned therein, and then and there to testify to all matters within his knowledge relative to the subject-matter of such investigation, and to bring with him and produce any document, book, or paper that he has in his possession or under his control relative to any such matter as aforesaid; and any such person may be summoned from any part of Canada by virtue of the subpoena, request or summons.

Expenses

(2) Reasonable travelling expenses shall be paid to any person so summoned at the time of service of the subpoena, request or summons. R.S., c. 154, s. 8.

Evidence may
be taken by
commission

9. (1) If, by reason of the distance at which any person, whose evidence is desired, resides from the place where his attendance is required, or for any other cause, the commissioner or commissioners deem it advisable, he or they may issue a named, empowering him to take such evidence and report it to him or them.

Powers for
that purpose

(2) Such officer or person shall, before entering on any investigation, be sworn before a justice of the peace faithfully to execute the duty entrusted to him by such commission, and, with regard to such evidence, has the same powers as the commissioner or commissioners would have had if such evidence had been taken before him or them, and may, in like manner, under his hand issue a subpoena or other request or summons for the purpose of compelling the attendance of any person, or the production of any document, book or paper. R.S., c. 154, s. 9.

Witnesses failing to attend, etc.

10. (1) Every person who

- (a) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,
- (b) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,
- (c) refuses to be sworn or to affirm, as the case may be, or
- (d) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid,

is liable, on summary conviction before any police or stipendiary magistrate, or judge of a superior or county court, having jurisdiction in the county or district in which such person resides, or in which the place is situated at which he was so required to attend, to a penalty not exceeding four hundred dollars.

Justice of the peace

(2) The judge of the superior or county court aforesaid shall, for the purposes of this Part, be a justice of the peace. R.S., c. 154, s. 10.

PART III
GENERAL

Employment of counsel, experts and assistants

11. (1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.

Experts may take evidence and report

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

Powers

(3) The persons so deputed, when authorized by order in council, have the same powers that the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

Report

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners. R.S., c. 154, s. 11.

Parties may employ counsel

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel. R.S., c. 154, s. 12.

Notice to persons charged

13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel. R.S., c. 154, s. 13.

PART IV

INTERNATIONAL COMMISSIONS AND TRIBUNALS

Authority to
confer powers
upon

14. (1) The Governor in Council may, whenever he deems it expedient, confer upon an international commission or tribunal all or any of the powers conferred upon commissioners under Part I.

Exercise of
powers in
Canada

(2) The powers so conferred may be exercised by such commission or tribunal in Canada, subject to such limitations and restrictions as the Governor in Council may impose, in respect to all matters that are within the jurisdiction of such commission or tribunal. R.S., c. 154, s. 14.

FIRST 51PART I. COMMISSIONS OF INQUIRY

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1870</u>			
Nov 16	17	Improvement of the water communications and the development of trade with the northeastern United States	Sir Hugh Allan
<u>1873</u>			
Aug 14	1058	Resolution moved by the Hon. Mr. Huntington in Parliament on April 2, 1873 re C.P. Railway	Charles Dewey Day
Dec 22	527	Claims to rights of cutting hay and common in Manitoba	Joseph Dubuc and John Farquhar Bain
<u>1875</u>			
Jan 23	56	Charges preferred against Edward Meyer, Chief Landing Waiter at Montreal	John W. Cudlip
<u>1876</u>			
July 22	720	The Management of the Canadian Northern Railway Company	Larratt Wm Smith

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1877</u>			
Nov 3	921	Charges against Captain James Cooper, Agent of the Department of Marine and Fisheries at Victoria, B.C.	John Hamilton Gray
<u>1880</u>			
May 22	933	Matters connected with the Canadian Pacific Railway	Geo. McKenzie Clark, Samuel Keefer and Edward Miall
<u>1881</u>			
Feb 25	320	Certain claims to lands in Manitoba	Joseph Dubuc and James Andrews Miller
<u>1882</u>			
Jan 12	35	Charges against Pullman Palace Car Company for violations of customs laws	James Johnson
<u>1884</u>			
July 4	1458	Chinese immigration into British Columbia	Joseph Adolphe Chapleau and John Hamilton Gray
<u>1885</u>			
Oct 15	1917	Certain claims arising out of the outbreak and rebellion in the North West Territories	Wm Hayes Jackson

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1886</u>			
Feb 25	5	Claims for compensation for loss or damage arising out of the half-breed and Indian insurrection in the North West Territories	Joseph Alphonse Ouimet
Mar 22	505	Charges preferred against Jeremiah Travis, Stipendiary Magistrate, N.W.T.	Thomas Wardlaw Taylor
<u>1891</u>			
Nov 14	2716	The present condition of Civil Service at Ottawa	George Hague
<u>1892</u>			
Mar 8	610	The liquor traffic in Canada	Sir Joseph Hickson
June 16	1705	Certain charges made against the Hon. Sir A.P. Caron, K.C.M.G.	Adolphe Basile Routhier and Melbourne McTaggart Tait
Sept 23	2447	Nets used, spawning periods and other matters re lake fisheries of Ontario	Samuel Wilmot
Dec 29	3250	Contractors' claims re construction of Oxford - New Glasgow Railway and the Cape Breton Railway	Geo. Wheeler Burbidge
<u>1894</u>			
Aug 25	2468	Excessive freight rates for the export of cattle	Wm Loftus Magee

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1894 (cont.)</u>			
Dec 28	3748	The pilotage business of the port of St. John (N.B.)	W.H. Smith
<u>1895</u>			
Sept 30	2585	Alleged violations of "The Fisheries Act" by James and Wm Noble	Frederick Wm Johnston
Oct 29	3138	Whether the sweating system is practised in industrial centres of the Dominion	Alexander Whyte Wright
<u>1896</u>			
Feb 18	586	Repairs to Dominion steamer "Quadra" after running aground (B.C.)	John Devereux and Richard Collister
Apr 22	1346	Claims by Dudley Perley and Thomas Williston on the right of property in salmon stand, Bay du vin	David George Smith
Oct 24	3655	Charges re the resignation of Wm Sykes, Postmaster, Cobourg, Ont., and the appointment of C. Guillet	Charles Seagar
Nov 13	3809	Reasons for election in Algoma riding being held other than on day of General Election	John Crerar
Nov 25	4009	Action of G. Guillet, M.P. re resignation of C.E. Ewing, Collector of Customs, Cobourg, Ont.	Charles Seagar

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1897</u>			
Feb 3	52	Sale of certain lots in the Town of Banff prior to the passing of the Rocky Mountain Park Act	Edwin Frederick Stephenson
Feb 9	242	Charges preferred against certain officers and guards at Stony Mountain Penitentiary	Frederick Coate Wade
Mar 2	490	Losses incurred by inhabitants of Quebec City from landslide of Sept. 1889	William Cook
July 17	2124	Charges of intemperance against Sheriff Owen E. Hughes, Saskatchewan	Thomas Horace McGuire
July 21	2252	Charges preferred against Sheriff James H. Benson and others, Regina	Thos. Cooke Johnstone
Aug 10	2393	Grievances of certain settlers residing with Esquimalt and Nanaimo Railway Company's land belt	Thos. Gainsford Rothwell
Nov 19	3180	Charges of conspiracy to defraud the Revenue by James Devlin, Engineer of Kingston Penitentiary	Charles Murphy
<u>1898</u>			
Jan 15	55	Charges of unjust treatment of persons engaged in construction of Crow's Nest Pass Railway	Calixte Aime Dugas

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1898 (cont)</u>			
July 1	1742	Grievances of the workmen on Crow's Nest Pass Railway and death of two employees	Roger Conger Clute
Oct 7	2371	Charges preferred against government officials in the Yukon Territory	William Ogilvie
<u>1899</u>			
Aug 2	1743	Claims for patents to land in the Yukon Territory	Alexander McLeod and Raoul Rinfret
Oct 7	2181	The shipment and transportation of grain (see also 1975)	Edmund John Senkler (later) Albert E. Richards
Nov 17	2407	Unrest and discontent among miners and mine-owners in B.C.	Roger Conger Clute
<u>1900</u>			
Mar 2	509	Claims to land in the Yukon Territory	Raoul Rinfret
June 4	1446	Election frauds prior to and subsequent to the General Election of 1896	Sir John Alex Boyd
June 19	1423	Claims to bounty for services rendered as scouts or otherwise re suppression of North-West Rebellion, 1885, by persons in Saskatchewan	Narcisse Omer Côté and Samuel McLeod

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1900 (cont)</u>			
July 19	1423	Claims to bounty for services rendered as scouts or otherwise re suppression of North-West Rebellion, 1885, by persons in Assiniboia and Alberta	James Andrew Joseph McKenna and James Walker
June 19	1527	The management and sales of lands in townsites of Regina, Moose Jaw, Qu'Appelle and Verdin	James Allen Smart and Edwin Frederick Stephenson
July 26	1853	The abstraction of money from a letter posted by Rev. J.M. Whitelaw	William White
Sept 3	2108	Alleged fraudulent practices and irregularities re public auction of school lands in Manitoba	James Pierre Prendergast.
Sept 21	2187	Chinese and Japanese immigration into B.C.	Roger Conger Clute
<u>1901</u>			
Jan 2	2809	Charges made against grain inspection at Montreal	David Horn
Apr 19	821	The circumstances attending the death of Dieudonne St. Michael in shipyard at Sorel	Wilfred Mercier and Geo Wheelock Burbridge
May 29	1011	Detention of the S.S. "Yukoner" at Dawson, B.C., 1898	Solon Wm McMichael

MOST RECENT 51PART I COMMISSIONS OF INQUIRY

<u>Date</u>	<u>O. in C. No.</u>	<u>Subject Matter</u>	<u>Commissioner or Chairman</u>
<u>1965</u>			
Mar 2	372	Charges of irregularities in federal election of 1963 made by Vancouver Province	Nathaniel T. Nemetz
July 9	1269	Marketing problems of the freshwater fish industry	Geo. H. McIvor
July 23	1350	Pay for Civil Servants in Group "D"	Jacob C. Anderson
Sept 1	1590	Work rules, etc. of non-supervisory staff of Post Office	André Montpetit
<u>1966</u>			
Jan 19	128	Dealings of Mr. Justice Leo A. Landreville with Northern Ontario Natural Gas Ltd.	Ivan C. Rand
Mar 7	395	The case involving Geo. Victor Spencer	Dalton C. Wells
Mar 14	482	The case involving Gerda Munsinger	Wishart F. Spence
May 26	978	Farm Machinery	Clarence L. Barber
Nov 16	2148	Security	Maxwell W. Mackenzie

1967

Feb 16 312 Status of Women Mrs. John Bird
July 4 1327 Justice in Hay River area, W.G. Morrow
N.W.T.

1969

May 29 1112 Non-medical use of drugs Gérald LeDain
June 19 1249 Prices and Incomes John H. Young
(see also 1934, 1948, 1957)
Dec 19 2405 Indian Claims Lloyd I. Barber

1970

Mar 12 448 Grounding of tanker "Arrow" Gordon L.S. Hart
in Chedabucto Bay, N.S.
Mar 17 492 Montreal Mail Transport H. Carl Goldenberg
Dec 8 2077 Foreign Claims Thane A. Campbell
(see also 1981)

1973

May 25 1239 Food Prices Review Board Mrs. Beryl A. Plumptre
Oct 5 3026 Airport Inquiry (Ontario) Hugh F. Gibson

1974

Apr 25 963 Parliamentary Accommodation Douglas C. Abbott
May 22 1177 Steel Profits Willard Z. Estey

1975

Jan 6 1 Marketing of Beef and Veal Maxwell W. Mackenzie
Apr 18 872 Rail needs in Manitoba, Saskatchewan and Alberta Emmett Hall
Apr 18 873 Cost and revenue data re rail movement of grain (see also 1899) Carl M. Snavely
Apr 22 879 Corporate Concentration Robert B. Bryce
Apr 25 963 Financial controls of Air Canada Willard Z. Estey
Oct 14 2429 Interim Anti-Inflation Board Jean-Luc Pepin
Nov 20 2726 Crash of Lockheed aircraft near Rea Point, N.W.T. Wm Alex Stevenson

1976

June 28 1588 Bilingual Air Traffic Services in Quebec W.R. Sinclair
Julien Chouinard and D.V. Heald
Nov 22 2884 Royal Commission on Financial Management and Accountability Allen Thomas Lambert

1977

Mar. 17 703 Elder Indians' Testimony / Lloyd I. Barber

Mar 24 816 Transportation Services in Newfoundland Arthur Sullivan

July 5 1910 Canadian Unity Jean-Luc Pepin
John P. Robarts

July 6 1911 Activities of R.C.M.P. David C. McDonald

July 28 2149 Marine (Oil) Terminal at Kitimat, B.C. Andrew R. Thompson

1978

June 20 1996 Special Adviser on the Canadian Automotive Industry S. Simon Reisman

1979

Mar 2 635 Changes in prices, profits, compensation and costs (inflation) Harold A. Renouf

May 25 1586 Certain allegations concerning commercial practices of the Canadian Dairy Commission Hugh F. Gibson

Dec 4 3286 Railway safety as it relates to the handling of dangerous goods (Mississauga derailment) Samuel G.M. Grange

1980

Aug 1	2137	Monitoring of matters concerning the petroleum and gas industry in Canada	Harold A. Renouf
Aug 27	2336	The conditions of the foreign service of Canada	Pamela A. McDougall
Sept 3	2343	The present conditions in the newspaper industry in Canada; the takeovers and concentrations of ownership	Thomas W. Kent

1981

Jan 12	60	The fisheries of the Pacific coast of Canada; conditions, management and utilization	Peter Pearse
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May 28	1447	Foreign Claims (re-established) (see also 1970)	Thos. D. MacDonald
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1982

Mar 17	819	"Ocean Ranger" Marine Disaster	T. Alex Hickman
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Nov 5	3438	Long-term economic prospects for Canada	Donald S. Macdonald
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1983

June 24	1924	Equality in employment, particularly by Crown corporations	Rosalie S. Abella
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1984

Apr 17	1298	Commission of Inquiry on the Pharmaciutical Industry	Harry Eastman
May 10	1585	The Canadian Sentencing Commission - Examination of sentencing in the Courts	W.R. Sinclair
May 31	1844	Marketing of Potatoes in Eastern Canada	Frances G. Carten
June 22	2242	Examination of Seals and the sealing industry in Canada	Albert Madouf