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PROPOSALS FOR THE REFORM OF THE PUBLIC INQUIRIES ACT

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ALBERTA LAW REFORM INSTITUTE

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The carriage of this project has been in the very capable hands of Mr. W.H. Hurlburt, Q.C. This has had two distinct advantages. Mr. Hurlburt's experience and knowledge has allowed us to take the broad view of Inquiries and all of the diverse issues raised by the process. Equally important, Mr. Hurlburt was able to make personal contact with a very broad group of people who have been involved in various ways in many of the Inquiries held in Canada.

The project was ably assisted by an active project committee consisting of David Jones, Q.C., Professor J.C. Levy, Professor Peter J.M. Lown, and Christina Gauk who have participated fully in the development represented by this report. We are also grateful to the Ontario Law Reform Commission which has under consideration a similar study. The exchange of information has been very useful.

In the course of this project, the Institute consulted the commissioners, counsel and officials listed in Appendix E. Many of them made themselves available for interviews. Others attended consultative meetings. All of them gave us unstintingly of their time and expertise. Their help enabled us to acquire an understanding of the strengths and problems of the public inquiry process that we could not have got in any other way. We are deeply indebted to them.

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TABLE OF ABBREVIATED REFERENCES

Statute	Abbreviated reference
Canadian Charter of Rights and Freedoms Part I of the *Constitution Act* 1982, being Schedule B of the *Canada Act 1982*, Statutes of the United Kingdom 1982 c. 11.	The Charter
Inquiries Act R.S.C. 1985, c.I-13	The Canada Act
Public Inquiries Act R.S.A. 1980, c. P-29	The Public Inquiries Act, or the Alberta Act
Inquiry Act R.S.B.C. 1979, c. 198	The British Columbia Act
Manitoba Evidence Act Part V, R.S.M. 1987, c. E-150	The Manitoba Act
Inquiries Act R.S.N.B. 1973, c. I-11	The New Brunswick Act
Public Enquiries Act R.S.N. 1970, c. 314	The Newfoundland Act
Public Inquiries Ordinance S.N.W.T. 1977 (1st Sess.), c. 6	The Northwest Territories Act
Public Inquiries Act R.S.N.S. 1989, c. 372	The Nova Scotia Act
Public Inquiries Act R.S.O. 1980, c. 411	The Ontario Act
Public Inquiries Act R.S.P.E.I. 1988, c. P-31	The Prince Edward Island Act
An Act Respecting Public Inquiry Commissions R.S.Q. 1977, c. C-37	The Quebec Act
The Public Inquiries Act R.S.S. 1978, c. P-38	The Saskatchewan Act

Statute	Abbreviated reference
Draft *Advisory and Investigatory Commissions Act* included in Law Reform Commission of Canada, *Advisory and Investigatory Commissions*, Report 13	LRCC draft Act

Commission	Abbreviated reference
Law Reform Commission of Canada	LRCC
Ontario Law Reform Commission	OLRC
Royal Commission on Tribunals under the Chairmanship of the Rt. Hon. Lord Justice Salmon, United Kingdom, 1966	1966 U.K. Salmon Commission

Term	Definition
Commission of inquiry	A commission, commissioner or commissioners appointed under a public inquiries act to conduct a public inquiry.
"Target"	A person whose conduct is part of the facts being investigated by an investigatory commission of inquiry. The term is neutral as to whether a "target" is blameworthy in any way.

PART I — EXECUTIVE SUMMARY

Retention and reform of public inquiries

The Public Inquiries Act gives the Lieutenant Governor in Council power to appoint a commission of inquiry to conduct an inquiry into a matter of public interest and to report back. Such public inquiries have made important contributions to the public life of Alberta. This report accordingly recommends that public inquiries should be retained.

Public inquiries have strengths:

- they can get at facts.
- they can provide good advice.
- they are independent.
- they are open.

However, they also have weaknesses:

- an inquiry into specific facts can injure individuals' interests.
- inquiries are expensive.
- inquiries often drag on.

This report recommends that a reformed Public Inquiries Act be adopted to promote the strengths and minimize the weaknesses of public inquiries. In particular, its proposals are intended to make public inquiries

- effective.
- independent of government.
- open to the public.
- as protective of the rights and interests of persons caught up in them as the public interest in effective public inquiries permits.

Establishment, powers and reports of inquiries

Within constitutional limitations, the Lieutenant Governor in Council would, under the proposals made in the report, have power to

- establish public inquiries.
- define their scope.
- appoint commissions of inquiry to conduct them.
- decide whether a commission of inquiry is to have power to compel testimony and production of documents and things.

and would be required to

- prepare and publish estimated expenses for a public inquiry.
- table the report of a public inquiry in the Legislature, with power to delete portions that should not be published for reasons such as public security, privacy, and prejudice to rights.

Conduct of inquiries

Subject to budgetary control and government ground rules, a commission of inquiry

- would be responsible for spending the money allocated to the inquiry subject to government ground rules.
- would have power to retain professional assistance and staff.

A commission of inquiry would have power

- to control its proceedings.
- to decide who will take part in the inquiry and the nature and extent of their participation.
- to make recommendations for the funding of participants.
- to decide what evidence will be admitted.

If specifically authorized by order in council, a commission would have power (enforceable by court order)

- to require witnesses to give testimony
- to require persons in possession of documents and things to produce them.
- to inspect public buildings and take from them documents that are required for the inquiry.

A commission of inquiry

- would not be required to hold public hearings.
- would be required to conduct its inquiry so as to enable the public to be informed and to participate.
- would be required to hold in public any hearings that it does hold, unless considerations of privacy, security, or a person's right to a fair trial or other good reason require a private hearing.

A commission's power to control its proceedings would allow it to

- regulate media reporting, subject to the openness principle and to freedom of the press.
- ban publication of reports of hearings for the same reasons that it can hold non-public hearings.

Protection of individual rights

A commission's powers would be subject to the following controls:

- a court order would be needed before a witness could actually be compelled to testify or to produce documents or be punished for contempt of a commission.
- a commission's acts or omissions would be subject to judicial review.
- a commission would have to give anyone against whom it makes a finding of discreditable conduct a fair and informed opportunity to rebut the finding.
- a commission could not summon a witness to testify about the subject matter of a charge pending against the witness.

Cross-references in other Acts

The Public Inquiries Act is important for another reason. Many provincial Acts give someone "the powers of a commissioner under the Public Inquiries Act". This report recommends that, wherever those powers are given by another Act, the powers should be subject to the same safeguards as apply to public inquiries under the Public Inquiries Act.

Draft Act

The report includes the draft of an Act that would give effect to the Institute's proposals.

PART II — PROPOSALS FOR REFORM

CHAPTER 1 — INTRODUCTION

A. Form and Content of this Report

This chapter describes our project on the Public Inquiries Act (which is attached as Appendix A), our reasons for adopting the project, the way we have conducted it, and our approach to it. Chapters 2 to 6 give necessary background and outline our major policy proposals. Part III of the report consists of a list of our recommendations. Part IV contains an annotated draft Act that would carry out our proposals. The reader who wishes to obtain a detailed understanding of our proposals should look at both Chapters 2 to 6 and the annotated draft Act.

B. Reasons for Preparing this Report

Inquiries under the Public Inquiries Act have been important to the public life of Alberta and to many people who have been caught up in them: see the selected list of public inquiries in Appendix C. So have inquiries under other statutes that confer upon functionaries the powers of a commissioner under the Public Inquiries Act: the Public Inquiries Act has a practical importance beyond its apparent scope and would continue to be important even if no public inquiry were ever conducted under it. While the past is not a sure guide to the future, it seems likely that public inquiries will continue to be held from time to time. That likelihood, together with the extensive cross-referencing in other statutes, makes the Public Inquiries Act an important piece of legislation.

Public inquiries have been criticized. Complaints have been made about the effects that fact-finding inquiries have had upon the reputations and careers and upon the criminal and civil liabilities of individuals caught up in them. Complaints have been made about the cost of inquiries and about the delays occasioned by formal inquiry processes. The effectiveness of public inquiries in terms of legislative or governmental action is often questioned. These criticisms and complaints suggest that a review of the Public Inquiries Act is desirable. So does the history of sporadic amendments to it over the years.

The focus of our project has been on identifying problems with the Public Inquiries Act and suggesting improvements in it. However, the question whether public inquiries legislation is desirable has inevitably come up in consultation and

in our internal discussions. We discuss this question below,[1] but we note here that the conclusion that we have reached is that on balance public inquiries legislation is desirable.

C. Scope of this Report

This report deals only with inquiries that are formally established by the Lieutenant Governor in Council under the Public Inquiries Act. Although it makes passing reference to them, it does not deal with

(a) an inquiry by a committee of the Legislature,

(b) an inquiry established under the royal prerogative, whether called a royal commission or not,

(c) an inquiry by a "task force" or departmental or interdepartmental committee of the Government, or

(d) any other form of inquiry that is not formally established by the Lieutenant Governor in Council under the Public Inquiries Act.

The report also refers briefly to statutes that confer on functionaries "the powers of a commissioner under the Public Inquiries Act". It does not deal with proceedings before such other statutory functionaries in general. It merely provides for constraints on the use of powers granted by reference to the Public Inquiries Act.

D. Conduct of the Institute's Project

In November, 1991, we published our Issues Paper No. 3, *Public Inquiries*. Our purpose was to obtain informed comment as to whether reform of the Public Inquiries Act is desirable and, if so, what form the reforms should take. We sent the issues paper to our usual mailing list, which includes Members of the Legislature, judges, law firms, the media and libraries. We also interviewed many lawyers and judges who have participated in public inquiries in Alberta and Ontario as commissioners, commission counsel and counsel for participants. In addition, we held two all-day meetings in Calgary and Edmonton respectively

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1 See pages 18-23.

which were attended by experienced lawyers from those two centres. The names of those whom we interviewed and met appear in Appendix E. We thus amassed a wealth of suggestions and comments.

We have had the advantage of the consideration given to public inquiries legislation by two law reform bodies, the Law Reform Commission of Canada and the Ontario Law Reform Commission. The LRCC issued a working paper on the subject in 1977 and a final report in 1979.[2] The OLRC issued its *Report on Public Inquiries* in 1992. We exchanged information and materials with the OLRC in the last half of 1991. While our views were developed quite independently, we are pleased to note that the Commission's thinking runs along the same general lines as ours, though with occasional divergences.

E. Comparison of Public Inquiries Act and Proposals of Law Reform Agencies

For the convenience of readers, we attach as Appendix B a table that summarizes our proposals, the provisions of the present Public Inquiries Act, and the proposals of the LRCC and the OLRC.

F. The Institute's Approach

In our view, a public inquiries act should provide for public inquiries that function independently, openly and effectively. It should, however, recognize that the public inquiry process may do damage to private rights and interests and try to reach a proper balance between the public and private interests. The OLRC took much the same view: see the four principles it enunciated.[3]

In this report we examine every aspect of the Public Inquiries Act to see whether it is well designed to achieve these purposes and make proposals for reform where reform is appropriate.

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2 Respectively, Working Paper 17, *Commissions of inquiry: A New Act*, 1977, and Report 13, *Advisory and investigatory commissions*, 1978. The LRCC's Report 14, *Judicial Review and the Federal Court*, 1978, deals with judicial review of commissions of inquiry.

3 Ontario Law Reform Commission, *Report on Public Inquiries*, 1992, Recommendation 1 at 214.

G. Relationship to the Institute's Administrative Procedures Project

The Institute is in the early stages of a study of the subject of administrative procedures in Alberta. A public inquiry can be viewed as an administrative procedure, and, whether or not it is so viewed, has much in common with administrative procedures. We have, however, concluded that, because of their unique characteristics, public inquiries can be dealt with without waiting for completion of the administrative procedures project.

CHAPTER 2 — CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Introduction

The Canadian Charter of Rights and Freedoms overhangs a discussion of public inquiries. This chapter is intended to integrate the necessary discussions of the Charter with the discussions of various issues relating to public inquiries later in this report.

The Public Inquiries Act is a law of the province. Commissions of inquiry established under the Act derive their powers from it. Any relevant provision of the Charter therefore applies to the Act and to public inquiries. Judicial authority for this proposition can be found in *O'Hara v. British Columbia*[4] and in the judgments of the Ontario Court of Appeal and Justice L'Heureux-Dubé (dissenting) in *Starr v. Houlden*.[5]

B. The Charter and the Establishment of Public Inquiries

Can the mere establishment of a public inquiry infringe a Charter right? To answer the question it is necessary, first, to identify the Charter rights that might be involved, second, to identify the effects of establishing a public inquiry, and, third, to see whether those effects infringe any Charter rights so identified.

Anthony & Lucas[6] raised the possibility that the very terms of reference of a public inquiry could have the effect of infringing a fundamental freedom granted by the Charter. Their hypothetical example is an inquiry established to investigate the activities of a particular religious sect, which might be said to infringe the members' guarantee of freedom of religion under section 2. Presumably other hypothetical infringements of fundamental freedoms could be constructed. Possibly also a public inquiry into groups might infringe the equality

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4 [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527 at 542-43.

5 See (1990), 64 D.L.R. (4th) 285 at 291 (Ontario Court of Appeal) and (1990), 68 D.L.R. (4th) 641 at 695. The majority in the Supreme Court of Canada, having held that the inquiry in that case was beyond the powers of the province, did not deal with Charter issues.

6 Anthony, Russell J. and Lucas, Alastair R, *A Handbook on the Conduct of Public Inquiries in Canada*, (Toronto: Butterworths, 1985) at 8-9.

provision of section 15. We agree with Professor Wayne MacKay[7] that it would be only in the most unusual circumstances that the substantive provisions of the Charter would bar the creation of a particular inquiry. However, it is within the broad realm of possibility that the Charter has imposed further, though minor, constitutional limitations on a province's power to establish public inquiries.

There is a further question whether the establishment of a public inquiry could infringe any of the "Legal Rights" conferred by sections 7 to 14 of the Charter. Section 7 is the only one of these sections that could apply. Under it, the question is whether the mere establishment of a public inquiry could infringe the right that everyone has "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".

The establishment of a public inquiry creates probabilities and possibilities. It creates a probability that the inquiry will be conducted. An inquiry may necessarily involve an investigation of the causes of deplorable events or of the workings of an institution of government. If it does, its establishment creates a possibility that it will result in a report that includes findings that named individuals have engaged in conduct that would make them liable to criminal sanctions or civil actions. If coercive powers are conferred on the commission of inquiry, the establishment of the inquiry creates a possibility that individuals who have information, documents or things that are relevant to the inquiry will be compelled to testify or to produce, and that the commission may find some of those individuals blameworthy.

These effects are all potential, not actual. The establishment of a public inquiry has no effect on the life of anyone, their liberty or their security of person. Nothing can happen until the commission commences its inquiry and makes operative decisions. We do not think that under any but the most extraordinary circumstances the mere establishment of a public inquiry can be held to infringe a Charter right under section 7.

Conceivably, the terms of reference and surrounding circumstances of a particular inquiry might make an infringement of Charter rights inevitable.

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7 MacKay, A. Wayne, "Mandates, Legal Foundations, Powers & Conduct of Commissions of Inquiry", in A. Paul Pross, Innis Christie and John A. Yogis (eds.), *Commissions of Inquiry*, (Carswell, 1990) at 29, (1990) 12 Dalhousie L.J. at 1-216.

Conceivably, an appointing authority might establish an inquiry as part of a concerted conspiracy to destroy an individual. It is unlikely that this will ever happen. If it is a possibility, it would again create a constitutional limitation, though an unlikely one.

An appointing authority should consider the Charter before it establishes a public inquiry. As we have said, it is possible, though not likely, that the mere establishment of the inquiry will infringe a Charter freedom or right. Possibly the inquiry is likely to lead to infringements of Charter rights. If there is such a likelihood, the appointing authority should reconsider, both on grounds of prudence and on grounds of principle. If the legal proceedings surrounding the Nova Scotia inquiry into the Westray mine explosion go to appeal, they may give further guidance to appointing authorities.

C. The Charter and the Conduct of Public Inquiries

The great concern with public inquiries is the effect that the inquiry process may have on individuals. Allegations at hearings may destroy reputations. So may findings in reports. Public inquiries may be used to obtain evidence for criminal trials in ways that deprive accused persons of protections that they would have in criminal proceedings. The publicity given to public inquiries may prevent an accused person from getting a fair trial. There is no legal mechanism for the correction of injustices thus perpetrated. We will describe these concerns at greater length later in this report[8] through the voices of eloquent speakers and writers and the voices of consultants.

Consultants strongly urged on us that any accusatorial inquiry with coercive powers that focusses on the wrongdoing of individuals brings into play very stringent constraints of fundamental justice. They said that the terms of reference of any such inquiry should be drawn in such a way that the fundamental justice issues will be perceived.

Section 7 of the Charter, while it implies that the right to "life, liberty and security of the person" can be taken away, provides that it can be taken away only "in accordance with the principles of fundamental justice". Section 7 is supplemented by specific protections against unreasonable search and seizure (section 8) and against arbitrary detention (section 9). It is further supplemented

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[8] See pages 18 to 22.

by various rights for an accused. These include a right not to be compelled to be a witness against oneself; a right to a hearing before an independent and impartial tribunal; and a right to be tried only once (section 11). They also include a right not to have the witness's own incriminating testimony used to incriminate them (section 13).

Arguments can be made that these Charter provisions do not apply to a public inquiry because a public inquiry does not affect the rights they confer. Under these arguments, sections 7 and 9 do not apply because a commission of inquiry's report does not deprive a person of life, liberty or security of the person or cause a person to be detained.[9] Section 8 does not apply because although a commission of inquiry's demand to produce documents and things may constitute a seizure, it is not an unreasonable seizure. Section 11 does not apply because a public inquiry does not establish guilt or innocence and is not a proceeding against a witness charged with an offence. Section 13 does not apply to evidence given before a commission but rather to evidence in subsequent proceedings in which it is sought to introduce that evidence.

A commission of inquiry's report has no substantive legal effect. A commission of inquiry's findings of fact are merely statements of the commission's opinion about the facts. Prosecutors who consider inquiry transcripts or reports in deciding to lay charges do so on their own responsibility and under the power of their office, not under the inquiry or its report. A commission's proposals are only recommendations. A government that adopts them does so under its own responsibility and under the powers of its office. If a commission's report has no legal effect, it can be argued that it has no effect on Charter rights.

Despite these arguments, we do not think that the possible effects of the public inquiry process on an individual's rights should be ignored. The *Thomson Newspapers* case[10] upheld a compulsory testimony provision, but the diversity of views in the court suggests that the validity of such provisions without additional safeguards has not been finally settled. The view that the Charter takes effect at

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9 "Security of reputation" has not yet been included in "security of the person".

10 *Thomson Newspapers* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 196-97 (S.C.C.).

the public inquiry stage, rather than waiting until formal proceedings are launched against a "target", should not be overlooked. This is both a matter of prudence and a matter of principle.

How then should a reformed Public Inquiries Act be designed? The public interest in effective public inquiries must be balanced against the prejudice to individual interests that effective public inquiries may cause. Both the Charter and good public policy must be taken into account.

The recommendations that we make in this report, in conjunction with the Charter, will provide a system of protection for individuals and sometimes for corporations and organizations as follows:

(a) The Charter prohibits the subsequent use of testimony given at a public inquiry to incriminate the witness who gives it.

(b) The reformed Public Inquiries Act will provide

(i) that a witness cannot be compelled to give testimony about the subject matter of a charge against them;

(ii) that a commission of inquiry cannot make a finding of "misconduct", that is, discreditable conduct, without giving the "target" of the finding a due process opportunity to rebut the evidence on which the finding is made;

(iii) that a commission of inquiry's powers to compel the giving of testimony and the production of documents and things can be enforced only by the Queen's Bench on the commission's application or by summary conviction proceedings.

(c) The Queen's Bench, by judicial review, will be able to keep commissions of inquiry within their jurisdictions and impose standards of fairness.

(d) The Charter confers a right to be presumed innocent until proven guilty before an independent and impartial tribunal, which right would protect an accused if a public inquiry has prejudiced their right to a fair trial.

Of course, requiring a person to give testimony or produce documents, without more, infringes the person's liberty. This is true even if there is nothing in the testimony or documents that affects the rights or interests of the person. We think, however, that such compulsion is permitted by the Charter. Witnesses are compelled to testify in lawsuits and in many different kinds of proceedings without any suggestion to the contrary. The Charter will come into play only if a special circumstance causes a Charter infringement such as depriving a witness of a safeguard guaranteed by the criminal process.

CHAPTER 3 — ESTABLISHMENT AND POWERS OF PUBLIC INQUIRIES

A. Nature and Powers of a Public Inquiry

(1) What is an "inquiry"?

A public inquiry is one kind of inquiry. "Inquiry" is not a mystical or magical word. An inquiry, according to the Shorter Oxford Dictionary, is

> the action of seeking, esp. (now always) for truth, knowledge, or information concerning something; search, research, investigation, examination.

This definition is not limiting. Anyone can conduct an inquiry into anything. They can conduct it in any way they see fit, for example, by reading books and periodicals or by asking questions. Of course, no one is obliged to assist the inquirer unless the inquiry has some special legal standing.

(2) Inquiries at the instance of branches of government

Governments often need information. A government can ask its staff for the information, and the staff will seek for the information; that is, the staff will conduct an inquiry. In a less simple situation, a government may appoint a group of persons to seek for the information. The group may be called a "departmental committee" or an "interdepartmental committee" or it may be given a more pretentious designation such as "task force". The group can conduct the inquiry in any way its instructions permit, but, again, no one is obliged to assist it unless it has a special legal standing. The government may require other elements of government to assist the group, but it cannot impose a legal duty on the general public to assist in the governmental inquiry.

The Lieutenant Governor in Council, i.e., the executive branch of government, may appoint an individual or group to conduct an inquiry. If they do so by letters patent under the royal prerogative, the person or group can be called a "royal commission". Such an appointment is the highest form of official sanction that the executive branch of government can give, and a royal commission is given great deference and has a strong moral force. But even a

royal commission has no power to compel anyone to assist it unless some additional legal standing is conferred on it.[11]

Many statutes establish continuing bodies to conduct inquiries in specific areas of activity. An inquiry function under such legislation is likely to be accompanied by an advisory function. It may also be accompanied by a regulatory function. Such statutes usually confer special powers to require other persons to give the body information and assistance. The many bodies and functionaries on which statutes confer the powers of a commissioner under the Public Inquiries Act are examples of such continuing bodies. The Fatality Inquiries Act is an example of a statute that provides for a process that can be set in motion as occasion arises.

The legislative branch of government can also conduct inquiries. It is most likely to do so through a committee of the Legislative Assembly. Such a committee has the power to require members of the public to give testimony before it and to produce documents to it. A legislative inquiry may in some cases be an alternative to an inquiry established by the executive branch. Legislative inquiries are not, however, part of the subject matter of this project and we will not discuss them further.

(3) Inquiries under public inquiries legislation

Under the Public Inquiries Act, the Lieutenant Governor in Council may appoint a commissioner or commissioners to inquire into a subject and report. The resulting public inquiry, like any inquiry, is a search for truth, but its establishment under the Act turns it into a more complex operation.

The Public Inquiries Act confers upon a commission of inquiry power to compel persons who are in possession of information, including documents, to give it to the inquiry. That is the characteristic of inquiries under the Act and its counterparts elsewhere that distinguishes them from inquiries that have no statutory foundation. The need for such powers is the reason behind public inquiries statutes of this kind and for establishing public inquiries under them.

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11 *Attorney General of Quebec and Keable* v. *Attorney General of Canada and Solicitor General of Canada,* [1979] 1 S.C.R. 218 at 240.

Establishing a public inquiry under the Public Inquiries Act does have other consequences. It emphasizes the importance of the inquiry. It confers prestige on the commission of inquiry. By tradition at least, it gives both the Government and the public an assurance that the inquiry is independent. These consequences are not, however, unique to public inquiries. The establishment of a royal commission under the prerogative has these same effects. The coercive powers are the principal unique contribution of the Act.[12]

It does not follow that a government that establishes a public inquiry wants these operational advantages. It may want to defer decision; to shift responsibility; to defuse controversy; or to legitimize a decision already taken. But a public inquiries act should not take these possible ulterior motives into consideration. Its purpose is to provide machinery that is appropriate for the purposes of important inquiries that are in the public interest.

(4) Investigatory and advisory inquiries

A commission of inquiry has two functions. One is to ascertain facts. The other is to give advice.

A public inquiry that focusses on the facts surrounding an event or series of events and the causes of the events is often called an "investigatory" inquiry. An inquiry that focusses on broad general policy and the kind of facts that are relevant to broad general policy is often called an "advisory" inquiry. Although, in our view, this terminology is not precise enough for use in the law itself, it is useful for discussion purposes, and we will use it in this report.

Investigatory inquiries give rise to most of the problems that should be addressed by a reformed Public Inquiries Act. The reason is that they investigate conduct, and the investigation may damage reputations and careers or turn up evidence that leads to civil or criminal liability. But a reformed Public Inquiries Act should be suitable for both investigatory and advisory inquiries and for the hybrids that fall along the continuum between them.

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12 In *Mahon v. Air New Zealand,* [1984] 3 All E.R. 201 at 206 (P.C.), the Judicial Committee referred with apparent approval to a practice of establishing a public inquiry both under the prerogative and under the New Zealand Commissions of Inquiry Act.

B. When Public Inquiries May be Established

(1) Whether public inquiries should be abolished

As we have said earlier, the focus of our project has been on whether and how the Public Inquiries Act can be improved. Inevitably, however, the question whether it should be retained at all was raised, both in our own discussions and in consultation, and we will accordingly discuss it.

We will record some powerful dissenting voices.

First, Mr. Justice Lionel Murphy of the High Court of Australia:[13]

> The authority given to the commissioner to exercise such an important ingredient of judicial power as finding a person guilty of ordinary crimes, is in itself an undermining of the separation of powers. It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away. Many in governments throughout the world would be satisfied if they could establish commissions with prestigious names and the trappings of courts, staffed by persons selected by themselves but having no independence (in particular not having the security of tenure deemed necessary to preserve the independence of judges), assisted by government selected counsel who largely control the evidence presented by compulsory process, overriding the traditional protections of the accused and witnesses, and authorized to investigate persons selected by the government and to find them guilty of criminal offenses. The trial and finding of guilt of political opponents and dissenters in such a way is a valuable instrument in the hands of governments who have little regard for human rights. Experience in many countries shows that persons may be effectively destroyed by this process. The fact that punishment by fine or imprisonment does not automatically follow may be of no importance; indeed a government can demonstrate its magnanimity by not proceeding to prosecute in the ordinary way. If a government chooses not to prosecute, the fact that the

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13 *Victoria* v. *ABCE and BLF (No. 1)* (1982), 152 C.L.R. 25, 110 (H.C. Aust.).

> finding is not binding on any court is of little comfort to the person found guilty; there is no legal proceeding which he can institute to establish his innocence. If he is prosecuted, the investigation and findings may have created ineradicable prejudice. This latter possibility is not abstract or remote from the case. We were informed that the public conduct of these proceedings was intended to have a 'cleansing' effect.

Second, Professor Ed Ratushny:[14]

> The present use of public inquiries in Canada poses a threat to the basic principles of our criminal processes. That threat cannot adequately be met by solicitations of restraint in their use. Nor can it be met by increasing the procedural protections given to a suspect at an inquiry unless, of course, exactly the same protections are provided as are available at the criminal trial itself. Such approaches beg the essential issue, which is the gradual displacement of our criminal process by another form of effective adjudication. Providing further protections to witnesses at public inquiries is a desirable object from the point of view of the operation of those inquiries, themselves. However, this approach may only increase the willingness to sanction their use as a technique of avoiding the more comprehensive and precise protections which would otherwise be available.

Professor Ratushny's statement was based on an extensive analysis of three years of operation of the Quebec Police Commission Inquiry. He thought that publicly naming persons alleged to be involved with organized crime and putting into gaol persons who declined to answer incriminating questions were devices used by the Commission in a crusade against organized crime. While Professor Ratushny thought that different traditions in Quebec made such an inquisition more supportable there, he pointed to cases elsewhere in Canada, including Alberta, that, in his view, have suffered from at least some of the flaws of the Quebec procedure.

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[14] Ratushny, Ed, *Self-incrimination in the Canadian Criminal Process*, (Toronto: Carswell, 1979) at 392.

Third, an English Member of Parliament who was found by a tribunal of inquiry (whether correctly or not) to have used for private gain budget information improperly communicated to him:

> I would ask the right hon. and hon. Members to visualize the position in which I now find myself. I have been condemned, and apparently I must suffer for the rest of my life from a finding against which there is no appeal upon evidence which apparently does not justify a trial, and there is now no method open to me by which I can bring the true and full facts, before a jury of my fellow-men . . . If any good may come from this, the most miserable moment of my life, I can only hope that my position may do something to prevent any other person in this country being subject to the humiliation and wretchedness which I have suffered, without trial, without appeal and without redress.[15]

Fourth, Mr. Justice John Sopinka[16]:

> Therefore, in my view the breed of public inquiries which I consider to be repugnant are those which aim directly at the alleged wrong doing of specific individuals, yet operate without the traditional safeguards developed over the centuries to protect the individual and which we profess to cherish as a hallmark of our democratic system. Public inquiries that are little more than criminal investigations yet do not accord these fundamental protections are invalid. They amount to trials without safeguards. Such inquiries do not conform to our accepted notions of fairness, do not produce just results, and hence cannot be tolerated in a society such as ours.
>
> I find the argument that the rights of the individual ought to be reduced because of alleged public interest quite alarming. Frankly, it makes no sense to me whatsoever to develop a criminal justice system painstakingly, to take care at every stride to strike the correct balance between the individual and society,

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15 Quoted by Hallett, L.A., *Royal Commissions and Boards of Inquiry* (Sydney: Law Book Company, 1982) at 181, quoted from 600 (Gt. Brit.) *Parl. Deb.* (Commons).

16 Address to the CIAJ Conference on August 24, 1990.

> and then to toss the whole system to the winds every time a politically volatile impropriety turns up. It is precisely at such times that the criminal system with all its checks and balances is required most urgently. Granted the person scrutinized in an inquiry does not face the same penal consequences as an accused in a trial. However, the consequences can be equally devastating. For instance the damage to personal reputation and the loss of privacy that may result from any inquiry, even if that inquiry absolves the individual of blame, is immense. Personal reputation is for many as cherished a commodity as any; for it to be shattered by a flurry of unsubstantiated accusations is a senseless and cruel waste.

Finally, reference should be made to an article by Gordon F. Henderson Q.C.[17] Running through the article is a strong concern about the effect that commissions of inquiry have upon individuals and the need to restrict the damage by a system of controls. The suggested controls include a requirement of a legislative resolution before coercive powers are conferred; precision in terms of reference; application of the rules of evidence; respect for the privileges and immunities of witnesses; judicial review; and denying a commission's report status in another proceeding as evidence or to discredit witnesses.

These are powerful voices. They express valid concerns based on fundamental principles of the rule of law. Several of our consultants added their voices. A few would have gone so far as to abolish public inquiries for similar reasons. Others expressed concerns and made suggestions about how to assuage them.

These concerns relate to inquiries that focus on specific events and the specific responsibilities of specific individuals for those events. They might be grounds either for abolishing inquiries into specific events or for introducing greater safeguards for individuals, but they are not grounds for abolishing all public inquiries. We note also that *Starr v. Houlden*[18] has held that a provincial public inquiry cannot be used as a substitute for a criminal investigation and a preliminary hearing (though it is still true an inquiry into a larger subject can involve an inquiry into allegations of what amounts to criminal behaviour).

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17 Special Lectures of the Law Society of Upper Canada, 1979.

18 *Supra*, note 5.

The public interest requires that inquiries of some kind can be conducted into matters of great public importance. It would be absurd to suggest that governments and society must blunder ahead without assessing situations through inquiry. A government may want to formulate policy about the economic union and development prospects. A government may want to know whether the way in which its system of police and courts deals with the native peoples should be improved. A government may want to know why large financial institutions collapsed and whether its regulatory system malfunctioned. An inquiry into any of these subjects may also be necessary so that the public can know whether its institutions have functioned satisfactorily and, if not, how future malfunctioning can be avoided.

Many agencies conduct inquiries on behalf of the government or the public. Courts inquire into allegations of criminal conduct. Government officials, individually and in task forces or committees, inquire into matters referred to them by their government or perceived by them as a necessary foundation for advice to the government. Regulatory agencies inquire into matters under their jurisdiction. Judges appointed for each case inquire into the causes of fatalities. Advisory committees to governments, appointed formally or under order in council, inquire into matters referred to them by the government. Committees of the Legislature inquire into matters referred to them by the Legislature.

With all this panoply of investigatory agencies available, is there a need for public inquiries to be conducted under the Public Inquiries Act? To answer that question it is necessary to compare what the other agencies can deliver to what a public inquiry can deliver, and to consider whether the unique contribution of public inquiries, if there is one, is worth incurring the disadvantages of public inquiries.

A public inquiry is independent of government and can thus retain the confidence of the public, which may be essential in the public interest. A public inquiry is public in the sense that the public can be and usually is informed about what it does. It can also be public in the sense of tapping public opinion and information. It can assemble legal expertise or expertise in the subject matter of the inquiry, or both. It can look into the whole of a subject. It can devote resources to a large inquiry without impairing the functioning of the institutions of government and justice.

None of the other bodies and institutions mentioned has all of these characteristics. A court is independent and open, but it cannot inquire into the whole of a subject and does not have the resources or expertise that are necessary for some inquiries. Legislators and government officials are not independent. Regulatory agencies are restricted to specific areas and their independence may be open to question. Purely advisory agencies do not have power to compel testimony and production of documents. A public inquiry may therefore be better suited than any other agency to conduct a specific public inquiry into a particular subject of great public interest or it may be the only machinery available that is suited at all to conduct such an inquiry.

That is the case for providing legal machinery for public inquiries in the way that existing public inquiries legislation does or in the way that reformed public inquiries legislation may do. It is a strong case, and we think that it should prevail.

But, as we have already said, protections should be provided for individuals caught up in public inquiries. These protections should always be the greatest possible protections that are consistent with the effective conduct of inquiries. In some cases, the protection of individuals must override the public interest in the effective conduct of inquiries. "The challenge is to strike the proper balance between creative articulation of public policy and the proper protection of the rights of the individuals involved in the process."[19]

Given the strength of the case for making public inquiry machinery available, and given the existing and prospective safeguards that can be provided against abuse of the public inquiry process, we think that a reformed Public Inquiries Act should be enacted.

RECOMMENDATION 1

Public inquiries should be retained but should be governed by a reformed Public Inquiries Act along the general lines of the draft Act set out in Part IV of this report.

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19 See MacKay, *supra*, note 7 at 37.

(2) Present position and possible changes

If a reformed Public Inquiries Act is to be enacted, the first question is: for what purposes should it be possible to establish public inquiries under the Public Inquiries Act?

Section 1 of the existing Public Inquiries Act gives the Lieutenant Governor in Council power to establish public inquiries. It imposes three limitations on the power. These are as follows:

(a) the subject-matter must be within the jurisdiction of the Legislature.

(b) the inquiry must be considered expedient and in the public interest.

(c) the inquiry must be connected with the good government of Alberta or the conduct of the public business thereof, or, alternatively, must be into a matter of public concern.

The courts can decide whether a given subject-matter is within the jurisdiction of the Legislature.[20] But only the Lieutenant Governor in Council can decide whether an inquiry is expedient and in the public interest and whether the matter to be inquired into is a matter of public concern. Therefore, the Lieutenant Governor in Council has a virtually untrammelled discretion to establish public inquiries that are within the boundaries of the province's powers under the constitution. Judicial review of the exercise of the discretion to establish a public inquiry might be available in an extreme case. However, judicial review of the discretion has never been sought on other than constitutional grounds and is not a significant control on the establishment of public inquiries.[21]

Many whom we consulted felt that public inquiries are sometimes established for "political" reasons, that is, in order to give some advantage to the government administration that establishes the inquiry or to avoid some disadvantage to that government. This feeling was not limited to any one jurisdiction. It was strongest in connection with inquiries that are primarily

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[20] See, e.g., *Starr v. Houlden, supra,* note 5.

[21] Ontario's s. 6 allows the jurisdiction to appoint a commission to be challenged by application for a stated case.

investigatory, though it was not restricted to them. It was related to the perceived prejudice to individual interests that may result from a public inquiry.

Our consultants' concerns are valid. We share them. In our issues paper we suggested for consideration some word formulas that might ameliorate them: we suggested that the appointing authority might be required to declare that the public interest in an investigatory inquiry is "substantial"; or to declare that the public interest in having the inquiry outweighs the interests of those likely to be affected by the inquiry; or to consider a list of factors. Alternatively, the statute might forbid the establishment of a public inquiry if there is no real public interest involved or if there is enough evidence to mount a criminal charge covering a substantial part of the prospective inquiry. Some of our consultants supported a word change that would tend to fend off the establishment of inappropriate public inquiries.

The support for change, however, was not strong, and upon reflection we have come to two conclusions. One is that the wording of section 1 of the Act already directs the mind of the Lieutenant Governor in Council to the right questions. The other is that any change in the word formula that would be an effective safeguard against the establishment of inappropriate public inquiries would unduly restrict the flexibility which is the object of the Act. We therefore do not recommend any change in the criteria laid down by section 1 of the Public Inquiries Act for the establishment of public inquiries.

(3) Constitutional limitation based on division of powers

Another question is whether a reformed Public Inquiries Act should try to keep public inquiries within constitutional bounds.

As noted above, section 1 of the present Act authorizes the establishment of a public inquiry only if the matter inquired into is within the jurisdiction of the Legislature. The constitution has the same effect, at least if coercive powers are conferred on the inquiry. Section 1 therefore does not impose any restriction on the establishment of provincial public inquiries that the constitution has not already imposed.

The Supreme Court of Canada has recognized two kinds of matters that a provincial public inquiry with coercive powers cannot inquire into because they are under exclusive federal jurisdiction. One is the workings of a federal

institution.[22] The second is alleged criminal conduct of named persons where the inquiry is, in effect, a substitute for a police investigation and preliminary hearing and is therefore an intrusion into the federal jurisdiction over criminal law and procedure.[23] As noted above, it is possible that the Canadian Charter of Rights and Freedoms has imposed further limitations on the provincial inquiry power.[24]

The full effect of *Starr v. Houlden*[25] is not yet clear. Earlier Supreme Court of Canada cases held that a provincial inquiry can inquire into allegedly criminal conduct if the predominant feature of the inquiry is a subject within provincial jurisdiction, such as the administration of justice in the province. *Starr v. Houlden* did not overrule those cases. Indeed, it specifically approved *O'Hara v. British Columbia*,[26] which upheld a provincial investigation into criminal conduct for a larger purpose.

Two decisions, *Castle v. Brownridge* in the Saskatchewan Queen's Bench and *Phillips v. Richard* in the Nova Scotia Trial Divison,[27] have extended the principle of *Starr v. Houlden*. The inquiry in *Castle v. Brownridge* involved public officials; its terms of reference did not track the Criminal Code; and the terms of reference purported to include broader purposes than a criminal investigation. The inquiry in *Phillips v. Richard* did not name individuals and its terms of reference did not track the Criminal Code. In each case, the court held that the inquiry was a substitute for a criminal investigation under *Starr v. Houlden*. Other cases have construed *Starr v. Houlden* fairly narrowly: see *Fleischer* v. *B.C.*;[28] *Re Ontario (Colter Commission) Inquiry into Niagara Regional Police Force*[29] and *Cross v.*

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22 *Attorney General of Quebec and Keable* v. *Attorney General of Canada, supra,* note 11.

23 *Starr* v. *Houlden, supra,* note 5.

24 See Chapter 2.

25 *Supra,* note 5.

26 *O'Hara* v. *British Columbia, supra,* note 4.

27 *Castle v. Brownridge,* [1990] 6 W.W.R. 354 (Sask. Q.B.) and *Phillips v. Richard* November 13, 1992, Action 83851 (Nova Scotia S.C.T.D.). This decision is under appeal.

28 (1990), 49 B.C.L.R. (2d) 23 (B.C.S.C.).

29 April 30, 1990 (a decision of the Ontario Commission of Inquiry).

Wood.[30] Although other provincial inquiries have been established since *Starr v. Houlden*, there may be an "inquiry chill", at least for a time.

We do not think that the province's power to establish a public inquiry should be circumscribed further. If a matter of sufficient public importance arises anywhere within provincial competence it should be possible to hold a public inquiry. Nor do we see any way in which a reformed Public Inquiries Act could give guidance about constitutional propriety to the appointing authority and its advisers other than by pointing out, as section 1 of the Alberta Act already does point out, that the matter inquired into must be within provincial competence.

(4) Joint federal-provincial inquiries

We think that it should be possible for two governments to establish a joint public inquiry. Sometimes it is in both the federal public interest and the provincial public interest to hold a public inquiry into the same subject matter. An example is the Royal Commission on the Ocean Ranger Marine Disaster, which was appointed jointly by the governments of Canada and Newfoundland to inquire into the sinking of a semi-submersible drilling unit on the Grand Banks. In such a case, establishing a joint inquiry would avoid duplication of effort and would thus be efficient. It would also avoid duplication of the harassment of those involved in the events that are investigated.

Neither the Public Inquiries Act nor the federal Act says that the Lieutenant Governor in Council and the Governor in Council cannot each establish a public inquiry into the same subject matter. Nor does either Act say that each of them cannot appoint the same commissioners to conduct the inquiry. Differences between the two Acts are not likely to cause problems, and practical difficulties can probably be overcome by negotiation between the two levels of government. This was the case in the Ocean Ranger inquiry.[31] However, we think that, in order to avoid doubts, a reformed Public Inquiries Act should facilitate the establishment of joint public inquiries. It can do this by providing that nothing in the Act precludes the establishment of joint inquiries.

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30 [1991] 2 W.W.R. 288 (Man. C.A.).

31 See the discussion of Australian joint Commonwealth-state inquiries in Campbell, Enid, *Contempt of Royal Commissions*, (Monash, 1984) at 9-10. For the functioning of the Ocean Ranger inquiry, see Grenville, David M., *The Role of the Commission Secretary*, in Pross, *supra*, note 7 at 53-54.

RECOMMENDATION 2

(1) A public inquiry should be established only if

(a) it is expedient and in the public interest that the inquiry be held, and

(b) the matter inquired into is within the jurisdiction of the Legislature and either concerns the good government of Alberta or the conduct of government business or is a matter of public concern.

(2) Nothing in a reformed Public Inquiries Act should preclude the establishment of joint public inquiries involving the federal government or other provinces.

Draft Act, section 2.

C. Establishment and Delineation of Public Inquiries

So much for questions about the boundaries of the jurisdiction to establish public inquiries. The next question is: who should have power to establish public inquiries within those boundaries?

No consultant recommended that any lesser authority than the Lieutenant Governor in Council should be authorized to establish public inquiries, and we see no reason to make such a recommendation. The only question of substance is whether a resolution of the Legislative Assembly should be required. Such a requirement would follow the model of the United Kingdom, which requires a legislative resolution.

The Legislative Assembly's consideration of a legislative resolution might give a chance for sober second thought. The fact or prospect of a public debate might inhibit a government from establishing an inappropriate public inquiry (though, as against that, the debate might also result in damaging statements being made about prospective targets from behind the shield of parliamentary privilege and with no opportunity of rebuttal). These are the arguments for requiring a legislative resolution.

While the question is one of judgment about which opinions can readily differ, we doubt that requiring a legislative resolution would have much deterrent value. For one thing, a government can usually get a legislative resolution if it wants one. For another, oppositions tend to ask for more public inquiries than governments want to give. It is more flexible and efficient to leave the establishment of public inquiries to the Lieutenant Governor in Council. We think that the benefits of flexibility and efficiency outweigh the doubtful benefits of requiring a resolution of the Legislative Assembly. Further, we tend to think of a public inquiry as an administrative process that falls naturally to the executive branch of government, acting at its highest level. For these reasons, we think that the Lieutenant Governor in Council should continue to have the power to establish public inquiries.

We think also that the Lieutenant Governor in Council should have the power to establish the terms of reference within which a public inquiry must operate. Some consultants thought it important that the commission of inquiry that conducts a public inquiry should have an opportunity to consider the terms of reference in order to avoid the inefficiencies or even disasters that can come from incautiously drafted terms of reference. We agree that it may well be prudent for a prospective commissioner to review proposed terms of reference and to decline to act if they are not satisfactory, but we think that the ultimate authority to define the inquiry should rest with the Lieutenant Governor in Council.

None of the decisions involved in the establishment of a public inquiry should be subject to judicial review.

D. Appointment of Commissions of Inquiry

(1) Power to appoint commission

It is clear, we think, that the power to establish a public inquiry must include the power to choose the members of the commission of inquiry and to appoint them. Appointment by an independent authority might enhance the independence of a public inquiry but we do not think that such a procedure would be practical.

(2) Qualifications of commissioners

An argument can be made for requiring an investigatory commission to include a commissioner with a legal qualification. An argument can also be made for a requirement that commissioners must have qualifications appropriate to the purpose of the inquiry they are to conduct. However, we doubt the utility of such legislative directions or guidelines. The Lieutenant Governor in Council should have the power to choose the members of a commission of inquiry in light of specific circumstances.

(3) Judges as commissioners

A specific question that often arises is: should judges be appointed to commissions of inquiry? Historically, they often have been appointed, particularly to investigatory inquiries. On the one hand, they are seen as independent and impartial and accustomed to dealing with complex factual questions. The public's confidence in judges leads to public confidence in the results of inquiries presided over by judges. A judge's security of tenure enables them to take positions that are unpalatable to those in power. On the other hand, investigatory public inquiries bring judges into politically controversial situations and may damage their reputations for independence and impartiality.

Judges themselves hold differing views. This division of opinion was found among our judicial consultants. Two examples from overseas illustrate the differences. The first is the 1966 U.K. Salmon Commission, which thought that investigatory public inquiries should be headed by a judge. The second is the higher judiciary of the Australian State of Victoria, which has taken the position that conducting a public inquiry is not consistent with judicial office. The Canadian Judicial Council, while not condemning the appointment of judges to commissions of inquiry, has indicated great reservations about them and has established a protocol under which a Minister of Justice or Attorney General should, as the first stage in the appointment process, discuss a prospective appointment with the chief justice of the court involved.[32]

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[32] *Commentaries on Judicial Conduct*, (Cowansville (Que.): Les Editions Yvon Blais Inc, 1991) at 97-100.

Most of those whom we consulted tended to assume that judges will continue to be appointed to investigatory public inquiries, and some of them welcomed this. Writings on the subject reflect divergent views.[33] The Law Reform Commission of Canada thought that the question should be decided by the Cabinet in each case, having regard to the conflicting considerations.[34]

We think, like the LRCC, that the question should be left to be decided by the appointing authority in each case. We do not think that a judge is obliged to accept an appointment to a public inquiry. A judge who is asked to be a commissioner will presumably consult the chief justice of the court before accepting the appointment, both because of the Canadian Judicial Council's protocol and because the work of the court will be affected by the judge's absence. We do not think that the statute need say anything on the subject.

(4) Vacancies on a commission of inquiry

The Lieutenant Governor in Council should have power to replace a commissioner who resigns, becomes incapable of serving or is dismissed. It does not matter whether the commissioner is a sole commissioner or one of a number. Section 20 of the Interpretation Act would authorize the Lieutenant Governor in Council to fill vacancies, but we think that it would be useful for a reformed Public Inquiries Act to include a specific provision to this effect.

RECOMMENDATION 3

The Lieutenant Governor in Council should have power, upon being satisfied of the things set out in Recommendation 2,

(a) to establish public inquiries,
(b) to define their scope,
(c) to choose the members of the commission, and
(d) to fill vacancies arising from resignation, incapacity or dismissal.

Draft Act, section 2.

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33 E.G., Le Dain, Gerald E., "The Role of the Public Inquiry in our Constitutional System" and Willis, John, "Comment on Le Dain" in Ziegel (ed.), *Law and Social Change* (Osgoode/York, 1973) at 79 and 98-101 respectively.

34 LRCC Report 13, *supra*, note 2 at 32-33.

CHAPTER 4 — CONDUCT OF PUBLIC INQUIRIES

A. Introduction

Public inquiries should be independent. They should function openly. They should function effectively. They should strike a proper balance between two conflicting sets of interests. One is the public interest in independent, open and effective inquiries. The other is the interest of individuals in reputations, careers, freedom from criminal and civil liability, and privacy.

In this chapter we consider each of these propositions and make recommendations to give effect to them.

B. Independence of Public Inquiries

(1) General principle

Should a public inquiry under a public inquiries act be independent of its appointing government? The answer is yes. The independence of a commission of inquiry is a benefit both to appointing governments and to the public. It assures the public that the investigation of facts and analysis of issues is carried on by a body not influenced by the partisan political exigencies of a specific administration. It enables a government to assure the public that the inquiry will not be diverted by partisan considerations from its search for the truth. A reformed Public Inquiries Act should, in our opinion, reflect the principle that public inquiries should be independent.

Are commissions of inquiry in fact independent of their appointing governments? At first blush, the answer appears to be no. An appointing government can choose commissioners who will give the answers that it wants. It can dismiss commissioners.[35] It determines the commission's terms of reference. It probably can give directions to a commission by order in council.[36]

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35 E.g., the dismissal by the Governor in Council of members of the Royal Commission on New Reproductive Technologies. This seems to confirm the existence of a general power to dismiss commissioners, at least on a *de facto* basis.

36 Mr. Justice David McDonald said that a government could not give directions *except* by order in council: *Re Commission of Inquiry Concerning* (continued...)

It controls a commission's budget and can starve the commission for money. It can exert pressure on a commission by saying that it will not implement recommendations that it does not like.

Nevertheless, public inquiries are generally perceived to be independent of the governments that appoint them. The OLRC report has said so categorically.[37] So did the LRCC.[38] The general perception says so. But if governments have the means of control mentioned above, how does it come about that commissions of inquiry act as if they were independent of government and that the public accepts their independence?

Mr. Justice McDonald attributed the independence of commissions of inquiry to tradition.[39] An Australian commentator attributed it to the fact that the public expectation of independence is a political reality that the executive cannot ignore.[40] Are tradition and public opinion sufficient safeguards? They have been. Should they nevertheless be given legislative support? We think that they should. Tradition can be forgotten and public expectations can be overridden. We think that a reformed Public Inquiries Act should require public inquiries to be independent.

What is meant by "independence"? The principal definition given by the Shorter Oxford Dictionary is: "not depending upon the authority of another; not in a position of subordination; not subject to external control or rule; self-governing". A later definition is "not influenced or biased by the opinions of others; thinking or acting for oneself". In the context of public inquiries, the primary meaning of "independence" is that a commission is not part of or partial to the appointing government nor controlled by it, and that the commission makes its own decisions.

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[36](...continued)
Certain Activities of the Royal Canadian Mounted Police (1979), 94 D.L.R. (3d) 365 at 374.

[37] OLRC, *supra*, note 2 at 11.

[38] LRCC, *supra*, note 2 at 20. For similar statements in the literature see Le Dain, Gerald E., *supra*, note 33 at 79-97 and MacKay, A. Wayne, *supra*, note 7 at 34.

[39] *Re Commission of Inquiry, supra*, note 36 at 371-72.

[40] Hallett, *supra*, note 15 at 49-50.

The Act can implement the principle of independence by requiring the Lieutenant Governor in Council to order that an *independent* inquiry be made into whatever matter is under consideration. In context, that means that the inquiry must not be controlled or directed by the appointing government and that it must be conducted by persons who are not under the control or direction of that government. This is a heavy load for the single word "independent" to bear. However, such a requirement would, in our view, inhibit governments from appointing commissions of inquiry that are not independent, and it would tell commissions that they should act independently. It would also provide the public with a touchstone to test the propriety of a commission appointment.

In summary, we recognize that a commission of inquiry does not now have the usual badges of independence, particularly security against being dismissed. We recognize that a commission appointed under our recommendation will not have those usual badges. However, we think that public inquiries must be under the ultimate control of the political process, and we think that their independence in fact will be sufficiently protected by tradition, public expectations and political pressures, supported by a statutory provision making independence a condition of appointing a public inquiry.

RECOMMENDATION 4

The reformed Public Inquiries Act should require that a public inquiry be independent.

Draft Act, section 2.

(2) Control of cost and delay

(a) Budgetary control of public inquiries

Public money pays for a public inquiry. The Government is accountable to the Legislature for the way in which public money is spent, and the Legislature is accountable to the electorate. The Government should therefore, as part of the process of establishing a public inquiry, consider the cost and ensure that it is properly controlled. But if a commission of inquiry is to be independent, it must have access to public funding that is sufficient to enable it to conduct its inquiry effective.

A reformed Public Inquiries Act should establish a framework within which the conflicting requirements of Government accountability and commission effectiveness and independence can be dealt with. We do not think, however, that this report should try to set out a detailed plan for fitting that framework into the intricacies of government finance. Instead, we will make a recommendation setting out the essential features of the framework and leave the detail to be worked out when a reform Act is enacted.

RECOMMENDATION 5

(1) Detailed estimates of the cost of a public inquiry should be established when the inquiry is established or soon thereafter as is practicable. Consultation with the commission of inquiry is desirable, but the minister who recommends the establishment of the inquiry should be responsible for ensuring that the estimates are prepared, necessary approvals given, and the money appropriated by the Legislature or by special warrant.

(2) The estimates should be

(a) tabled in the Legislative Assembly, either at the time they are approved or when the Assembly next sits, and

(b) published in the Alberta Gazette at the time of approval.

(3) The same procedures should apply to changes in the estimates that are needed from time to time.

(4) Subject to standard accounting controls of the Government and any ground rules laid down as to rates payable for services and facilities required for the inquiry, the spending of the money, once it is properly allocated, should be in the discretion of the commission of inquiry.

(5) Costs of participants that the commission of inquiry recommends for payment should be dealt with by the same budgetary process.

Anthony and Lucas, in their handbook on public inquiries,[41] say that a commission of inquiry must have sole discretion over the spending of money. They do recognize, however, that a commission will have to provide a budget and that it will have to go back to the government in order to fund any overruns. In general, we think that our recommendation is consistent with their views. One significant difference, however, is that in their view, a commission should not be bound by government-prescribed rates of remuneration and tendering procedures. We agree that the exigencies of an inquiry are often different from those of government departments and require different treatment. However, we think that any necessary adjustments to usual allowances should be worked out between the government and the commission in the course of working out the budget for the inquiry.

(b) Date for completion

Public inquiries often take much longer than expected. Delay is a problem. Should a deadline be imposed on a public inquiry?

Imposing a deadline takes a major decision out of the hands of a commission of inquiry. It is likely to require the commission to go back to the government for the favour of an extension of time. It therefore detracts from the commission's independence. We do not think, however, that it does so significantly. Commissioners can decline to accept appointments if the initial specified time is too short, and they can decline to act further if a necessary extension is refused. The government in such a case will have to bear the political responsibility for having provoked them into such action.

A deadline may make it difficult or impossible for a commission of inquiry to do an adequate job. In *Mahon v. Air New Zealand*,[42] for example, the Judicial Committee of the Privy Council thought that time pressures were in large part responsible for deficiencies in a royal commission's report and thus for the

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41 Anthony and Lucas, *supra*, note 6 at 41-44.

42 *Supra*, note 12 at 204.

controversies and litigation that erupted after the commission issued its report. But commissioners can refuse to agree to act if a deadline is too short.

On the other hand, a deadline can help to concentrate the minds of those involved. The OLRC therefore thought that the Act should *require* an order in council that establishes a public inquiry to impose a termination date.[43] We think it enough for the Act to *authorize* the order in council to do so. A permissive provision of that kind would bring the point home to the minds of those involved in the establishment of a public inquiry without requiring them to impose a termination date if one is not appropriate. The power to impose a termination date should, of course, include the power to change it, and a commission should be able to deliver its report even after the termination date so that failure to meet a deadline will not cause the loss of the commission's work.

RECOMMENDATION 6

The Lieutenant Governor in Council should be authorized to specify in the order in council establishing a public inquiry a date by which the inquiry is to be finished and its report delivered, with power to substitute another date from time to time. A commission of inquiry that misses a deadline should still have power to complete and deliver its report.

Draft Act, section 2(1)(c),(d) and (3).

(3) Specific measures protecting independence

(a) Introduction

We have said above[44] that a commission of inquiry should be independent. That is all very well. But its independence should be supported by specific legislative provisions that deal with specific aspects of independence. The OLRC, though it did not make a recommendation for a general statement of the independence principle in the legislation itself, recommended that the principle of independence should guide the conduct of public inquiries and that the

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43 *Supra*, note 3 at 210-11; Recommendation 20 at 217.

44 See Recommendation 4 at page 34.

"central features" of independence should be protected. The OLRC listed the following central features: freedom of a commission to conduct its proceedings; freedom to deliver its report for public release; power to retain offices, staff, counsel, investigators and other personnel; and immunity from civil suit. These are included in the discussion that follows.

(b) Control of commission

An act or decision of a majority of a commission of inquiry should usually be an act or decision of the commission, that is, that the majority should control the commission. A minority should, of course, have a right to issue a dissenting report. A commission as a whole should be responsible for its actions, and majority control is the device to achieve this responsibility. In order to promote efficiency, however, a commission should be able to delegate the power to make administrative and procedural decisions.

Section 17(1) of the Interpretation Act says that if an enactment requires something to be done by more than 2 persons, a majority of them may do it. Section 17(2)(a) and (b) say that at least half of the members of a commission are a quorum and that anything done by a majority of the members present, if the members present are a quorum, is deemed to have been done by the commission. These provisions are satisfactory in their result, but for two reasons we think that a reformed Public Inquiries Act should contain its own provisions. The first reason is that including the provisions in the governing statute will make them more easily accessible and less likely to be overlooked. The second is that we think that they should be amplified by a provision authorizing two kinds of delegation. A commission should be able to delegate the power to make procedural and administrative decisions. It should also be able to delegate the power to conduct part of its inquiry.

Section 17(2)(c) of the Interpretation Act contains a further provision that is useful. It enables a commission of three or more members to continue to act despite a vacancy so long as the remaining number of commissioners is not less than a quorum. We think a reformed Public Inquiries Act should contain this provision as well.

While we think that the rules about control of a commission that we have recommended should be the usual rules, we think that it should be open to the

Lieutenant Governor in Council, in the interests of efficiency, to prescribe different rules for a particular inquiry.

RECOMMENDATION 7

Unless the order in council establishing a public inquiry otherwise provides,

(a) an act or decision of a majority of

(i) the commissioners, or

(ii) the commissioners present at a meeting of the commission if the commissioners present constitute a quorum

should be an act or decision of the commission;

(b) half of the members of a commission should be a quorum;

(c) a commission should be able to function despite vacancies if the number of the remaining members is not less than a quorum;

(d) a commission should have power to authorize a properly qualified person to inquire into a matter within the scope of the inquiry;

(e) a commission should have power to delegate the power to make procedural and administrative decisions and to revoke any such delegation.

Draft Act, section 4(2), 6.

(c) Counsel and staff

Section 2(1) of the Alberta Act gives a commission of inquiry power to engage "counsel, clerks, reporters and assistants" as well as expert help. We think

that the section should be continued. We agree with the OLRC[45] that this is an aspect of independence. However, since public money is involved, we think that this recommendation should be subject to our recommendation about budgetary control.[46]

RECOMMENDATION 8

A commission of inquiry should have power, subject to our recommendation about budgetary control, to engage counsel and staff.

Draft Act, section 4.

(d) Control of proceedings

The Public Inquiries Act confers some specific powers upon a commission and says that the commissioners are appointed to "make the inquiry". This implies that the commission controls the inquiry and can conduct it as it thinks fit. We think, however, that it would be better for a reformed Public Inquiries Act to say specifically that a commission controls its proceedings.

We think that it would also be useful to say that a commission has the power to maintain order in its proceedings and that it is entitled to require the assistance of a peace officer in doing so. This is probably self-evident, but, again, it might as well be stated. This would be a power exercisable by a commission, as differentiated from the contempt power, which would be exercised by the Queen's Bench.[47]

We note parenthetically that we do not recommend, as did the LRCC, that the statute provide that a commission must establish and publish its rules of practice and procedure.[48] The LRCC's reasons were related to efficiency of operation and to giving guidance to the public in dealing with the commission

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45 OLRC, *supra*, note 3 at 206; Recommendation 15 at 216.

46 See Recommendation 5 at pages 35-36.

47 See Recommendation 20 at pages 78-80.

48 LRCC, *supra*, note 2, draft Act, s. 3.

of inquiry. While we agree that putting out rules may often be sensible, we think that it is better for a commission to assess whether the publication of rules would be useful in the particular situation and that a statutory requirement could impose an unnecessary rigidity. The OLRC expressed views similar to ours.[49]

RECOMMENDATION 9

A commission of inquiry should have

(a) the power to control its proceedings, and

(b) the power to maintain order in its proceedings and to require the assistance of a peace officer in doing so.

Draft Act, section 11.

(e) Control of evidence

Control of the admission of evidence is an important aspect of the control of the proceedings of an inquiry. The rules of evidence that apply in court proceedings do not now, as a matter of law, apply in a public inquiry. Is that as it should be? The present Alberta Act deals with privileges and statutory confidentiality but does not say anything about admissibility. What, if anything, should a reformed Public Inquiries Act say on the subject?

A number of our consultants thought that the rules of evidence should apply to investigatory inquiries, or, at least, that a commission of inquiry should make adverse findings against an individual only on evidence that is legally admissible. An investigatory inquiry is similar to a trial; its findings can affect civil and criminal liability; and media reporting of hearings and reports can have a devastating effect on reputations and careers. A middle ground was that an investigatory inquiry "should have regard to" the rules of evidence without being bound by them. However, the more widely held view was that the rules of evidence are not appropriate for a public inquiry.

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[49] OLRC, *supra*, note 3 at 211.

A lawsuit is a party-driven adversarial proceeding for the adjudication of a specific dispute by an impartial and largely passive arbiter. The rules of evidence are designed to give due process in such proceedings. They are not appropriate for an advisory inquiry, or even for an investigatory inquiry, which is a searching commission-driven inquiry for the elucidation of events for the benefit of government and public. They would unduly inhibit the gathering of fact and opinion that is one of the principal functions of a public inquiry. Their application would make the proceedings of a public inquiry unduly legalistic.

The LRCC and the OLRC took a somewhat different approach. The LRCC draft Act[50] says that all relevant evidence is admissible unless its probative value is substantially outweighed by danger of undue prejudice or adverse effect on the inquiry process, and provides that "relevant evidence" means "evidence that has any tendency in reason to prove a fact in issue that is related to the mandate of the commission". The OLRC[51] recommended that a commission should not be bound by the rules of evidence.

A somewhat different question is whether a commission of inquiry must listen to all evidence that can reasonably be described as relevant. The Niagara Regional Policy Inquiry appears to have proceeded on the basis that it must, and *Re Bortolotti and Ministry of Housing*[52] said so. Although the *Bortolotti* decision is not binding in Alberta, it is a persuasive authority. The OLRC recommended that a commission should have a discretion to disallow evidence or cross-examination if it determines that the relevance of the evidence would be outweighed by its prejudicial impact.

We think that a commission of inquiry should have broad powers both to admit evidence and to exclude evidence. This is an aspect of independence, as a commission to which an inquiry is entrusted should in general be able to determine how to conduct the inquiry. It is also an aspect of efficiency, as rules that interfere with a commission's power to control its proceedings limit its ability to conduct an inquiry effectively. We think that a reformed Public Inquiries Act should allow but not compel a commission to admit all relevant evidence, thus

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50 LRCC, *supra*, note 2, draft Act, s. 10.

51 OLRC, *supra*, note 3 at 205; Recommendation 13 at 216.

52 (1977), 15 O.R. (2d) 617 (C.A.).

enabling the commission both to give proper protection to private interests and to get on with its proceedings.

RECOMMENDATION 10

A commission of inquiry

(a) should not be bound by the rules of evidence, and

(b) should have a discretion to refuse to receive evidence.

Draft Act, section 12

(f) Immunities

(i) Commissioners

Should the members of a commission of inquiry be exposed to lawsuits for what they do in the course of an inquiry? This is an important question of independence.

The question of civil liability arises most often in relation to judges. At common law, according to Halsbury, persons exercising judicial functions in a court are "exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity". In a superior court, the immunity applies even to a judge who acts without jurisdiction. In order to be liable for what they do, a judge must at least know that they have no jurisdiction. There seems to be an additional element required for liability, which may be "not acting judicially" or "acting in bad faith". A superior court judge has absolute immunity for anything said or done in the belief that they have jurisdiction.[53]

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[53] See Halsbury's Laws of England, (4th ed) reissue, vol. 1(1), paras. 212, 216, which states the immunity somewhat differently from (4th ed.), vol. 1, paras. 206, 210. The latter was cited in *Morier v. Rivard*, [1985] 2 S.C.R. 716 at 738. The judgment referred extensively to the English authorities and noted that in the principal authorities Lord Denning and Lord Bridge of Harwich had not cited authority for their somewhat different statements but found it unnecessary "to decide the merits of that for this appeal": see page 744.

It is not clear whether these immunities apply to public inquiries. In *O'Connor* v. *Waldron*,[54] an appeal from Canada, the Judicial Committee of the Privy Council held that a commissioner appointed under the Combines Investigation Act could be sued for defamation by a barrister who appeared before the commission. On the other hand, in *Trapp* v. *Mackie*,[55] the House of Lords said that whether or not *witnesses* appearing before a tribunal had the same absolute privilege against action for defamation as witnesses in court depended on how "court-like" the tribunal was. Lord Diplock listed a number of factors to consider in making this determination. The privilege was held to apply to a local inquiry made pursuant to the Education (Scotland) Act.

In *Morier* v. *Rivard*,[56] the majority in the Supreme Court of Canada held that a statutory immunity displaced the common law stated in *Trapp* v. *Mackie*. In that case, the Quebec legislation provided that commissioners had the protection and privileges of a Superior Court judge for any act done or omitted in the execution of their duty.[57] The Supreme Court held that members of a police commission could not be sued for having made findings against individuals without giving them their statutory right of rebuttal.

Section 4 of the Alberta Act reads as follows:

> **4** The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.

If section 4 is read literally, it confers upon a commissioner "the same privileges and immunities as a judge of the Court of Queen's Bench". There is a difficulty of interpretation, however, because the statement is made at the end of a section dealing with attendance of witnesses and could be interpreted as

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54 [1935] A.C. 76 (P.C.).

55 [1979] 1 All E.R. 489 (H.L.).

56 *Supra*, note 53.

57 Another statute conferred on a police commission the immunity of a commission under the Quebec Act.

applicable only to what a commission does with respect to enforcing the attendance of witnesses.

A public inquiries act could (a) confer upon the commissioners who constitute a commission of inquiry the immunities of a superior court judge; (b) confer such immunities unless a commissioner acts maliciously or in bad faith; (c) confer only immunity against defamation actions, or (d) do something else within that general range. The LRCC proposals would confer only immunity against defamation actions, while the OLRC's proposal would confer the broader immunity of a superior court judge.[58]

Immunity from liability will enable a commissioner to escape the consequences of wrongdoing committed during a public inquiry. That is not a desirable result. However, such wrongs happen rarely, if at all, and the public interest in having public inquiries effectively conducted is strong and is best served by protecting commissions from being sued if someone does not like what they do. We therefore think that a commission should be immune from action to the same extent as a superior court judge. We do not think that an exception should be made for cases in which a commissioner, acting within their actual or supposed jurisdiction, acts maliciously or in bad faith, so long as they believe that they have jurisdiction. That is not because we think that a commissioner who acts maliciously or in bad faith should be protected, but rather because making the exception would expose honest commissioners to actions alleging malice or bad faith and thus compromise their independence.

(ii) Witnesses

Witnesses in court have absolute immunity from action for any testimony given in court, even if it is spoken or written "maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed".[59] The LRCC[60] proposals would give a witness in a public inquiry

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58 Recommendation 16 at 216.

59 Halsbury, *supra*, note 53, para. 212; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1891-94] All E.R. 429. Note that s. 22 of the Alberta Evidence Act imposes upon a witness who defaults in obeying a subpoena civil liability to the person issuing the subpoena for damage suffered by that person. Might giving false testimony be a default in obeying the subpoena?

immunity against actions for defamation, but only if the witness did not act out of malice.

As we have said earlier, Lord Diplock in *Trapp v. Mackie*[61] listed four factors that determine whether a tribunal is "court-like" enough to attract immunity for witnesses. First, is the tribunal "recognised by law"? "Merely domestic" tribunals will not attract the immunity. Secondly, what is the nature of the investigation? Is it a dispute between parties? Does the decision affect the criminal or other status of an individual? The immunity will not extend to tribunals whose decisions are administrative in nature, even if they use judicial procedures. Thirdly, does the tribunal use court-like procedures? Fourth, what are the legal consequences of the tribunal's decision? Is the decision final, or merely advisory? In respect of the first and sometimes the third factors, a public inquiry is on the court-like side of the line. In respect of the second and fourth, arguments could be made both ways. The result of applying the four factors is inconclusive.

There is a dearth of Canadian cases that deal with the immunity of witnesses testifying before a public inquiry. People who have been censured by commissions' reports have not flocked to court to sue inquiry witnesses for defamation or other torts. This may be the result of a general assumption that court-like privilege applies to these witnesses, whether or not the assumption is true.

It is unfair to compel someone to testify before a public inquiry and then to allow him or her to be sued for defamation. Further, it is in the state's interest, in order that the truth may be ascertained, that witnesses feel free to tell the truth as they see it. Such a consideration does not apply with as much force to a merely advisory commission, since testimony is usually voluntarily given to advisory commissions by persons who want to be heard. However, even in such a case there is a public interest in having witnesses speak frankly. We think that a witness before a public inquiry should have the same immunity as a witness in court. In order to protect honest witnesses against the threat of lawsuits based on allegations of malice, we think that the immunity should be absolute.

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[60](...continued)

[60] LRCC, *supra*, note 2, draft Act, s. 9.

[61] *Supra*, note 55.

(iii) Counsel

Counsel play different roles in the inquiry process. They can be commission counsel, counsel for interest groups, counsel for witnesses, or counsel for persons whose conduct is in issue in an inquiry. Commission counsel are often charged with deciding what evidence to present to the commission and with examination or cross-examination of witnesses; their role is in some ways analogous to that of a prosecutor. Counsel representing persons whose conduct is in issue, on the other hand, play a role much like that of a barrister acting for a private party to a civil or criminal proceeding; they may examine their own client or cross-examine other witnesses, but their task is to present their client's side in the most favourable way. Any counsel who appears may make statements or present argument that reflects on someone.

At common law, barristers have the same absolute immunity for anything said or done during court proceedings as do judges and witnesses. The situation for prosecutors used to be thought to be the same. However, in *Nelles* v. *Ontario*,[62] the Supreme Court of Canada held that prosecutorial immunity is not absolute; a prosecutor may be liable for the tort of malicious prosecution. Justice Lamer said that questions of privilege must be determined on a case by case basis, considering such factors as the role of the prosecutor, the rights of the injured party, the misconduct involved, and the public interest in either supporting or denying the immunity.

None of the public inquiries acts, whether provincial or federal, deals with the immunity of counsel, so the question then becomes whether the common law immunity of counsel that applies in court proceedings applies in a public inquiry. Counsel are likely to have at least a qualified immunity, since they speak under a duty and the commission has an interest in hearing what they say. The LRCC proposal[63] would grant commission counsel an absolute immunity against liability for defamatory statements made in the course of their duties but is silent about other counsel and other torts.

We think that all counsel should have the same immunity as counsel appearing in court for things said in hearings and in arguments before commissions of inquiry. In addition, commission counsel should have the same

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62 [1989] 2 S.C.R. 170.

63 LRCC, *supra*, note 2, draft Act, s. 8.

immunity as a commissioner for things said and done other than in hearings and arguments. This would include advising the commission of inquiry, and it would include decisions as to what witnesses to call. Commission counsel would not be immune from action if they act outside their delegated authority in bad faith, but they would have an absolute immunity except in that extreme case. The position of commission counsel in this respect would resemble that of a crown prosecutor under *Nelles v. Ontario*, though it would not be precisely the same.

RECOMMENDATION 11

(1) Commissions of inquiry, commissioners and commission counsel should have the immunities of superior court judges for any act done or omitted in the execution of their duty in conducting an inquiry and making a report.

(2) All counsel who participate in a public inquiry should be immune from action for things said in hearings and arguments.

(3) Witnesses in an inquiry should have the immunities of witnesses in court proceedings.

Draft Act, section 5.

(g) Release of commission report

The function of a commission of inquiry is to inquire and report. Commissions make their reports to the Lieutenant Governor in Council because that is the body that commissioned the inquiry. The Public Inquiries Act does not give any guidance as to whether or not the report is confidential in the hands of the recipient. The usual view is that it is for the Lieutenant Governor in Council to say whether, how and to whom the report should be made available. The question for consideration here is whether the Act should require that a commission's report be made public.

The OLRC treated a commission's freedom to deliver its report for public release as an independence issue.[64] It recommended two things: first, that reports

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[64] OLRC, *supra*, note 3 at 206.

of public inquiries should be tabled in the Legislature or before a relevant legislative committee;[65] and, second, that if a report is not tabled or released to the public in 30 days, the commission should have the right to release the report.

Like the OLRC, we think that the report of a public inquiry should become a public document. We have two reasons for this view:

(a) *independence*: a commission of inquiry that knows that its report will become public is in a more independent position than a commission that knows that its report can be suppressed by its appointing government;

(b) *openness*: when a government has established a public inquiry using the machinery of a statute, the public has a right to be informed of the results of the inquiry.

Usually the appointing government will be subject to strong political pressure to release the report of a public inquiry and will pay a political price if it refuses to do so. We do not think, however, that reliance should be placed on these pressures, but rather that a reformed Public Inquiries Act should lay down an understood ground rule in advance.

We think that tabling a report in the Legislature is enough to make it public. Section 14 of the British Columbia Act requires tabling. Of course, if the Legislature is not in session the tabling will be delayed until the next sitting. However, we do not think that that much delay will be of serious consequence if ultimate publication is assured. We think also that the Lieutenant Governor in Council, as the responsible authority, should be required to make the publication under formal procedures. We do not think that the commission of inquiry, which is an ad hoc body, should make the report available for public inspection.

There is a further reason for having publication effected by the Lieutenant Governor in Council. Occasionally, some part of a report should not be made public because of its effect on important public and private interests. One example is the parts of the McDonald Commission's report on the RCMP that were withheld from publication for many years. Another example, though one that

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65 OLRC, *supra*, note 3; Recommendation 21 at 217 and Recommendation 14 at 216. Note that s. 14(2) of the B.C. Inquiry Act requires tabling in the legislative assembly.

might not occur again since *Starr v. Houlden*,[66] is that of the Hughes Mount Cashel report, which was withheld until all criminal proceedings with respect to its subject matter had been concluded.

The openness principle says that the report of a public inquiry should be available to the public. A strong public or private interest may say that part of it should not be made public. Who should decide the issue?

The practical options are as follows:

(1) let the commission of inquiry decide. The commission is the body entrusted with the inquiry, and under our recommendations it will be entrusted with a power to decide when to hold private hearings, which is an issue that is somewhat similar to a decision to withhold part of a report. However, we think that it is going too far to say that whatever a commission says must be made public. A commission is likely to be chosen for its likely ability to investigate and report, not for its ability to weigh the public interest in the openness principle against a conflicting public or private interest.

(2) let some body or functionary independent of the political process, or with an independent public duty, make the decision. The courts would be an example of an independent body, but balancing these kinds of interests is not a judicial function. The Attorney General, who has public duties that override their functions as a member of the government, would be an example of a functionary with an independent public duty, but balancing these kinds of interests is not an Attorney General's function either, and it would be artificial to have one member of the Cabinet review a report for this purpose.

(3) let the Lieutenant Governor in Council decide. The difficulty with this is that the report of a public inquiry may be damaging to the government of the day, and a decision of the Lieutenant Governor in Council to withhold publication of part of a commission's report is, in effect, a decision of the cabinet that would suffer the damage from publication of that part. However, we think that this has to be the answer. The Lieutenant Governor in Council is the authority that is ultimately

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66 *Supra*, note 5.

politically accountable for the establishment and delineation of public inquiries, and they should be required to determine whether a portion of a commission's report should not be made public. They should be required to use criteria similar to those prescribed for determining whether or not a hearing of a commission should be held in private, and they should be required to disclose on the face of the tabled copy every place in the report where a deletion from the tabled copy has been made.

RECOMMENDATION 12

(1) The report of a commission of inquiry should be made to the Lieutenant Governor in Council in writing.

(2) The Lieutenant Governor in Council should be required to table a report of a public inquiry in the Legislature within 30 days from receipt, and if the Legislature is not sitting at the end of that period, forthwith after the commencement of the next sitting.

(3) Before tabling the report, the Lieutenant Governor in Council should have power to delete any portion of the report if, in the opinion of the Lieutenant Governor in Council, the interest of the public in the disclosure of the matters set out in that portion is significantly outweighed by another reason or consideration, such as that disclosure would unduly prejudice public security, privacy of personal or financial matters, or the right of any person to a fair trial.

(4) The tabled copy of the report should indicate where a deletion has been made.

Draft Act, section 7.

C. Openness of Public Inquiries

(1) General principle

A public inquiry is a formal proceeding that is conducted under a public law of the province. Its subject matter has to do with government, with government business or with something else that involves a public interest. Often a policy-making inquiry will be established in order to obtain access to all applicable facts and views as a basis for policy-making. The coercive power of the province is made available to a public inquiry on the grounds that there is a high public interest in having the inquiry conducted and a report made.

We think that two consequences flow from these facts:

(a) a public inquiry should be conducted in a public way so that the public may be informed about and assess the validity of its activities, findings and recommendations;

(b) a public inquiry should facilitate the participation in some way or another of individuals and groups who have either facts or opinions to contribute to the inquiry.

This combination of public information and public participation may collectively be characterized as "the openness principle".

The openness principle cannot be rigidly applied. For example, the resulting inefficiency may preclude a commission of inquiry from hearing all submissions at public hearings, and the protection of other public and private interests may require that it hear evidence at a private hearing. Commissions of inquiry have to be left free to balance conflicting considerations and interests.

RECOMMENDATION 13

A commission of inquiry should be required to exercise its control of its proceedings, where appropriate, with a view to

(a) enabling the public to be informed about the commission's proceedings, and

(b) facilitating public participation in the proceedings.

Draft Act, section 9.

We now turn to a consideration of specific applications of the openness principle.

(2) Hearings

(a) Whether a commission should be required to hold public hearings

Most commissions of inquiry hold public hearings. Three questions arise: should a reformed Public Inquiries Act require a commission to hold hearings? If so, should it require a commission of inquiry to get *all* of its information and representations at hearings? Should it require that all hearings be open to the public?

The Alberta Act is virtually silent about hearings. The Ontario[67] and Northwest Territories[68] Acts do not require a commission to hold hearings, but they do provide that all hearings are public, subject to a discretion to hold them in private in certain circumstances. Section 5 of the LRCC Draft Act,[69] which applies to advisory inquiries as well as to investigative inquiries, is much the

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67 S. 4.

68 S. 7.

69 LRCC, *supra*, note 2.

same, though with a somewhat different set of grounds for holding private hearings. The OLRC took a similar approach.[70]

The most effective way to let the public be informed about a public inquiry is to let the public or its representatives observe the commission obtaining its information and submissions. That consideration suggests that a reformed Public Inquiries Act should require commissions to hold public hearings. The reasoning behind it could be taken to the logical conclusion that commissions should get all their information and submissions at public hearings. This latter conclusion would, we think, be going much too far: the MacDonald Commission on the Economic Union, for example, commissioned 70 volumes of research, and it would be unrealistic and unproductive to have required that the commission hear all that material at hearings.

Nor do we think that a reformed Public Inquiries Act should require a commission to hold any hearings, public or otherwise. A primarily advisory commission of inquiry could in theory obtain all its information and representations by research and written submissions, and this might be the most productive and least costly way of doing things. In such a case, the openness principle could be satisfied in other ways. Given that the openness principle is generally accepted in the context of public inquiries, it is doubtful that any public inquiry will be conducted without any public hearings, but we do not think that that is a reason for the Act to require them. We note that the OLRC contemplated that policy-oriented commissions might not hold formal hearings.[71]

Of course, an investigative inquiry will be compelled by circumstances to hold hearings, because that is the only effective way to elicit and assess evidence about specific facts and to deal with conflicts in that evidence. We will recommend later that a reformed Public Inquiries Act prohibit the making of findings to the discredit of individuals and organizations without giving them a fair chance of rebuttal. If that recommendation is adopted, a commission of inquiry that proposes to make findings of misconduct can be compelled to hold a hearing to give due process to a "target".

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70 OLRC, *supra*, note 3; Recommendation 17 at 217.

71 OLRC, *supra*, note 3 at 209.

The 1966 U.K. Salmon Commission said this[72] (in relation to purely investigatory commissions, because that is what the U.K. 1921 statute deals with):

> As we have already indicated it is, in our view of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.

The Commission thought that the hurt to witnesses and persons mentioned must be suffered in the interest of the public in having the truth.

The term "hearing" implies a formal proceeding for the investigation of a controversial question or controversial facts.[73] If such a proceeding in fact takes place, we think that it should be held in public unless other considerations override the openness principle, and we think that a reformed Public Inquiries Act should so provide. This would follow the models of the Ontario and Northwest Territories Acts, the LRCC and the OLRC.

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72 Report of the Commission under the chairmanship of the Rt. Hon. Lord Justice Salmon, Cmnd. 3121, HMSO, 1966.

73 Jowitt's Dictionary of English Law, Vol. 1, 2d ed. (London: Sweet & Maxwell, 1977) at 895.

RECOMMENDATION 14

(1) Subject to Recommendation 13, a commission of inquiry should not be required to hold hearings.

(2) A commission should be required, except as otherwise provided in Recommendation 15, to hold in public the hearings that it does hold.

Draft Act, section 10(1), (3).

(b) When a commission should be able to hold private hearings

The openness principle says that information about a public inquiry's proceedings should be available to the public. Occasionally, however, the adverse consequences of publishing specific information will outweigh the benefits of openness. Some provision must be made for private hearings in such cases.

Section 8 of the Public Inquiries Act provides that information and documents that, but for the section, would have been protected by public interest immunity or statutory confidentiality, must be dealt with in private and must not, without the Attorney General's consent, be disclosed by the commission of inquiry that receives it.[74] The Act does not make any general provision for private hearings.

Existing legislation and law reform proposals provide for holding hearings in private on varying grounds. Examples of the varying grounds are:

(a) *Ontario and Northwest Territories Acts*:[75]

> matters affecting public security are likely to be dealt with or intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest

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74 S. 8 is discussed in Recommendation 28 and the supporting text: see pages 96-99.

75 Ss 4 and 7 respectively.

outweighs the desirability of adhering to the principle that hearings are to be open to the public.

(b) *LRCC*:[76]

considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in public hearings.

(c) *OLRC*:[77]

the effect of publicity on the ability of an individual to be treated fairly in the inquiry's proceedings or subsequent proceedings; on public security; and on an individual's privacy.

The following points should be noted:

(a) As noted above, the present Ontario section 4 requires the balancing of certain private interests (but not public security) against the desirability of openness. The OLRC thought that matters involving public security and the right of a person to a fair hearing should also be balanced against the public interest in openness.

(b) The OLRC's formulation of "an individual's privacy"

(i) may in some respects be broader than the specifics of Ontario section 4 and the LRCC's formulation of "privacy of personal or financial matters", but

(ii) is narrower in that it does not include a catchall such as the LRCC's "any other reason" or the Ontario section's "any other matters". In particular, it does not allow corporate privacy, such as the protection of confidential trade information, to be a grounds for a private hearing.

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[76] *Supra*, note 2; Draft Act, s. 5.

[77] *Supra*, note 3; Recommendation 17 at 216.

The openness principle is important and should not be chipped away at. It is, however, difficult to foresee and legislate for all cases in which another principle should be given priority. We think that the LRCC's formulation, with its broad discretion for a commission of inquiry to hold private hearings, should be adopted.

There is another point. A commission receives information in private because publication would prejudice a public or private interest. It is likely that publication of the same information through the commission's report would prejudice the same interest. If the information is material to a commission's findings, what is the commission to do? Publish it? That would do the damage that was to be avoided by a private hearing. Exclude it from its thinking? That would make its conclusions unsatisfactory. Say that it has information that supports its conclusions but can't disclose it? That would detract from its credibility. None of these options is satisfactory. Except for Alberta's section 8 (which prohibits a commission from disclosing some information that would usually be protected by public interest immunity or statutory confidentiality), none of the legislation and law reform proposals under consideration deal with what could be a serious problem. We conclude reluctantly that there is nothing for it but to leave the question to be decided whenever it arises.

A commission may have to admit to a private hearing interested persons other than the witness giving the evidence. Evidence given in private may then be repeated outside the hearing. That would, we think, be a contempt of the committee that could be punished under our Recommendation 20, which deals with the contempt power, particularly if the commission bans publication of what happens at the private hearing.

RECOMMENDATION 15

A commission of inquiry should be permitted to hold a hearing to which the public is not admitted if

(a) considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in having the hearing held in public; or

(b) information or documents that, but for the Act, would have been subject to public interest immunity or statutory confidentiality will be disclosed at the hearing.

Draft Act, section 10(2).

(c) Reporting public inquiries

(i) Media reporting and regulation

Implicit in the notion of a public hearing is that the media may be present at the hearing and report the proceedings.[78] However, a commission of inquiry controls its own proceedings (and would continue to do so under our proposals), so that it can, in the interests of good order, regulate the way in which media representatives conduct themselves in public hearings.

Media reporting of investigative inquiries is controversial. The televising of inquiry hearings is more so. Our consultants were divided on the question of television. The arguments on one side are as follows:[79]

(a) the intense scrutiny is unnerving for witnesses and causes commission and counsel to play to the television camera.

(b) television tends to show only short inflammatory bites that are prejudicial without informing the public in any real way.

(c) the damage done by reporting unsubstantiated testimony is immense and may not be cured by subsequent evidence or findings.

The arguments on the other side are as follows:

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78 S. 12 of the LRCC draft Act explicitly provides that commission hearings may be reported without restriction: see LRCC, *supra*, note 2.

79 These arguments are strongly put by Justice Sopinka in his Address to the Canadian Institute for the Administration of Justice, August 24, 1990.

(a) witnesses are not unduly affected by the presence of a properly regulated television camera and can ask to have it turned off if they are; a commission can control itself and counsel so that television will not affect the proceedings.

(b) the media in general and television in particular do inform the public and may improve the chances that an inquiry's recommendations will be adopted.[80] In some cases, the whole of an inquiry has been run on television, and people have watched much of it.

(c) the importance of maintaining public confidence in the public inquiry process by giving wide publicity to its proceedings outweighs the pain to individuals. Televising inquiries is a fact of life that must be borne.

(d) television access makes inquiries more accountable and more open.[81]

We do not think that a reformed Alberta Public Inquiries Act need say anything specific about reporting or about televising inquiry proceedings. Under our recommendations, commissions of inquiry should take into account the openness principle, and commissions do so in practice do so anyway, so that media reporting will continue. Commissions must also take into account the Charter protection of the freedom of the press, though it is by no means clear that the freedom of the press includes a right to attend the proceedings of a public inquiry. On the other hand, a commission can use its control of the inquiry to avoid media excesses. The practice adopted in some recent major inquiries[82] is to allow television broadcasting of the hearings but to restrict media presence to a single camera, a single camera operator and a limited range of points on which

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80 See MacKay, *supra*, note 7 at 45.

81 *Ibid.*

82 E.g., The Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children (Grange Inquiry); Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Dubin Inquiry); and the Code investigation of the Principal Group of Companies.

the camera can focus. We think that the media reporting is best dealt with by each commission on a case by case basis.

RECOMMENDATION 16

A commission of inquiry should be allowed to deal with the reporting and televising of hearings on the basis of its control over its proceedings, the openness principle and the freedom of the press.

(ii) Banning of publication

We will consider here an issue that primarily has to do with the protection of private interests but is relevant as a possible limitation on the openness principle.

One disadvantage of an investigative public inquiry is that allegations can be made against an individual and immediately reported by the media before the individual has a chance to rebut the allegations. If the individual is a principal "target", the interval between allegation and rebuttal may be weeks or months. That is because it is good inquiry policy to put in all the evidence relating to a "target" before calling upon the "target" to reply.

A commission of inquiry could solve the problem of the time lag by holding hearings in private. However, private hearings are undesirable. Those with legitimate interests in the inquiry, who may be numerous, have to be allowed to attend even private hearings, and the press and the public should be excluded only if there is no practicable alternative. A solution less in conflict with the openness principle would be to hold the hearings in public but to prohibit the publication of damaging evidence until the other side is heard. This would not give complete protection to affected individuals, as the allegations will have been made in the presence of all participants and any members of the public in attendance. It would, however, restrict the dissemination of the allegations and minimize the damage resulting from dissemination.

There is no legislative precedent in Canada for the banning of publicity by a public inquiry (though the reporting of preliminary inquiries into criminal charges is sometimes banned pending the disposition of charges), but both the LRCC and the OLRC proposals would authorize a commission to restrict

publication or impose a ban on it. In each case, the grounds on which a commission could restrict or ban publication are the same as the grounds for holding a private hearing. We agree with the two commissions. The public's right to know the moment an allegation is made may not, in a particular case, be of sufficient importance to justify the widespread publication of damaging allegations before a "target" has a chance to give their side of the case.

RECOMMENDATION 17

A commission of inquiry should have the power to restrict or ban publication of proceedings before it on the same grounds as it can decide to hold private hearings.

Draft Act, section 10(2).

(3) Right to participate

The next question is whether, in order to give effect to the openness principle, a reformed Public Inquiries Act should provide for participation in an inquiry by the public or by members of the public who have certain qualifications. Both the LRCC and the OLRC made recommendations in that regard:

(a) the OLRC recommended that any individual or organization with a genuine interest should be entitled to make submissions, but that the form of the submissions should be in the commission's discretion.[83] The "genuine interest" test was intended to be broader than the "substantial and direct interest" test in section 5(1) of the existing Ontario Act and to include more than "personal, proprietary or pecuniary interests".[84] On the other hand, if the form and extent of the submissions is to be in the commission's discretion, a commission could presumably restrict most participants to written submissions, with or without limits on length.

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83 OLRC, *supra*, note 3; Recommendation 18 at 217.

84 *Ibid.*, at 208.

(b) the LRCC draft Act said that "an advisory commission shall hear anyone who satisfies the commission that he has a real interest in any matter relating to its mandate".[85] The word "hear" seems to imply a personal attendance on the commission and the making of oral representations.

It seems to us that the LRCC duty to hear everyone with a real interest could place too high a burden on a commission. It is not clear what the LRCC intended by the term "real interest", but it appears to have intended that a commission should hear any testimony that is not highly frivolous or entirely irrelevant. It appears to us that this could be an unduly onerous duty, as the number of persons with "real" interests in the subject matter of a major policy inquiry could be legion.

The OLRC proposal would be more efficient. In order to get on with its job, a commission could simply rule that everyone other than those entitled to special recognition should address it in writing with or without space limitations. The commission would be able to determine how much commission time it spent on the submissions. But we are doubtful that such a provision would accomplish very much. Even without it a commission would normally receive and consider any written submissions that anyone sent it.

We think that it is best to leave each commission of inquiry to decide how to conduct its inquiry. As part of its control over its proceedings it should have a discretion to determine who may participate in its proceedings and to what extent. The commission is chosen to conduct the inquiry and should be allowed to conduct it in the most efficient way it can. There will be two controls. One is the requirement under Recommendation 13 that it have regard to the openness principle in its conduct of the inquiry. The other is the prohibition under Recommendation 24 against making a finding of "misconduct" without due process.

Our proposals depart from the present Public Inquiries Act. Section 11 of the Act deals with the right to give evidence and to call and examine or cross-examine witnesses. Its structure is somewhat complex:

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[85] LRCC, *supra*, note 2, at 41.

(a) it gives a witness before an inquiry "who believes that his interests may be adversely affected" a right to testify "on the matter", which presumably must be the matter into which the commission is inquiring; it appears that once a person has become a witness, they have the right to give any evidence that comes within the commission's terms of reference.

(b) it gives the same right to any person who satisfies a commission "that any evidence given before a commissioner or commissioners may adversely affect his interests"; that is, it gives a person who so satisfies the commission the right to give any evidence that comes within the commission's terms of reference.

(c) it gives the commission a discretion to allow both classes (witnesses and persons who have satisfied the commission that their interests may be adversely affected) an opportunity to call evidence and to examine or cross-examine.

While section 11 does not *mandate* a hearing in which evidence is called and examination and cross-examination take place, it *contemplates* that such a hearing will be held. Examination and cross-examination of witnesses are characteristics of court proceedings, and a proceeding governed by section 11 is likely to be legalistic in nature. We think that it should be replaced by a provision under which a commission of inquiry would have a broader discretion as to who will be permitted to participate.

RECOMMENDATION 18

(1) It should be in the discretion of a commission of inquiry to determine who may participate in the inquiry and the manner and extent of their participation.

(2) In exercising its discretion under this recommendation, a commission should have regard to

(a) the openness principle, and

(b) the commission's duty to allow a person against whom a finding of misconduct is made a full right of reply to the allegations and evidence on which the finding is made.

Draft Act, section 14(1).

(4) Release of commission report

We have already discussed the tabling of a commission's report under our discussion of the independence principle.[86] The openness principle leads to the same recommendations.

(5) Disposition of records

Public inquiries should deal with matters of great importance to the public. It follows, we think, that it is important in the interests of the public that the records of commissions of inquiry be preserved.

The Lieutenant Governor in Council already has the power to make regulations concerning the preservation of public records, including their transfer to the Provincial Archives, under section 21 of the Department of Public Works, Supply and Services Act. The definitions in section 21 bring the records of a commission of inquiry within the term "public records". The Lieutenant Governor in Council has made a regulation that establishes a procedure for transferring records, and we note that the records of at least one recent public inquiry have been transferred to the Archives.[87] This would be the normal way of dealing with such records.

We think that the principle that a commission's records should be preserved should be reflected in a reformed Public Inquiries Act. The Act should, however, restrict itself to requiring the Lieutenant Governor in Council to make provision for the preservation of the records. This would leave open a discretion as to how the records would be preserved, while ensuring their preservation. The discretion should be exercised with due regard for the confidentiality of confidential or privileged information.

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[86] See pages 48-51.

[87] The 1991-1992 report of the Provincial Archives of Alberta discloses the accession of the transcripts and exhibits from the Board of Inquiry into the West Edmonton Mall Roller Coaster accident.

RECOMMENDATION 19

The Lieutenant Governor in Council should be required to make provision for the preservation of the report and records of a commission of inquiry, having due regard for the confidentiality of confidential or privileged information.

Draft Act, section 9.

C. Measures to Promote Effectiveness

(1) Introduction

The purpose of a public inquiry is to seek truth and to make recommendations on which future action may be based. A reformed Public Inquiries Act should enable public inquiries to achieve those purposes. This section of the report will make recommendations intended to make public inquiries effective in the pursuit of truth.

(2) Control of proceedings

We have already recommended that a commission of inquiry have power to control its proceedings.[88] That recommendation was based on the independence principle. We point out here that it is also required by the effectiveness principle: a commission of inquiry cannot function effectively unless it controls its proceedings.

Under our proposals, a commission's control of its proceedings is not absolute. Where appropriate, a commission must enable the public to be informed and to participate.[89] It must conduct its hearings in public except in restricted circumstances.[90] These are requirements of the openness principle. Where private

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88 Recommendation 8 at page 40.

89 Recommendation 13 at page 53.

90 Recommendation 14(2) at page 56; Recommendation 15 at pages 58-59.

rights are affected by the inquiry process, a commission must recognize some restrictions on the way it proceeds[91] and it is subject to judicial review.[92]

But implicit in a commission's power of control is that the commission may choose its own way of proceeding. It may conduct formal hearings. It may act informally. It may conduct inquisitorial hearings. It may conduct adversarial hearings. It may conduct no hearings at all. In short, it may, subject to the limitations we have mentioned, conduct its proceedings in the way that it considers most effective in the circumstances.

(3) Coercive powers

(a) Introduction

A commission of inquiry, whether advisory or investigatory, must somehow acquire a knowledge of facts. Otherwise it would be giving advice in a vacuum. Some advisory commissions can get all the information they need from their own experience or expertise, by research, or by voluntary communications from individuals, businesses and governments. Others cannot get all the information they need without compulsion. That is because a person who is in possession of information in memory or in documentary form may not want to give it to the commission and may even have a strong interest in denying it to the commission. The principal reason for enacting public inquiries legislation is that commissions of inquiry need the power to compel persons to give information, documents and things necessary for effective inquiries.

There are two general questions. One is whether some commissions of inquiry should have coercive powers, and, if so, what those powers should be. The second is whether all commissions should have such coercive powers or whether only some should have them, and, if the latter, which commissions. In the text immediately following we will deal with the two questions in that order.

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91 E.g., it must give a "target" due process before making a finding of misconduct (Recommendation 24 at pages 89-90), and anyone appearing in the inquiry is entitled to be represented by counsel (Recommendation 23(1) at page 84).

92 Recommendation 32 at 117.

This section of the report deals only with the availability of powers available to commissions of inquiry. We discuss later[93] how the powers should be exercised.

(b) What coercive powers should be available to public inquiries

(i) Compelling testimony

An investigatory inquiry cannot be effective unless the commission has the power to compel witnesses to give testimony. The same is true of an advisory inquiry that requires information that is in private hands. Commissions of inquiry now have the power to compel testimony. We have no doubt that they should continue to have that power. We think that the power should continue to be limited to requiring witnesses to attend and give testimony at a hearing. Although it is efficient for commission counsel to interview witnesses before a hearing, we do not think that a commission should have power to require a witness to attend a prior interview.

A commission should have the power to require a witness to give testimony before another person in Alberta as section 9 of the Public Inquiries Act now provides. We think that, in addition, the Queen's Bench should be able to lend its powers for the taking of evidence as if a public inquiry were a proceeding in that court. Despite the unsatisfactory nature of interprovincial subpoena legislation of the various provinces in relation to a public inquiry,[94] we do not recommend that any steps be taken to improve it.

(ii) Compelling production

Investigatory commissions of inquiry and some advisory commissions must also have the power to compel persons to produce documents. This is particularly true in an investigatory inquiry involving institutions of government or large businesses where paper records are important. Commissions of inquiry now have the power to compel production of documents and things and they should continue to have that power. We think also that a commission should have the

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93 Pages 73-74; see also Recommendation 20 at pages 78-80.

94 See Issues Paper at 63-65.

additional power to compel the production of documents and things before a hearing. The power should extend to information in electronic form and to things.

Section 7 of the Public Inquiries Act makes a minor but important point. It provides that a commission of inquiry that takes a document or paper into possession under section 6 (inspection of public buildings) or admits a document or paper in evidence shall, at the request of the previous custodian of the document or paper, photocopy it and return the original. The photocopy then becomes admissible in evidence in place of the original. A reformed Public Inquiries Act should make the same provision and should extent it to cover all documents received by a commission of inquiry under the power to compel production.

(iii) Search and seizure

A commission of inquiry under the Public Inquiries Act has the power to compel production. It also has power under section 6 to take possession of documents during an inspection of a public building. Should it have any additional power of search or seizure?

The Ontario Act allows a judge to issue a search warrant on the application of a commission's delegate. The OLRC[95] recommended that a judge should continue to have this power but should exercise it only if satisfied that the documents and things to be seized are material; that the public interest in access clearly outweighs the privacy interest of individuals; and that there are reasonable grounds to believe that the documents would not be produced under the power to compel production.

We do not recommend that a new search and seizure power be made available to a public inquiry in Alberta. We have no evidence that commissions of inquiry are not able to get all the documents they want under the power to compel production. Further, we think that introducing a search and seizure process into a public inquiry would move it towards becoming a criminal process.

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95 OLRC, *supra*, note 3; Recommendation 8 at 215.

(iv) Inspection of public buildings and taking documents

Section 6 of the Alberta Act confers on a commission of inquiry a power to inspect public buildings and take possession of relevant documents, papers and things. Two things are needed before the commission can exercise the power. First, the Lieutenant Governor in Council must declare that section 6 applies to the inquiry. Second, a Queen's Bench judge (who may be a member of the commission of inquiry) must make an order designating a person to exercise the powers. Manitoba has a more far-reaching section that allows a commission to enter any property at any time if they think that a view will help the inquiry, and the federal Act, for departmental inquiries only, confers a right of entry to public offices and institutions and a right to examine documents belonging to the offices and institutions. The LRCC's draft Act[96] would have conferred similar rights on all federal commissions of inquiry.

We think that section 6 is useful. If it affected only public buildings and government information, we would recommend that it be continued in its present form. We are, however, concerned about the great amount of third party information that governments accumulate, sometimes under compulsion. We think that, in order to protect third parties against the inappropriate disclosure of their information, the section should be revised as follows:

(a) it should require an order from a Queen's Bench judge sitting as such and not as a commissioner;

(b) the order should confer access to documents and other information only where access is reasonably required for the purposes of the inquiry; and

(c) the court should have power to impose terms and conditions.

(v) Power to punish for contempt

Two questions now arise. The first is how a commission of inquiry's powers to compel testimony and production should be enforced. The second is whether and how a commission should be protected against conduct in relation to its proceedings that would, in relation to court proceedings, be contempt of court.

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[96] LRCC, *supra*, note 2; Draft Act, s. 30.

Under the Alberta Act, a commissioner who is a judge of the Queen's Bench has "the same power of committal for contempts" as the Queen's Bench. Any commission of inquiry, whether or not a judge is a member, "has the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record". This may be intended to include a power to hold recalcitrant witnesses in contempt. The contempt power is commonly made available by the Canada and provincial Acts.

A commission of inquiry's power to compel testimony and production must be backed up by legal sanctions. So must its power to maintain order in its proceedings. The integrity of a commission's proceedings in general must be protected. That integrity can be compromised, for example, by tampering with witnesses or records.

Statutory penalties for specific statutory offenses would be one form of sanction against improper conduct. These would be imposed on conviction in the same way as other statutory penalties. The LRCC recommended the imposition of statutory penalties,[97] giving as its reason that "it is desirable, in the interests of civil liberties, to retain normal procedures". The LRCC contrasted this proposal with giving a commission itself the power to punish for contempt but did not discuss the possibility of a contempt power enforced by a court rather than a commission. The Australian Law Reform Commission also proposed a system of statutory penalties.[98]

We do not think that imposing statutory penalties, without more, would be efficient. A prosecution for a statutory offence may take many months. A commission of inquiry may not be able to wait while a witness it needs is prosecuted for refusing to testify. Further, such a prosecution may not be effective enough. "It aims at punishment for breaches, and not at securing compliance. It provides for definite fine and prison terms, and does not allow for the kinds of flexibility available in contempt proceedings. It is in essence retrospective and not prospective."[99] A penalty will not ensure compliance, particularly if the burden

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97 See LRCC, *supra*, note 2; Draft Act, s. 25 and notes.

98 Report 35, *Contempt*, 1987, at 452.

99 Per Gonthier, J., *Chrysler Canada Ltd. v. Canada* (June 25, 1992), S.C.C.

of the penalty is small in comparison with the disadvantages a witness may suffer by testifying.

We think that the contempt power should be available to commissions of inquiry. It can be enforced expeditiously. It can exert continuing pressure to conform. If it is exercised through the courts, as we will recommend below, it will not interfere more drastically with civil liberties when it is applied with respect to a public inquiry than when it is applied with respect to a court proceeding. While protection of the administration of public inquiries is not as important as protection of the administration of justice, most public inquiries, on an individual basis, are of more public importance than the adjudication of most individual disputes. We think that the effectiveness principle requires that the contempt power be available, and we think that the Queen's Bench will exercise it with due sensitivity for individual rights. This is consistent with the views of the 1966 UK Salmon Committee[100] and of the OLRC.[101]

The courts' contempt power is very broad. Should all of it be available to commissions of inquiry? We think that there should be two exceptions. It is contempt of court, particularly when a jury is involved, to publish anything that is intended or likely to prejudice the fair hearing and disposition of litigation. We see no reason to interfere with freedom of expression to this extent in order to protect a public inquiry. It is contempt of court to "scandalize" the courts, that is to say, to engage in scurrilous abuse of the courts and to attack their good faith and impartiality. While an argument can be made for protecting a commission of inquiry against this sort of thing, we do not think that it is a strong enough argument to justify bringing the contempt power into play.[102]

Should the whole of the power of contempt be available less the two exceptions mentioned in the last preceding paragraph, or should it be made available in specific cases only? The Australian Law Reform Commission thought that there should not be a "residual" contempt power, and the LRCC's proposals did not provide for one. However, we think that it is better to leave the contempt power in place subject to the two exceptions. Statutory language is imprecise and

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100 *Supra*, note 72.

101 OLRC, *supra*, note 3 at 199-200.

102 Some of this language comes from the most useful discussion of the subject in Campbell, Enid, *Contempt of Royal Commissions* (Monash, 1984).

statutory foresight is less than perfect, so that proscribing specific conduct is not likely to catch all conduct against which sanctions should be available. The exercise of the contempt power by the courts rather than by commissions of inquiry will, we think, be sufficient protection for individuals.

We think, then, that imposing statutory penalties is not by itself a sufficient sanction for the protection of public inquiries. However, a statutory penalty may on occasion be an appropriate sanction for refusal to attend, give evidence or produce documents. Further, including a statutory offence in a reformed Act would make it clear that there is a legal duty to do these things. We therefore think that failure to comply with a commission's notice to attend, testify or produce should be a summary conviction offence. Laying a charge under the offence provision should preclude contempt proceedings. Failure to attend as a witness when given notice to do so should not be punishable at all unless the proposed witness is paid his reasonable expenses in advance.

We have recommended earlier[103] that a commission of inquiry have power to maintain order in its proceedings and to requisition the help of the civil authorities in doing so. The power to hold someone in contempt for disrupting a commission's proceedings is an important element of the contempt power and there will be some overlap between it and the power to maintain order. However, we think that both are useful.

(c) How coercive powers should be enforced

The next question is how the coercive powers that are available to a commission of inquiry should be enforced.

The existing Public Inquiries Act reads as if a commission of inquiry can itself enforce the attendance of witnesses and the production of documents.[104] Further, a commissioner who is a Queen's Bench judge (though no other

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103 See Recommendation 9 at 39.

104 S. 4. See, however, the view of David W. Scott, Q.C. that these powers amount to a mere entitlement to demand attendance (and, presumably, production) and that the entitlement can be enforced only through the court: Scott, "Rights and obligations of witnesses" in Pross, etc., *supra*, note 7 at 135-37. Recommendation 20 makes it unnecessary to consider this question.

commissioner) has the same power of committal for contempt of the commission as a Queen's Bench judge has for contempt of the court.

The Canada and provincial Acts commonly purport to give a commission of inquiry itself the power to commit a person who refuses to testify or to produce documents, either in so many words or by conferring the same powers as a court has. The Ontario Act is somewhat different: section 8 allows a commission to state a case to the Divisional Court, which can impose a penalty as if the contempt were a contempt of court, and section 16 allows a commission to apply for a court bench warrant to apprehend a witness. Section 7 of the New Brunswick Act and section 12 of the Quebec Act appear to give a commission of inquiry the full contempt power. In consultation we found some sentiment for enabling commissions of inquiry to enforce their own orders.

We think that, except to prevent disruption of its proceedings, a commission of inquiry should not itself be able to use the machinery of the State to interfere with personal liberty. We think that the Queen's Bench should exercise the coercive powers of a commission upon application by the commission, and we so recommend. This procedure would make the coercive powers available to a commission but would ensure that the powers are exercised properly and according to law. This view is in agreement with that of the OLRC, as the OLRC approved the retention of section 8 of the Ontario Act under which a Divisional Court can punish contempts of a commission of inquiry.[105]

We do not think that a reformed Public Inquiries Act should try to specify what the court should take into consideration in deciding whether or not to enforce a commission order or punish a contempt against a commission. We expect that the Queen's Bench would, on an application for enforcement, address itself to the question whether the proposed coercive measure is within the powers of the commission. In a given case, the process might amount to something like judicial review of a commission's decision to exercise the power.

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105 OLRC, *supra*, note 2 at 199-200.

(d) When coercive powers should be available to a public inquiry

We have discussed the coercive powers that a commission of inquiry should have and how those powers should be enforced. We now turn to the question whether all commissions should have the coercive powers.

The LRCC thought that a commission of inquiry should not have coercive powers unless the powers are necessary for the inquiry. It then went on to say that, when establishing a public inquiry, the Governor in Council should either use a formula of words that would characterize the inquiry as "advisory" (that is, addressed to broad questions of policy) or a formula of words that would characterize is as "investigative" (that is, addressed to the facts of a particular problem, usually a problem associated with the function of government). An investigatory commission would automatically receive coercive powers. An advisory commission would not receive them unless the Governor in Council specifically conferred them.

The OLRC[106] took a different view:

> In the Commission's view, it would not be wise to create two separate classes of inquiry, one with coercive powers and one without. It would often be difficult to determine, at the outset, whether any inquiry would require coercive powers. If governments were to choose to appoint some inquiries without coercive powers, such inquiries might find their work frustrated by a refusal of affected interests to co-operate in providing information. The very existence of coercive powers, even if they are never exercised, may be vital in obtaining information. Moreover requests by a commission to have the Cabinet grant it coercive powers after its appointment might well compromise the independence of its operation that we think is essential . . . Accordingly, the Commission recommends that all inquiries should have the same range of powers available, but an inquiry need not use all the powers available if it considers any of them to be inappropriate to the nature of the inquiry.

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106 *Ibid.*, at 190.

We will state our own views.

We agree with the LRCC that coercive powers should not be granted unless they are needed. The question may not be of great practical importance: if coercive powers are not needed they are not likely to be exercised, so that no harm is likely to be done. We think, however, that whether or not coercive powers should be conferred on a commission of inquiry is a question of principle that should be addressed in a reformed Public Inquiries Act.

But we are doubtful about the LRCC's proposal that "investigatory" inquiries should have coercive powers while "advisory" inquiries should not. This test would require the appointing authority to turn their mind to the question whether an inquiry will fall within one legally defined category ("advisory") or another legally defined category ("investigatory"). The answer would determine whether the commission of inquiry would automatically have coercive powers.

We think that the imprecision of the terms "advisory" and "investigatory" would cause difficulty. Many public inquiries are set up to find both what went wrong in the past and how to prevent the occurrence of similar problems in the future. The McDonald Commission on the RCMP, for example, had to go exhaustively into facts of specific incidents in order to make policy recommendations for the structure of intelligence-gathering organizations. The advisory/investigative dichotomy does not seem to us to differentiate adequately between those inquiries where coercive powers should be available and those inquiries where they should not.

We think that the true question that should be addressed is whether the need for coercive powers in a particular public inquiry justifies overriding the private rights involved. That is the question that the appointing authority should be required to address.

We think that the Lieutenant Governor in Council is the only appropriate body to determine whether or not coercive powers should be granted in a particular case. The courts could do so, but it seems to us that the assessment of the public interest is a matter for the political process. Our proposal is therefore that a reformed Public Inquiries Act confer coercive powers upon a public inquiry only if the Lieutenant Governor in Council (a) is satisfied that it is in the public interest the inquiry have them and (b) declares that the powers apply to the

inquiry. To facilitate the carrying out of this proposal, we propose that the coercive powers be put into a separate part of a reformed Public Inquiries Act.

This proposal will require the Lieutenant Governor in Council to decide whether a specific inquiry needs coercive powers. It will impose on them the political burden of the decision and will thus impose the responsibility where the power to initiate the public inquiry lies. We think that this is as it should be. We cannot, of course, guarantee that the Lieutenant Governor in Council and their advisers will take the responsibility seriously, but we have no reason to doubt that they will do so. In that connection, we note from the OLRC report[107] that the Ontario Lieutenant Governor in Council declared Part III of the Ontario Act, which contains extraordinary powers of search and seizure, applicable to only eight of the 30 inquiries that were established under that Act from 1975 to 1990. This is, we think, some indication that an appointing authority may be expected to apply its mind to the similar question whether a commission should have the usual coercive powers.

Under the proposal, the cabinet would, in effect, decide whether a commission of inquiry should have coercive powers. But the cabinet may have a political interest in the outcome of the inquiry. We think that this has to be accepted, particularly since it is the cabinet that makes the basic decision to establish a public inquiry. Other proposals that we make, if adopted, will impose limits upon the exercise of the coercive powers; require due process before adverse findings are made; put the enforcement of the coercive powers in the hands of the courts; and provide for judicial review of the exercise of the coercive powers. This seems to us to strike the appropriate balance between the public interest and the private interests that will be affected by a decision whether or not to confer coercive powers on a commission of inquiry.

The OLRC, as has been noted,[108] expressed concerns about such a proposal. One was that it may be difficult to decide in advance whether a proposed inquiry will require coercive powers. A second was that some inquiries might find their work frustrated by refusals to provide information. We agree that such difficulties exist. The solution is to allow a commission of inquiry to go back to the Lieutenant Governor in Council to have the coercive powers made available to it. The OLRC's concern about that solution was that it might make a

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107 OLRC, *supra*, note 3 at 57.

108 *Ibid.*, at 190-91.

commission dependent on the good will of the Lieutenant Governor in Council and thus compromise its independence. The OLRC did not say just how the commission's independence would be compromised. We do not think it likely that a commission and the Lieutenant Governor in Council would strike a bargain under which the commission would trade its independence of judgment for a grant of coercive powers. No doubt, the Lieutenant Governor in Council's decision on the question could undesirably restrict a commission's inquiry. But it seems to us that a fundamental decision of this kind should be left to the same accountable authority that establishes an inquiry, chooses the members of the commission, sets the terms of reference and provides the budget. It is for these reasons that we respectfully disagree with the OLRC on this point.

The OLRC makes one final point. It is that a Government that wants to establish an inquiry that does not involve coercive powers can do so outside a public inquiries act. This is quite true. It might seem to follow that there is no reason why a reformed Public Inquiries Act should contemplate an inquiry without coercive powers. Further, it may at first blush seem somewhat anomalous that, the principal purpose of a public inquiries act being to confer powers that the government cannot confer in the absence of legislation, the Act should contemplate an inquiry that does not have those powers. But the establishment of an inquiry under the Public Inquiries Act is useful for other reasons: it signals the importance that the government attaches to the inquiry; it makes the statutory machinery available; and it establishes the potential for a grant of the coercive powers if they prove to be needed. We think that it is important to direct the appointing authority's mind to the question whether powers are needed and that the establishment of a public inquiry under the Public Inquiries Act may be functional even if the inquiry does not have coercive powers.

RECOMMENDATION 20

(1) The Lieutenant Governor in Council, if satisfied that the powers listed below are required for the full investigation of the matters into which a commission of inquiry is appointed to inquire, should be able to confer upon a commission of inquiry

(a) the power to compel testimony before the commission,

(b) the power to compel production of documents and things, including information in electronic form, to the commission or a person designated by the commission to receive them, and

(c) the power to have contempt of the commission punished.

(2) A commission on which powers have been conferred under subsection (1) should be able

(a) to give notice to a person requiring the person to appear and give testimony before the commission or to produce documents and things, or

(b) to apply to the Queen's Bench for an order requiring the person to do so.

(3) A person who does not comply with a proper notice or order under subsection (2) should

(a) be guilty of an offence punishable on summary conviction, and

(b) be in contempt of the commission or the Court as the case may be

but if a charge is laid by the Crown or the commission under paragraph (a), it should not be possible to bring or maintain proceedings for contempt on the basis of the same facts.

(4) A person who is given notice to appear before a commission should be entitled to be paid in advance their reasonable expenses for appearing.

(5) An application for an order to appear and give testimony or to produce documents or things should be made on notice, but the court should have power to make an order *ex parte*. If an order is made *ex parte*, a person who is required to give testimony or to produce documents or things should be able, by application returnable on or after the business day next following the service of the order, to require the commission to show cause why the order should not be set aside.

(6) If the Lieutenant Governor in Council declares that the relevant provision of a reformed Public Inquiries Act applies to an inquiry, the Queen's Bench should have power to confer on a commission of inquiry the right to enter and inspect public buildings and take possession of documents and things found there that are reasonably required for the purposes of the inquiry, subject to such terms and conditions as the court may by its order impose.

(7) The Queen's Bench should have, in respect of conduct in respect of a commission of inquiry that would constitute contempt if it were in respect of the court, the same powers as it has in respect of a contempt of the court. However, neither publishing a discussion of a subject being inquired into by a commission nor making comments about a commission should in itself be contempt.

(8) No other power of search or seizure should be available to a commission.

Draft Act, sections 17, 18, 20, 21.

RECOMMENDATION 21

(1) A commission of inquiry should be able to appoint a person to take evidence and report it to the commission.

(2) On the application of a commission of inquiry, the Queen's Bench should have power to make orders and give directions with respect to the taking of evidence for a public inquiry as if the public inquiry were a proceeding in the Court.

Draft Act, section 8(3),(4).

RECOMMENDATION 22

A commission of inquiry that takes a document or paper into possession under recommendation 20, or admits it in evidence, should be required, upon the request of the previous custodian of the document or paper, to return the document or paper upon taking a photocopy, which may be admitted in evidence in place of the original.

Draft Act, section 22.

D. Protection of Rights and Interests

(1) Introduction

We have recommended that coercive powers should be conferred on some commissions of inquiry. We now turn to the question whether and how private interests should be protected against the inappropriate use of those powers.

The report of the commission of inquiry is the final product of a public inquiry. It gives the commission's views about the relevant facts. These may be specific facts of specific occurrences, or they may be general or statistical facts relevant to large policy questions. The report usually contains recommendations flowing from the commission's assessment of the facts. However, the report has no legal effect. It does not establish facts for legal purposes, and the Government can accept or reject its recommendations. Why should a public inquiries act concern itself about the protection of private interests against a proceeding that has no legal effect?

The answer is that a public inquiry and a commission's report may have important non-legal effects on rights and interests. The report may create the possibility of changes in government policy that may affect broad economic

interests or specific private interests. It may include findings of fact that may affect reputations and careers because of the publicity given to the findings or the credence attached by the public to reports of commissions of inquiry. The findings may lead to or support either civil or criminal proceedings against individuals. In some cases, at least, the law should ensure that individuals are treated fairly by a commission's report. The law should recognize also that allegations made in the course of public hearings may damage reputations and prospects.

An efficient and effective public inquiry will enlighten the public about important policy and factual issues and will give useful advice to the Government. The public therefore has an interest in effective public inquiries. That interest is best satisfied by leaving commissions of inquiry free to manage inquiries as the circumstances suggest. Private individuals and organizations have interests in the protection of private rights and interests, and the public also has an interest in the protection of private rights. Private rights are best protected by ensuring that commissions of inquiry stay within their mandates and that they give affected individuals fair treatment. These conflicting interests have to be balanced.

A public inquiries act can protect private rights and interests by two devices. One is to build in legal safeguards for them. The other is to give the courts power to supervise public inquiries. The two devices are interrelated, because a safeguard is of no effect unless there is an independent authority to see that it is adhered to. They are also interrelated because judicial review provides some safeguards beyond those provided by legislation. The difficulty with both devices is that they tend to impose upon a public inquiry court-like procedures that may stultify a process that will be more efficient and effective if a commission is left free to follow its own bent.

Individual rights and interests may be prejudiced by the making of bad fact assessments and the giving of bad advice by commissions of inquiry. But the law should not provide safeguards against bad assessments and advice. The public inquiry process is designed to get the best fact assessment and advice possible, and allowing courts to substitute their views for those of commissions of inquiry would be self-defeating. The most that the law can do is to see that in proper cases commissions of inquiry stay within their mandates and do not make findings of misconduct without due process.

We will now turn to a consideration of specific safeguards against undue prejudice to individual rights and interests.

(2) Specific safeguards

(a) Right to be represented by counsel

Section 10 of the Alberta Act says that "any person appearing before a commissioner or commissioners may be represented by counsel". A witness who gives evidence is such a person. This is as it should be, as a witness who is subjected to the coercive power of the state should have legal advice if they want it. Everyone whom a commission of inquiry allows to participate is also entitled to counsel. This is also as it should be. Once a person or organization is properly before a commission, they should be entitled to have legal advice if they want it. A reformed Public Inquiries Act should therefore continue to give a right of counsel to persons who appear before a commission of inquiry.

(b) Right to examination by own counsel

Efficiency often suggests that commission counsel should interview all witnesses and lead all evidence before a commission of inquiry. However, it is common for a commission to allow a person whose interests are likely to be affected by the inquiry to be examined in chief by their own counsel, thus providing a more sympathetic examiner and ensuring that the "target" will be able to get their story out in a way that will best protect their interests. This practice has been favoured by the 1966 U.K. Salmon Commission, the Ontario Court of Appeal,[109] and Mr. Justice Estey.[110] On the other hand, Chief Justice Laycraft, in the *Royal American Shows* report,[111] gave reasons for thinking that, in a lengthy or complex matter, it is not feasible to have the evidence of a witness led by the witness's own counsel, and he had commission counsel lead all evidence. He did, however, invite a witness's counsel to adduce further direct evidence, and this may be enough to enable a witness to give the testimony they want to give.

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109 *Re Public Inquiries Act and Shulman* (1967), 63 D.L.R. (2d) 578 (Ont. C.A.).

110 Estey, Willard, "The Use and Abuse of Inquiries: Do They Serve a Public Policy Purpose", in Pross, *supra*, note 7 at 212.

111 Laycraft, J.H., *Royal American Shows Inc. and Its Activities in Alberta*, Report of a Public Inquiry, 1978, at A6-A7.

We think that it is good practice for a "target" to be examined by their own counsel unless doing so will unduly impede the orderly conduct of the inquiry. However, we do not think that it is the sort of thing that should be legislated. We therefore do not recommend that a reformed Public Inquiries Act confer on a "target" a right to be examined in the first instance by their own counsel.

RECOMMENDATION 23

(1) A person who appears before a commission of inquiry should have the right to be represented by counsel.

(2) Though it will often be appropriate for a commission of inquiry to allow a "target" to be examined first by their own counsel, a reformed Public Inquiries Act should not confer such a right.

Draft Act, section 13.

(c) Opportunity to rebut discrediting findings of misconduct

We have said earlier[112] that a commission of inquiry should be able to decide whether to hold hearings and who should have the right to participate at hearings. This applies even though the subject matter of the inquiry involves economic interests. But there is one exceptional case, namely, a case in which a commission, in its report, makes a finding that an individual, an organization or a corporation has engaged in discreditable conduct. What makes that case exceptional is the extraordinary impact that a public inquiry can have upon reputations, careers, civil and criminal liability and economic opportunities. If that impact is likely to occur, fairness may require a hearing.

The impact is the impact of the inquiry process itself. It does not depend upon, though it may be exacerbated by, the adoption or implementation of a commission's recommendations by its government. While a commission may have to make findings of discreditable conduct in order to make a full report, it should

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[112] See Recommendation 14 and supporting text, at pages 53-56 and Recommendation 18 and supporting text, at pages 62-65.

not do so unless the "target" of the findings has had a full and fair opportunity to rebut them.

Section 12 of the Public Inquiries Act gives effect to this "due process" principle by providing that a report alleging misconduct shall not be made until reasonable notice of the allegation has been given and the "target" of the finding has had an opportunity to give evidence and, at the discretion of the commission, to call and examine witnesses personally or by counsel. The section applies even if the person has already given evidence or called and examined witnesses. Other public inquiries acts in Canada have similar provisions.

There is general agreement that a finding of "misconduct" should not be made without due process. All of our consultants who addressed the question agreed with this. Section 12 and its counterparts in other public inquiries acts have, however, given rise to problems that should be addressed.

Some of these problems are as follows:

(a) Section 12 does not say who is to give the notice of allegations or possible finding. It seems that the notice must come from the commission or from commission counsel. But a commission can hardly give notice that it may make a finding unless it has decided, at least, that there is evidence that could support the finding. This means that it must have gone some distance towards making the finding. There is doubt whether, at that stage, the "target" will receive an unbiased hearing.[113]

(b) Section 12 does not say when the notice is to be given. It seems to imply that notice can be given at any time before the commission issues its report, but this has not been universally accepted. In at least one case[114] under the Ontario counterpart of section 12 it was argued, though unsuccessfully, that the notice must be given before the evidence on which the finding is based is introduced.

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113 This point has been developed by David W. Scott, Q.C. at greater length: Scott, in Pross, *supra*, note 7 at 145.

114 *VanderMeer v. Ontario (Royal Commission of Inquiry into Niagara Regional Police Force)* (1992), 90 D.L.R. (4th) 409 (Ont. Div. Ct.).

(c) Section 12 does not say how the notice must be given. Must a commission give formal notice that it is considering making the finding? Would a notice that certain evidence is going to be given allow a commission to make a finding based on that evidence? Would some other form of notice be enough?

(d) Section 12 does not say whether or not the fact that a notice has been given must be made public. This is important, as the mere fact that notice has been given, if it becomes public, gives the impression that the "target" is guilty of misconduct.

The federal counterpart of section 12 was applied in *Landreville* v. *The Queen (No. 2).*[115] A commission of inquiry had been established to advise Parliament as to the fitness of a judge for office. The commission had inquired into the conduct of the judge in respect of certain transactions, and had found that that conduct rendered the judge unfit for office. The commission had gone on to find that the judge's conduct in relation to various tribunals that had considered the transactions had amounted to contempt of those tribunals. This prospective finding had not been drawn to the judge's attention and he accordingly had had no opportunity to rebut it. The court declared that that finding was invalid because the commission did not comply with the federal notice provision.

Commissions of inquiry have used various devices to avoid being caught by the notice provisions. One such device is for commission counsel to make a final public submission to the commission outlining all findings that the commission might reasonably make; this submission constitutes the notice, and if "targets" do not ask for further hearings, the commission can make findings. Another such device is to send out formal notices after the hearings have concluded, and, if necessary, to reconvene the commission's hearings to deal with requests for due process.

The decision of an Ontario Divisional Court in the Niagara Commission case[116] has helped to clear up some of the doubts about the effect of section 12 and its counterparts. The court found that in that case the "targets" had notice of the allegations; had every opportunity to call evidence to respond to the allegations; that the "targets" did call evidence; and that "the door remains open

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115 (1977), 75 D.L.R. (3d) 380 (F.C.T.D.).

116 *VanderMeer v. Ontario (Commission of Inquiry), supra,* note 114.

to them to call or recall witnesses for the purposes of examination or cross-examination in order to further respond to any and all allegations". The essence of the court's decision is that the substance of due process is enough. However, this is a decision of an intermediate court in another province based on the legislation of that other province, and we think that Alberta's section 12 should be revised so that it will give the substance of protection to a "target" without entangling a commission of inquiry in a web of legalistic requirements.

The essence of the revised section 12 should be that a commission should not make a finding of misconduct unless the person against whom it is made has had an opportunity to rebut it. Implicit in this is

(a) that the person must know what the prospective finding is and what evidence the commission has that supports it;

(b) that the person must have an opportunity to do whatever is necessary to rebut the finding or explain the facts. This includes an opportunity to make representations to the commission. It is likely to include an opportunity to call evidence and cross-examine witnesses.

Upon reviewing sections 4 and 5 of the Administrative Procedures Act (Alberta), we think that they cover these points in relation to administrative decisions. For the sake of uniformity of provincial law, we think that a reformed Public Inquiries Act should have a section patterned after those sections. Because sections 4 and 5 deal with administrative decisions rather than the making of recommendations, some changes will be necessary to apply them to a public inquiry.

The OLRC made a similar recommendation.[117] It went further, however, to recommend that a commission of inquiry be required to give, at the commission's earliest convenience, notice of allegations of misconduct that will be made during a commission's public proceedings, including the substance of the allegation and, where appropriate, any relevant evidence.[118] It also recommended that the "target" have a right to respond. That is undoubtedly good

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[117] OLRC, *supra*, note 3; Recommendation 10 at 215. Also see discussion at 201-04.

[118] *Ibid.*, Recommendation 9 at 215.

practice, and our understanding is that recent major investigatory commissions of inquiry have in fact given full advance disclosure to the primary participants. We think, however, that legislating this kind of practice is likely to entangle commissions in mandatory red tape that may inhibit their proceedings and even trip them up; an immediate right to respond to every allegation, for example, with consequent cross-examination by all parties, might well embroil an inquiry in side issues or throw it off stride on the main issues. We prefer not to go so far. We think that it is enough to require that a commission of inquiry give notice of a prospective finding and a chance to rebut it.

Our recommendations deal with findings of "misconduct". The statutes now merely refer to misconduct without defining it. One federal commission of inquiry characterized the lack of a definition as a weakness in the federal Act. It went on to hold that "misconduct" in that Act "*prima facie* encompasses wrongdoing or misconduct of such a nature as to attract a criminal charge".[119] In so doing the commission relied, at least in part, on the words "*charge of* misconduct alleged against him" which distinguishes the federal section from Alberta's section 12. On the other hand, a commission of inquiry under the Ontario Act indicated that, as a matter of constitutional law, the Ontario counterpart of section 12 could not include criminal conduct.[120]

There should be a definition of "misconduct". The right of rebuttal should apply to any serious allegation about conduct. We accept the OLRC's formulation of "any finding or conclusion that could reasonably be construed as bringing discredit on an individual" and recommend that it be included in a reformed Public Inquiries Act.

We think that the successor to section 12 should protect a corporation as well as an individual. Corporations have reputations and can be subjected to criminal and civil liability. Alberta's section 12 refers to a "person" and presumably applies at least to both individuals and corporations, unless it can be

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[119] Commission of Inquiry into the Air Ontario crash at Dryden, Ontario, Final Report, Vol. III at 1194. The Commission nevertheless directed that notices go to persons against whom lesser allegations were made.

[120] Royal Commission of Inquiry into the Niagara Police Force, Ruling dated September 3, 1991, page 8, per Hon. W.E.C. Colter. The ruling was affirmed without reference to this point in *VanderMeer v. Ontario (Royal Commission of Inquiry into Niagara Regional Police Force), supra*, note 114.

successfully argued that the word "misconduct" is not appropriate in relation to a corporation.

We would make two minor points:

(a) a mere technical failure to comply with the provision requiring notice and an opportunity to rebut should not affect the validity of a finding.

(b) a commission should not be required to make public the fact that it has given a notice of a possible finding (though this will become apparent if a hearing is reconvened to give a "target" a chance to rebut the possible finding).

RECOMMENDATION 24

(1) A commission of inquiry should be prohibited from making findings in its report that could reasonably be construed as bringing discredit on a person unless, before the finding is made, that person

(a) has been adequately informed about the allegations on which the finding is made and the supporting evidence, and

(b) has had a fair opportunity to rebut or explain the allegations on which the finding is based, including where appropriate, a fair opportunity to give evidence, cross-examine witnesses and make representations to the commission.

(2) The protection of this recommendation should apply to individuals and corporations.

(3) The fact that a notice of intention to make a finding has been given should not have to be made public.

(4) Substantial compliance with this recommendation by a commission of inquiry should be sufficient unless a manifest injustice has resulted or may result.

(5) A commission should be able to comply with this recommendation in respect of any person at any time after the appointment of the commission and before the delivery of its report.

Draft Act, section 16.

(d) Funding

Extensive participation in a public inquiry is likely to cost a good deal of money. Private resources may well be insufficient to fund an effective participation. Without public funding, the benefit of a right to participate may be illusory.

One case in which public funding is required is that of a "target" of an investigatory inquiry. Funding a "target" who is perceived as a wrongdoer is likely to be unpopular. But public inquiries are for the public benefit, and the law and circumstances compel "targets" to participate in them even though that may expose the "target" to serious adverse consequences. The cost of defending oneself may be ruinous to a "target". In our view, fairness requires that "targets" of a public inquiry be publicly funded.

Fairness and good conscience may require public funding for other interests involved in an investigatory inquiry. Examples are the investors in the Principal Group inquiry (though that was not an inquiry under the Public Inquiries Act), the parents in the Ontario inquiry into deaths at the Hospital for Sick Children, and the relatives of the passengers who died in the airplane crash involved in the federal Dryden inquiry.

Somewhat different considerations apply to an advisory inquiry. Its effectiveness may depend upon the effectiveness of the participation of interest groups. Unfunded views are likely to be less effectively put forward than funded views. Considerations of effectiveness therefore often require funding for participants.

For these reasons, public funding should often be available for participants in public inquiries. How should it be determined whether when it should be available and in what amounts? We think that decisions about funding should be made in two stages.

First, the commission of inquiry should consider the question of funding and make recommendations. Where appropriate, it should take steps to control costs by requiring persons or groups with similar interests to participate through one counsel or team of advisers and by ensuring that counsel are funded to appear only when their clients' interests require them to appear. This is similar to the OLRC's recommendation.[121]

Second, the government should receive and consider the commission's recommendations. It would be inappropriate to impose a legal obligation on the government to provide funding either at all or at a prescribed level, but there will be a practical compulsion on it to provide funding that is adequate under the circumstances. The process of budget control that we have previously recommended should apply in order to ensure that costs do not get out of hand.

RECOMMENDATION 25

Subject to Recommendation 4 about budgetary control, a commission should have power to recommend that the Government pay such costs of participation in a public inquiry as the commission thinks reasonable.

Draft Act, section 14(2).

(e) Role of commission counsel

A commission of inquiry is not obliged to retain a lawyer to assist it. However, an investigatory commission is very likely to want a lawyer to obtain, organize and present evidence about the untidy sets of facts that must be investigated. Even an advisory commission will often find counsel to be useful. The Alberta, Manitoba, Newfoundland, Northwest Territories, Prince Edward Island and Saskatchewan acts make specific provision for retaining commission counsel, and the LRCC Report does so also.

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121 OLRC, *supra*, note 2; Recommendation 19 at 217.

Commission counsel is the commission's counsel. Their actions are attributed to the commission. A commission may delegate to commission counsel such functions as it thinks fit. It may give such directions to counsel about the conduct of the commission's affairs as it thinks fit. It may ask commission counsel for assistance whenever it thinks fit. But it is for the commission to conduct the inquiry and give directions about the performance of delegated functions.

In order to serve the commission properly, commission counsel must be unbiased with relation to the issues and the persons involved in the inquiry. Chief Justice Laycraft equated the function of commission counsel with that of a Crown prosecutor,[122] in the sense that a prosecutor's function is not to struggle for a conviction but is rather to ensure that all evidence is put before the court. In Mr. Justice Sopinka's view, this statement does not go far enough. A prosecutor, he noted, is not the court's agent, but commission counsel is the commission's agent. A prosecutor does not confer with the court about what evidence to call, as commission counsel may well do. A prosecutor does not help the court to write its judgment, but commission counsel may well help the commission to write its report.[123] "These and other factors demand more impartiality than is required of a prosecutor."[124]

An investigatory inquiry may put commission counsel in a confrontational position. Commission counsel must lead evidence, including evidence that a "target" or interested party does not want led. They must test evidence, and that may well involve vigorous cross-examination of a "target". They must expedite hearings even if interested parties want to obstruct and delay the inquiry. If the commission wants advice or argument, commission counsel must give it even if it is adverse to an interested party. Commission counsel cannot shrink from confrontation if confrontation is necessary to advance the inquiry process.

But once commission counsel has taken a position adverse to that of an interested party, that party is likely to regard them as the enemy and consider

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122 Laycraft, *supra*, note 111.

123 The cases holding that it is a denial of natural justice for counsel who acts as prosecutor before a professional disciplinary tribunal to assist the tribunal in writing its decision have not yet been applied to public inquiries, and the circumstances are different.

124 Sopinka, "The Role of Commission Counsel", in Pross, *supra*, note 7 at 77-78.

them partisan and biased. This is likely to give rise to a feeling that commission counsel should not be an intimate adviser of the commission and should not assist in preparing the commission's report. The literature discloses this feeling, and so did some of our consultants. So has Mr. Justice Sopinka on a number of occasions.[125] On the other hand, Anthony and Lucas, while recognizing the dangers of apparent bias, think that commission counsel should not be precluded from assisting at the report stage.[126]

There is a real difficulty in these requirements of both impartiality and confrontation. The question is whether a reformed Public Inquiries Act should in some way regulate or define the role and function of commission counsel. We do not think that it should, and the OLRC came to the same conclusion.[127] A legislative command that commission counsel act impartially and fairly would accomplish little, as that is their duty now. Specific legislative regulation of commission counsel's conduct would impose rigidities that are likely to be inappropriate.

It is better to recognize that the functioning of commission counsel is part of the functioning of a commission of inquiry. If certain conduct of the commission itself would be a breach of duty or would attract judicial review, so would the same conduct by commission counsel unless the commission rectifies the situation. The remedies for unfair or biased conduct of a commission apply to unfair or biased conduct of commission counsel if the commission permits the conduct.

RECOMMENDATION 26

A reformed Public Inquiries Act should not attempt to define or regulate the function of commission counsel.

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125 See, e.g., *ibid.*, at 85.

126 Anthony and Lucas, *supra*, note 6 at 144-45.

127 OLRC, *supra*, note 3 at 211.

(f) Findings of criminal or civil liability

In Ontario, some orders in council that have established investigatory inquiries have, in effect, prohibited the commissions of inquiry from "expressing any conclusion of law regarding civil or criminal responsibility".[128] The OLRC thought that this prohibition should be codified and recommended that it apply generally to all commissions of inquiry.[129]

The Ontario words could be interpreted as doing no more than prohibit a commission of inquiry from saying in so many words that a person is civilly or criminally responsible for certain conduct. However, in *Re Nelles and Grange,*[130] the Ontario Court of Appeal held that they precluded the commission of inquiry from making findings of fact from which criminal (and presumably civil) liability would flow. The civil rights of persons that the limitation was designed to protect overrode the needs of the parents of the dead children and the public to know the facts.

An Alberta decision allowed an inspector appointed to conduct an investigation under Part XVIII of the Business Corporations Act[131] to go further and to report whether or not he had discovered any evidence "tending to show" that wrongdoing had occurred. The decision allowed the inspector to name names. While, in the judge's view, the Act reserved the adjudicative function to the courts, the proposed wording would not amount to a finding of civil or criminal liability and would not be construed as such. This decision, however, was made in the context of an inquiry to determine whether or not certain kinds of wrongdoing had taken place, and it would be difficult to report sensibly on

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128 See *Re Nelles and Grange* (1984), 9 D.L.R. (4th) at 79, 83 (Ont. C.A.); *Starr v. Houlden, supra,* note 5, at 1377; *VanderMeer v. Ontario (Royal Commission of Inquiry into Niagara Regional Police Force), supra,* note 114 at 409, 412.

129 OLRC, *supra,* note 2 at 204; Recommendation 12 at 216. The OLRC expressed the view that the provision has now "been elevated, arguably, to a constitutional requirement" with the decision in *Re Nelles and Grange.*

130 *Supra,* note 128 at 90. Dicta in *Re Beckon* (1992), 93 D.L.R. (4th) 161 at 168 (Ont. C.A.), while referring to *Nelles v. Grange* seem to suggest a less ample interpretation.

131 See *Re Code and First Investors Corporation Ltd.* (1989), 54 D.L.R. (4th) 730 at 732-33. The Court of Appeal quoted Justice Berger's reasons in the course of its own decision on another subject. The Court did not suggest that the reasons were not correct.

that question without saying that the evidence tended to show that wrongdoing had taken place or that it did not.

Recently, a commission of inquiry under the federal Act[132] declined to refrain from naming names. While the commission disclaimed any intention of assigning civil or criminal responsibility, it said that it could not report its findings fairly and accurately without identifying individuals, corporations and organizations whose human, corporate and regulatory error was involved in the events inquired into.

What should a reformed Public Inquiries Act do? We think that a commission of inquiry should not be allowed to express any conclusion of law regarding civil or criminal liability. That is because a commission can provide a full and proper report and recommendations without expressing any such conclusion.

But we think that a commission should be able to make any finding of fact that falls within its mandate. A commission of inquiry may be established to get out the facts of a disaster of some kind with a view to satisfying legitimate public concern about what happened and with a view to obtaining advice as to how future disasters of the same kind may be avoided. If so, the commission cannot do a proper job without saying what the facts are. Others may draw from those findings inferences about the criminal or civil liability of a "target". That is unfortunate, but it cannot be helped if the inquiry is to serve the public interest.

What legal effect should a commission's findings of fact have? The findings are made for the purposes of the inquiry only. A commission is not a court established to adjudicate private rights or criminal liability and it functions without the usual court protections. Therefore, a commission's findings should not affect private rights or criminal liability. We accordingly recommend that a commission's findings be inadmissible in a court to establish the truth of the facts stated by the commission.[133]

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132 Commission of Inquiry into the Air Ontario Crash at Dryden, *supra*, note 119 at 1360, per Justice Moshansky.

133 A minority of the Institute's board think that this recommendation is too extreme. They agree that a commission's findings should not give rise to *res judicata* but they think that it should be left to a court to decide in particular circumstances whether or not a commission's findings should be

(continued...)

RECOMMENDATION 27

(1) A commission of inquiry should be entitled to make any finding of fact that falls within its mandate but should not express a conclusion of law regarding legal liability.

(2) A commission's report should not be admissible in any proceedings in court under the law of Alberta to prove the facts found by the commission.

Draft Act, section 15.

(3) Evidentiary privileges and immunities

(a) Privileges generally

The reasons for the evidentiary privileges apply to a public inquiry in the same way as they apply to other legal proceedings and we do not think that there is anything special in the nature of a public inquiry that would override those reasons. We therefore think that in general the evidentiary privileges that are available in court proceedings should be available in a public inquiry, and we so recommend. Section 8(1) of the Public Inquiries Act is intended to have this effect, and the Alberta Evidence Act extends the benefit of some privileges to public inquiries.

(b) Crown privilege, public interest immunity and statutory confidentiality

Section 8(2) to 8(6) of the Public Inquiries Act deal with information that is subject to a public interest immunity, including Crown privilege and a statutory requirement that information be kept secret. The subsections provide that

(a) information must be disclosed to a commission of inquiry even if it is subject to public interest immunity or statutory secrecy. The Attorney General may, however, effectively forbid the disclosure of such information by certifying that disclosure would involve cabinet

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[133](...continued)
capable of founding an issue estoppel or a claim of abuse of process or should be admissible in evidence.

deliberations, matters of a secret or confidential nature the disclosure of which would not be in the public interest, or matters the disclosure of which cannot be made without prejudice to the interests of persons not concerned in the inquiry.

(b) privileged and secret information disclosed *to* a commission under section 8 cannot be disclosed *by* the commission unless the Attorney General consents to the disclosure.

Section 8 was adopted in 1980. Its enactment appears to have been a considered legislative effort to deal with difficult subjects in an orderly way and to strike a balance among competing considerations. Although some of our consultants thought the section inappropriate, we accordingly do not think that we should recommend its rejection for a reformed Public Inquiries Act. We do, however, propose one change in the section.

The law has moved away from allowing the Executive to shield documents from disclosure by its own untested statement that disclosure would be contrary to a public interest. Courts tend to assert a power to look at the documents to be sure that the claim of privilege is justified. *R. in right of Alberta v. Mannix*[134] shows this. It dealt with section 35 of the Alberta Evidence Act. Section 35(1) purports to authorize a deputy head or other officer of a department of the government, acting on ministerial direction, to claim privilege for a document that is officially in the possession of the minister or department head. Section 35(4) provides that an employee cannot be compelled to disclose information if a minister certifies that in his opinion disclosure of the information is not in the public interest or will prejudice the interests of persons not involved in the litigation, and section 35(5) declares that information to which section 35(4) applies is privileged. The effect of the decision of the Court of Appeal is that section 35 deals only with the procedure by which Crown privilege may be claimed and does not stop the courts from deciding when Crown privilege applies.

Two arguments can be made that section 8(4) of the Public Inquiries Act does not prevent a court from looking behind an Attorney General's certificate. The two arguments are not entirely consistent. They are as follows:

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134 [1981] 5 W.W.R. 343 (C.A.).

(a) *Mannix* shows that the courts retain the power to look behind an Attorney General's certificate despite legislation that provides that a ministerial certificate establishes a public interest immunity.

(b) the effect of section 8(4), which provides for the Attorney General's certificate and the consequent privilege, is merely to displace section 8(3), which provides that public interest immunity and statutory confidentiality do not apply to a public inquiry, so that all it does is to restore the common law situation under which a court can review the Attorney General's certificate.

We do not think that either of these arguments establishes conclusively that the courts can go behind a certificate of the Attorney General issued under section 8(4). *Mannix* may not apply because the section under consideration there dealt only with procedure, while section 8 deals with the substantive applicability of the public interest immunity and statutory confidentiality. Interpreting section 8(4) as merely restoring the public interest immunity that is abolished by section 8(3) gives rise to some further problems of interpretation. We think that these doubts about the power of the courts to go behind an Attorney General's certificate should be settled.

We think that the question should be settled by allowing a court review of an Attorney General's certificate. In our view, the disclosure to a commission of inquiry of privileged information is likely to be as much in the public interest as disclosure to a court for the purposes of a lawsuit. The case for disclosure *to* a commission of information covered by section 8(2) and (3) is strengthened by the fact that disclosure *by* the commission to anyone else is prohibited unless the Attorney General consents. We therefore think that the rules that apply to courts in this area should apply to public inquiries. But it does not follow from the analogy of court proceedings that the commission itself should be able to look behind a certificate of the Attorney General as do the courts. What does follow, we think, is that the commission should be able to apply to the Queen's Bench for an order for disclosure of the information to the commission and that the Queen's Bench should have the same powers on such an application as it would have if the question arose in a lawsuit, including any power to look behind the Attorney General's certificate. That is what we propose.

One provision of section 8(4) needs special mention. It is that the Attorney General's certificate may protect third-party information from disclosure. It may

seem anomalous that the Attorney General should have the power, though not the duty, to protect private interests in this way. However, the information involved is most likely to be private information in government hands, and policy justifications exist for providing some protection for bystanders who are not involved in the subject matter of the inquiry.

RECOMMENDATION 28

(1) Except as provided below, a person should have the same evidentiary privileges in a public inquiry as they have in a court.

(2) Public interest immunity and statutory secrecy should not in general apply to the disclosure of information *to* a commission of inquiry.

(3) Information that, but for this recommendation, would have been subject to public interest immunity or statutory secrecy should not be disclosed *by* a commission of inquiry without the written permission of the Attorney General.

(4) Public interest immunity and statutory secrecy should apply if the Attorney General certifies that in their opinion disclosure would infringe Cabinet confidentiality, would be contrary to the public interest, or would prejudice the interests of a person not concerned in the inquiry.

(5) A commission should be able to apply to the Queen's Bench to determine any question that arises under the section; upon such application the Queen's Bench should have any power that it would have under the common law if the matter were a proceeding in the court, including any power to review a certificate of the Attorney General; and the Queen's Bench should have power to determine the question and give consequential orders and directions.

Draft Act, section 19.

(c) Self-incriminating evidence

(i) Self-incriminating testimony

The common law permitted a witness to refuse to give self-incriminating testimony. Provincial and federal evidence acts have abolished that common law privilege. At present, section 6(1) of the Alberta Evidence Act (which applies to public inquiries)[135] provides that a witness shall not be excused from answering a question on the grounds that the answer may tend to incriminate him or render him liable to prosecution under a provincial statute. The better opinion is that section 6(1) is constitutionally valid.

However, there is still an underlying principle of the law that a person should not be compelled to convict themself of a crime out of their own mouth. Section 6(2) of the AEA and section 13 of the Charter, using identical words, therefore give a witness "a right not to have any incriminating evidence so given used to incriminate that witness is any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence". The Charter provision is binding everywhere in Canada.

This right, or "use immunity", not to have self-incriminating testimony used against one has some limitations. An accused's prior self-incriminating testimony can be used as the basis of cross-examination to attack their credibility.[136] The police or the Crown can use an accused's prior self-incriminating testimony to find other admissible evidence, that is, an accused does not have any immunity against the use of evidence derived from prior self-incriminating testimony. It is unlikely that the use immunity will apply to later civil proceedings, and it is not yet clear whether it will apply to regulatory proceedings such as the disciplinary proceedings of professional associations.[137] Because of these limitations on the

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135 The AEA applies to evidence in an "action" in "court" (s. 2). "Action" includes an . . . inquiry . . . and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Alberta" (s. 1(a)). "Court" includes a . . . commissioner . . . or other officer or person having by law . . . authority to hear, receive and examine evidence" (s. 1(b)).

136 *R. v. Kuldip*, [1990] 3 S.C.R. 618.

137 See, for example, *Donald v. Law Society of British Columbia*, [1984] 2 W.W.R. 46 (B.C.C.A.); *Knutson v. Saskatchewan Registered Nurses Association* (1990), 6 W.W.R. 645 (Sask. C.A.).

protection afforded by the use immunity, the OLRC recommended that "everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her".[138] This would confer on witnesses summoned to public inquiries a protection not available to witnesses in court proceedings or in most other inquiries under provincial law. While the OLRC does not give reasons for the different treatment, it presumably thought that the public interest in getting information before a public inquiry is not as strong as the public interest in getting information before a court in litigation.

Our consultants were divided on the question whether a witness in a public inquiry should be able to refuse to give self-incriminating testimony. Some thought that a right to decline to give self-incriminating testimony is necessary for the protection of individual rights, and some who held that view thought that the protection should apply to testimony leading to civil as well as criminal liability. One consultant would go further and forbid the asking of a question if the answer might tend to incriminate the witness, so that a witness would not have to incur the opprobrium of declining to answer on grounds of self-incrimination. Others, however, thought that the use immunity under the Charter gives adequate protection and that a right to decline to answer on grounds of self-incrimination might stultify inquiries, or at least unduly inhibit their work.

It is nearly 100 years since the Canada Evidence Act,[139] which was the model for the provincial evidence act provisions including section 6(1) of the AEA, abolished the right to decline to give self-incriminating testimony. In the Institute's view, it has not been shown that there is reason to depart, in the particular case of public inquiries, from the general rule that applies to all other proceedings in which sworn testimony can be compelled. Further, the use immunity conferred by the Charter is a powerful protection and has not, in the Institute's view, been found wanting.[140] For these reasons, our recommendation

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138 OLRC, *supra,* note 2; Recommendation 5(1) at 214. The OLRC's recommendation is subject to two exceptions: it would not allow a witness to refuse to testify about the execution of official government duties, and it would not protect a witness who has received a grant of immunity from prosecution from the proper prosecutorial authorities.

139 S.C., 1893, c. 31.

140 A minority view on the Institute's board is that the right question is not (continued...)

is that no special privilege against self-incrimination should be conferred on a witness in respect of testimony given in a public inquiry.

RECOMMENDATION 29

A reformed Public Inquiries Act should not confer on a witness any special privilege or immunity against self-incrimination on a witness in respect of testimony given in a public inquiry in addition to the use immunity conferred by section 13 of the Charter.

(ii) Self-incriminating documents and things

We now turn from a discussion of compelled self-incriminating testimony to a discussion of the compelled production of self-incriminating documents and things.

There appears to have been a common law privilege against compulsion to produce self-incriminating documents and things. This was in addition to the common law privilege against compulsion to give self-incriminating testimony that is discussed above.[141] Section 6(1) of the Alberta Evidence Act and its counterpart provisions in federal and provincial legislation may have abolished that privilege: although in terms they only say that possible self-incrimination is no excuse for refusal to answer questions, they have sometimes been interpreted as including the proposition that possible self-incrimination is no excuse for

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[140](...continued)
how an exception from a general rule of compellability can be justified for witnesses in public inquiries, but is whether the public interest in favour of public inquiries justifies compelling a witness to give self-incriminating evidence. The minority view is that the answer to the latter question is no.

[141] For Canadian authority see, e.g., *Klein v. Bell*, [1955] S.C.R. 309; *R. v. Judge of the General Sessions of the Peace for the County of York, Ex parte Corning Glass Works of Canada Ltd.*, [1971] 2 O.R. (2d) 3 (Ont. C.A.); *Webster v. Solloway, Mills*, [1930] 3 W.W.R. 445; *Marcoux v. R.*, [1976] 1 S.C.R. 763; *Ziegler v. Hunter*, [1984] 2 F.C. 608 (C.A.); Stevenson and Cote, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 436; Sopinka and Lederman, *Evidence in Civil Cases* (Butterworths, 1974) at 220 (though the authors of the second edition at 736 expressed the view that the point is unclear).

refusal to produce documents and things.[142] There is, however, considerable doubt that the use immunity granted by section 13 of the Charter and section 6(2) of the AEA applies to documents and things produced under compulsion.[143]

Documents and things have an existence independent of the will of the person who has them. Compelling a person to produce evidence against themself that has an independent objective existence is a less objectionable means of obtaining a criminal conviction than compelling a person to create evidence against themself from their own mouth.[144] We do not recommend that a reformed Public Inquiries confer any special privilege against compulsion to produce self-incriminating documents and things. We think that the production of self-incriminating documents and things should be governed in public inquiries by the general law that applies to other proceedings.

The OLRC was of the same view,[145] with one qualification. Under its recommendations, it should be a lawful excuse for refusing to produce a document or thing that the right of privacy of the person in control of the document or thing outweighs the commission's interest in its production. Again, however, we think that the general law should apply.

RECOMMENDATION 30

A reformed Public Inquiries Act should not confer any special privilege upon persons who are required to produce documents and things in public inquiries.

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142 See *Ziegler v. Hunter, supra,* note 141; *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, supra,* note 141; *R. v. Judge of the General Sessions of the Peace, supra,* note 141; *R. v. Sweeney (No. 2)* (1977), 16 O.R. (2d) 814 (Ont. C.A.). See also per L'Heureux-Dubé J. in *Thomson Newspapers v. Canada, supra,* note 10 at 282.

143 *Ziegler v. Hunter, supra,* note 141; *R. v. Simpson* (1943), 79 C.C.C. 344 (B.C.C.A.); see, on the other hand, *Attorney-General v. Kelly* (1916), 10 W.W.R. 131 (Man. C.A.).

144 See, e.g., *Collins v. The Queen* (1987), 33 C.C.C. (3d) 1 at 19. The majority thought that real evidence obtained through a Charter violation would rarely operate unfairly so as to require exclusion under s. 24(2) of the Charter.

145 OLRC, *supra,* note 2 at 197-99; Recommendation 6 at 215.

Before leaving the subject of self-incriminating evidence, we will stop to consider whether there is anything in other Alberta legislation dealing with self-incriminating evidence, or in the Charter, that will cast doubt on the policy or the validity of Recommendations 29 and 30.

(iii) Self-incrimination and other Alberta legislation

In addition to the Alberta Evidence Act, at least 30 special Alberta statutes, in one way or another, require a witness to answer self-incriminating questions in various kinds of proceedings. All but one[146] of those provisions is accompanied by some protection to the witness. The protection given by most of the statutes providing for the discipline of professionals, and some other statutes as well, is to make self-incriminating testimony inadmissible in subsequent civil proceedings and in proceedings under any Alberta statute,[147] though section 66 of the 1990 Legal Profession Act dropped the use immunity for civil proceedings. Two other devices that are used in Alberta statutes should be specifically noted.

First, section 19 of the Natural Gas Marketing Act and section 40 of the Energy Resources Conservation Act specifically provide that self-incrimination is not a grounds for refusing to produce documents and papers in certain inquiries, and they both go on to provide an immunity against the later use of documents and papers produced in those inquiries. This makes explicit both the abolition of the privilege against the compulsion to produce self-incriminating documents and papers and the extension of the use immunity to them. The sections do not mention "things".

Second, section 30 of the Public Utilities Board Act and section 33 of the Local Authorities Board Act abolish the privilege with respect to self-incriminating books, documents and papers and go on to provide that "no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he has, under oath, testified or produced documentary evidence" (with a perjury exception).

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146 Railway Act, s. 114(3).

147 The Architects Act, s. 44, is an example of a professional statute. The Boilers and Pressure Vessels Act is an example of another statute giving the same protection, and the Fatality Inquiries Act extends the use immunity to "any other proceeding". Proceedings in respect of perjury or giving contradictory evidence are excepted, but these are not proceedings under an Alberta statute.

These sections, if valid, confer a full immunity with respect to wrongdoing in a transaction about which evidence is given. This transactional immunity extends far beyond a mere use immunity.

It is not clear how the provisions in the 30 Alberta statutes relate to section 6 of the Alberta Evidence Act or to each other, and they cannot, of course, detract from the protection given by section 13 of the Charter. To the extent that any of them purport to affect criminal proceedings, there is doubt about their constitutional validity,[148] and the two devices we have described appear to cover criminal proceedings. Further, conferring a use immunity on documents and things would raise the possibility that a person could effectively immunize themself against the self-incriminating consequences of a document in their possession by the simple expedient of producing it at a public inquiry, which we think is likely to be considered undesirable. Going further and conferring a full transactional immunity would be even more extreme. We see nothing in the 30 statutes that would require or suggest a change in Recommendations 29 and 30.

(iv) Self-incriminating evidence and the Charter

The Charter raises two questions about self-incriminating evidence. The first is whether the Charter has invalidated section 6(1) of the Alberta Evidence Act, which abolishes the privilege against self-incrimination.

In the *Thomson Newspapers* case,[149] Madam Justice Wilson, dissenting, held that a section of the Combines Investigation Act that required a witness to give self-incriminating evidence offends section 7 of the Charter unless it confers an immunity against the use of evidence derived from the testimony, and it seems that Chief Justice Lamer would have agreed with her if, in his view, the question had been properly raised for decision. Two other judges, Madam Justice L'Heureux-Dubé and Mr. Justice Sopinka, held that the failure to provide an immunity against the use of derived evidence did not offend section 7 (though Mr. Justice Sopinka held that the section offended section 7 for another

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148 See *Klein v. Bell, supra,* note 141.

149 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161 (S.C.C.).

reason).[150] The fifth judge, Mr. Justice La Forest, also held that the section did not offend section 7 because the criminal law itself includes a limited derivative use immunity which satisfies the requirements of fundamental justice. It cannot yet be said, however, that the existence of this limited immunity against the use of derived evidence is established in the law. The question of a derivative use immunity may come before the Supreme Court again in view of the application for leave to appeal the decision of the British Columbia Court of Appeal in *British Columbia Securities Commission v. Branch.*[151]

We said two things in our discussion of Recommendations 29 and 30. The first is that self-incriminating testimony given and self-incriminating documents produced in public inquiries should be treated the same as self-incriminating testimony given and documents produced in other kinds of proceedings. The second is that the use immunity conferred by section 13 of the Charter is adequate. If the courts ultimately hold that the use immunity is not enough to satisfy the Charter, the resulting situation in all kinds of proceedings will have to be reviewed. Corrective steps taken with respect to section 6 of the Alberta Act would automatically apply to public inquiries. Recommendations 29 and 30 would leave public inquiries in the same situation as other proceedings. We do not see any reason to change the two recommendations in light of this discussion of the Charter.

The second Charter question is whether compulsion to produce documents and things for a public inquiry infringes section 8 of the Charter, under which a person has a right "to be secure from unreasonable search and seizure".

In the *Thomson Newspapers* case,[152] an administrative official had power to order production of documents in the course of an investigatory proceeding to determine whether offenses under the Combines Investigation Act had taken

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150 Mr. Justice Sopinka held that the compulsory evidence provision offended a right of a suspect to silence by requiring them to answer questions asked by a functionary whose function it is to investigate the commission of criminal offenses (which presumably does not include a provincial commission of inquiry). However, he held that s. 13 of the Charter covers the privilege against self-incrimination, leaving no residue of that privilege in s. 7.

151 (1992), 63 B.C.L.R. (2d) 331 (B.C.C.A.).

152 *Supra,* note 149.

place. Four of the five judges of the Supreme Court of Canada held that an order to produce in the nature of a *subpoena duces tecum* constitutes a seizure, and the basis of the contrary decision of the fifth[153] was that the power to order production in that case could not be enforced without judicial intervention, that is, without an application to and a certificate by a Federal Court judge. Of the four judges who held that an order to produce constitutes a seizure, two[154] held that the seizure would be unreasonable under section 8 of the Charter and two[155] held that it would not. Those who held that a seizure under the Act in question would not be unreasonable viewed the Act as regulatory rather than as a true criminal statute. Two consequences flowed from this. One was that it was not necessary for the administrative official who wanted to compel production to have reasonable and probable grounds for believing that an offence had taken place. The second was that there was a lower expectation of privacy in connection with business documents.

It is not easy to extract a binding reason for decision from the *Thomson* decision and to apply it to provincial inquiries. A provincial public inquiry does not fall within a category of proceedings that can be described as criminal proceedings. Indeed, if it is a true criminal proceeding, it is beyond the powers of a province to establish it. On the other hand, it is by no means clear that every provincial inquiry will fall within the "regulatory" category. That is because one of the stated characteristics of a "regulatory" proceeding is that it is part of a continuing regulatory regime of which those subject to it are aware in advance. A public inquiry, on the other hand, is a one-off event that may not have the object of improving an existing regulatory regime. Further, one justification for applying lower standards to a "regulatory" provision is that the documents sought are usually business documents, for which there is a lower expectation of privacy than there is for at least some kinds of personal documents; but a public inquiry, while it often involves business documents, may also involve personal documents.[156]

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153 Mr. Justice Sopinka.

154 Mr. Justice La Forest and Madam Justice L'Heureux-Dubé.

155 Chief Justice Lamer and Madam Justice Wilson.

156 Note that Stevenson & Cote (*Civil Procedure Guide, 1989*, Juriliber, 1989, at 468) cite *Thomson Newspapers* and other cases for the proposition that forced production of documents in a civil case or administrative inquiry is a seizure under the Charter. They say that "whether the production (continued...)

On the whole, it seems likely that, if all powers to compel production must be categorized as either "criminal" or "regulatory", commissions of inquiry will fall into the "regulatory" category. If it should turn out that the "criminal" and "regulatory" categories do not exhaust the categories of proceedings, it could also turn out that the mere requirement that a commission must consider the production of a document to be necessary for its inquiry will not be enough to satisfy the Charter.

However, we think that compelled production for the purpose of a public inquiry, if enforced by order of the Queen's Bench as we have recommended,[157] is no more an unreasonable search and seizure than is compelled production for the purpose of litigation. Enforcement through the courts guarantees that the power to compel production will be exercised only after judicial intervention, and we think it unlikely that a power exercised by a court in its discretion will be regarded as unreasonable under section 8 of the Charter.

(d) Compelling testimony by a witness charged with an offence

An accused person cannot be compelled to testify at their own trial. This is a fundamental principle of Canadian criminal law. Section 11(c) of the Charter gives effect to it. Section 11(c) does not say that an accused person cannot be compelled to testify about the subject matter of the charge in proceedings other than their own trial, such as a public inquiry, and it is doubtful that section 7 of the Charter confers any such protection.

In England, a person charged with murder could not be compelled to testify at an inquest into the death of the victim.[158] That rule, being one of criminal law and procedure, can be changed only by Parliament, which has not legislated on the subject. The Supreme Court of Canada therefore held that the

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[156](...continued)
(seizure) is reasonable depends on what, from whom, why, by whom and the circumstances".

[157] Recommendation 20(7) at page 80.

[158] The English rule applied on July 15, 1870, the date of reception of English law for Saskatchewan (and Alberta). It presumably applied on the reception dates for the other provinces.

rule applies in Saskatchewan,[159] though it has also held that a suspect who has not been charged is compellable.[160] Since the rule applies only to inquests, it does not appear to apply to a provincial public inquiry[161] under the Public Inquiries Act.

The OLRC has recommended that "no person should be summoned by an inquiry to testify or produce evidence about any subject matter in relation to which an information has been laid against that person and has not been finally disposed of".[162] There is an analogy between this proposal and the fundamental criminal law principle, but the two are not identical.

Insofar as it relates to the trial of a criminal charge, an accused's right under the criminal law principle is to refuse to testify at all: an accused who testifies can be cross-examined to the same extent as any other witness. Under the OLRC recommendation an accused would not have to testify at a public inquiry about the subject matter of the charge, but would have to testify about other matters. Requiring an accused person to give any evidence at all might seem to be anomalous, but we think that it is justified. A public inquiry is not focussed on specific matters of criminal wrongdoing by a witness (or, if it is so focussed, is probably an invalid trespass on criminal law and procedure), and an accused person's right to silence about an offence is not infringed by compulsion to testify about other matters.

We accordingly agree with the OLRC that it is appropriate to allow a charged witness to be summoned to give evidence only about matters not related to the charge, thus giving the witness a fundamental protection analogous to that given by the criminal law, while allowing the inquiry to get information from the witness about unrelated matters. The border line between what is and is not related to the charge may be difficult to draw in a particular case, as the accused's view of what is related to the charge may be broader than the commission of

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159 See *Batary v. Attorney General of Saskatchewan*, [1965] S.C.R. 465.

160 *Faber v. The Queen*, [1976] 2 S.C.R. 9.

161 See the cumulative effect of pre-Charter remarks by Chief Justice Dickson in *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet*, [1978] 1 S.C.R. 152 and by Estey J. in *Attorney General of Quebec and Keable v. Attorney General of Canada* (1979), 90 D.L.R. (3d) 161 at 190.

162 OLRC, *supra*, note 3; Recommendation 4 at 214.

inquiry's view, but we think that the line has to be left to be drawn on a case by case basis.

We depart from the OLRC's recommendation in one minor aspect. We prefer to use the term "charged" rather than to treat the laying of an information as the event that entitles a witness to protection. This usage may well be less precise, but it tracks the opening words of section 11 of the Charter. Both its flexibility and its constitutional source suggest that it may prove somewhat more protective of persons involved in the criminal process.

RECOMMENDATION 31

No person should be summoned to testify or produce evidence at a public inquiry about any matter in relation to which they have been charged with an offence unless the charge has been finally disposed of.

Draft Act, section 18(2).

(4) Judicial review[163]

(a) When judicial review should be available

A commission of inquiry is established to report and recommend. It does not determine rights. The traditional judicial view was that a recommending body was not subject to control by the courts. That view was authoritatively expressed by the Supreme Court of Canada as long ago as 1891[164] and has been repeated since. A more modern (and in our opinion more suitable) view is that the mere fact that a commission's product is only a report and recommendation should not be enough to preclude judicial review of its proceedings and report.[165] This is because of the effect that the inquiry process may have upon private interests.

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163 The subject of judicial review of public inquiries is discussed at length by Anthony and Lucas, *supra*, note 6, Chapter VIII.

164 *Godson v. The City of Toronto* (1891), 18 S.C.R. 36.

165 See, for example, *Anderson v. Laycraft, Commissioner of Inquiry* (1978), 5 Alta. L.R. (2d) 155, where Mr. Justice Miller recognized four exceptional cases in which judicial review might be available.

That does not mean that we think that a court should be able to review the findings and recommendations of a commission of inquiry and set them aside or change them on the grounds that they are wrong. The commission is the adviser that is established to investigate and report. The court is not. A court would defeat the purpose of an inquiry if it were to substitute its own views for those of the chosen adviser. In our opinion, the courts ought not to review the correctness of the findings or recommendations of commissions of inquiry.

Canadian courts have, however, used the power of judicial review to consider whether commissions of inquiry have acted or are acting properly in conducting their proceedings and in arriving at their findings and recommendations. Generally speaking, they have granted judicial review on jurisdictional grounds. These may relate to the validity of an inquiry[166] or to the validity of a commission's coercive powers.[167] Judicial review has also been granted on the grounds that a commission has exercised improperly a power which it has.[168] In such cases, so long as the judicial review power is not used to impose the procedural requirements of the courts upon bodies that should be allowed to operate informally, there is a much stronger case for judicial review.

We think that judicial review should be available

(a) if the establishment of an inquiry is beyond the powers of the Legislature or beyond the powers of the Lieutenant Governor in Council, or if a commission of inquiry goes outside the inquiry described in the instrument appointing it or acts in contravention of conditions imposed on it, that is, if the commission of inquiry did not have authority to embark upon the inquiry or part of it; and

(b) if a commission of inquiry contravenes a Charter right, a procedural requirement of the act under which it is established or a duty of fairness (or possibly natural justice) as established by the courts for administrative tribunals, or engages in other conduct that causes it to leave or exceed its jurisdiction after it has lawfully embarked upon the inquiry.

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166 E.g, *Starr v. Houlden, supra,* note 5.

167 E.g., *A.G. Quebec & Keable v. A.G. Canada,* [1979] 1 S.C.R. 218 at 225-26.

168 E.g., *Re Landreville, supra,* note 115.

Some comment is required on judicial review for error of law and failure to observe natural justice or fairness.

(b) Errors of law and jurisdiction

Under administrative law, judicial review is available with respect to some errors of law. Sometimes the error of law is one that leads to a tribunal exceeding or losing jurisdiction, in which event judicial review can be granted on jurisdictional grounds. Sometimes the error is one that is committed within the jurisdiction of a tribunal, and then it can be corrected only if it appears on the face of the record. An intra-jurisdictional error of law by a commission of inquiry might be an appropriate subject for judicial review if it affects individual rights and reputations though not if it goes only to the quality of the advice given by a commission of inquiry. We think that judicial review should be available for error of law, though the review jurisdiction should be exercised with restraint.

Almost all of those whom we consulted thought that judicial review should be available in some form for jurisdictional error, with some words of caution against allowing it to entangle inquiries in procedural difficulties. The question of judicial review for error of law did not attract significant comment.

(c) Natural justice and fairness

Although direct authority on the question is not extensive, the courts appear to be moving towards applying the administrative law standards of fairness to public inquiries that investigate specific conduct.

In 1978, a Federal Court judge held that standards of bias do not apply to a public inquiry.[169] However, while the effect of the 1983 judgment of the Supreme Court of Canada in *Bisaillon v. Keable*[170] is not entirely clear, the court felt obliged to address the question of whether the actions of a commission of inquiry could be a ground for disqualification as indicating bias and hostility, and its decision on the point was based on its conclusion that the conduct in question did not constitute a demonstration of bias. If judicial review is made specifically available, we think that a person specifically affected by a biased commission's actions would be able to obtain relief. This would include the "target" of an

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169 *Re Copeland and McDonald* (1978), 42 C.C.C. (2d) 334 (F.C.T.D.).

170 (1983), 2 S.C.R. 60 at 81-84.

investigative inquiry. It might include a person affected by the coercive powers of an advisory inquiry.

In 1983, in *Fraternité inter-provinciale des ouvriers en électricité* v. *Office de la construction du Québec*,[171] the Quebec Court of Appeal held that the rules of natural justice applied to a commission that had the powers of a commission of inquiry under the Quebec Act. In 1986, the Federal Court of Appeal, in *Re League for Human Rights of B'nai Brith Canada and Commission of Inquiry on War Criminals*,[172] held that fairness required a commission of inquiry to make available to a protagonist legal opinions obtained by the commission about a point material to the inquiry even though the protagonist was not a "target" and did not have an economic interest in the subject matter of the inquiry. In 1987, the Supreme Court of Canada applied the doctrine of fairness to an investigation under the Combines Investigation Act in *Irvine* v. *Restrictive Trade Practices Commission*.[173]

It cannot safely be concluded that these decisions, by themselves, establish that a commission of inquiry under a Public Inquiries Act is under a duty of fairness.[174] The reports of the inquiring bodies in the *Irvine* and *Fraternité inter-provinciale des ouvriers* cases were parts of procedures which could have criminal or civil legal consequences and were thus different from the usual public inquiry, and in the *Fraternité inter-provinciale des ouvriers* case the court held that the investigator was acting in a quasi-judicial capacity. In the *B'nai Brith* case, the commission conceded that it was under a duty of fairness to the applicant so that the question whether the duty existed was not argued and the precedential weight of the decision on that question is doubtful. Nevertheless, the decisions do suggest that the courts are willing to broaden the application of the principle of fairness established by *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*[175] to include public inquiries. We think that, if a reformed Public Inquiries Act specifically provides for judicial review of the acts and

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171 (1983), 148 D.L.R. (3d) 626 (Que. C.A.).

172 (1986), 28 D.L.R. (4th) 264 (F.C.A.).

173 [1987] 1 S.C.R. 181.

174 For opinions that the courts will impose minimum standards of fairness, see David W. Scott, Q.C., *supra*, note 7 at 145, and Anthony and Lucas, *supra*, note 6 at 24 and 158.

175 [1979] 1 S.C.R. 311.

decisions of commissions of inquiry, the courts will require commissions to act fairly if their acts or decisions affect individual rights.

Should a commission of inquiry be required to meet legal standards of fairness? A government does not have to satisfy legal standards of fairness in deciding upon policy. Neither does a legislature in enacting legislation. There is no apparent reason why an adviser to a government or legislature, including an advisory public inquiry, should have to do so. This is true even if the adoption of the commission's recommendations will affect economic interests: the MacDonald Commission on the Economic Union could not be faulted if it did not give procedural fairness to everyone in the country before making recommendations that, if accepted, would affect everyone's economic interests. However, if a commission's findings about specific facts will cause damage to reputations or careers there is reason to think that fair procedures should be followed. Our recommendation for giving a "target" a fair opportunity to rebut findings before they are made in a report will do much to ensure procedural fairness for such persons, and our recommendation that a commission's coercive powers should be enforceable only by the courts will do much to ensure procedural fairness in their use, but there is still room for judicial review based on the general principles of procedural fairness generated by the courts.

(d) Procedure and remedies

Under the Ontario and Manitoba Acts, an affected person may apply to a court for an order requiring a commission of inquiry to state a case for the court. In Ontario, the grounds must be jurisdictional, while in Manitoba it seems that the correctness of a commission's decision can also be challenged in this way. The court hears and decides the stated case. The decision appears to be declaratory.

A few of those whom we consulted thought that it takes too long to get to an Ontario Divisional Court, and two commission counsel thought that threats of applications under the Ontario provision had been used to apply pressure to commissions. However, the balance of opinion was that Ontario's section 6 is a satisfactory form of judicial review and works well. The OLRC was of the same view[176] and did not make any recommendation for change.

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[176] OLRC, *supra*, note 2 at 212. Note, however, that Mr. Justice Grange gave as one reason for not stating a particular case that it plus a likely appeal would bring about a delay of months or even years that would deprive his

(continued...)

In Alberta, judicial review of administrative action is now sought through the single originating notice procedure provided for in Part 56.1 of the Alberta Rules of Court. The procedure is relatively simple and gives ready access to the Queen's Bench by an application in chambers. It provides for a flexible range of remedies, including injunctions. We think that Alberta should stay with the ordinary judicial review rules and procedures for those aggrieved by a commission's actions. We think that this form of judicial review is appropriate even if it results in one Queen's Bench judge, sitting as such, reviewing the actions of another Queen's Bench judge, acting as commissioner.

The designation of one judge to hear all matters arising from one major investigative public inquiry is likely to promote efficiency and consistency. We do not, however, make a recommendation on the point. Such a designation would be consistent with the present practice of the Queen's Bench. It is something that should be left to the good sense of the court.

(e) Standing to apply for judicial review

The question of standing to apply for judicial review is often a difficult one, and public inquiries present special difficulties because of the wide range of things they do. If an advisory public inquiry, for example, starts to inquire into a subject that is outside its terms of reference, should everyone have standing to stop it from doing so? Probably not, but there may be cases in which the potential effect that a commission's recommendations, or even the conduct of an inquiry, might have on economic interests would justify a grant of standing for judicial review. At the other extreme, a "target" whose reputation, career or civil or criminal liability may be affected by a commission's findings, should almost certainly be able to apply for judicial review.

Standing is a source of continual difficulty for the courts, and the cases show different approaches to the question. According to Jones & de Villars,[177] the usual test is whether an applicant is "aggrieved" or "affected" or has some other "sufficient interest", and these terms have attracted a broad interpretation

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[176](...continued)
report of value: *Report of the Royal Commission of Inquiry into certain deaths at the Hospital for Sick Children and related matters*, 1984, at 212.

[177] Jones, David Phillip and de Villars, Anne S., *Principles of Administrative Law* (Carswell, 1985) at 369.

in some cases and a narrow one in others. However, at least without a major study, we do not think that legislation can give any better answer to questions of standing for judicial review of public inquiries than a court that is addressing specific facts can do, and we propose that the question of standing to apply for judicial review be left to the Queen's Bench as part of the general question of judicial review.

(f) Statutory provision for judicial review

If judicial review of the actions of public inquiries is desirable, what should a reformed Public Inquiries Act do about it? At one extreme, the new Act could include a code of judicial review, including grounds, remedies and standing. We do not think that a code would be useful in this one field of the operation of judicial review, and we think that it might prove unduly confining. At the other extreme, the new Act could say nothing and leave it to the courts, which have fashioned judicial review in the past, to continue to fashion it in the future. While we think that the subject should largely be left to the courts, we do think that the new Act should clear up any remaining doubts that judicial review is available for things other than jurisdictional error in the narrow sense of that word. We think that the Act should declare that the actions of a public inquiry are subject to judicial review on any question of law or jurisdiction and leave it to the courts to apply it.

A legislative declaration that judicial review applies would bring in the Alberta Rules of Court. A commission of inquiry would clearly be "a commission whose decision, act or omission is subject to judicial review" that is included in the definition of "person" by Rule 753.01. The remedies under Rule 753.04 would be available, that is, orders in the nature of *mandamus*, prohibition, *quo warranto*, *habeas corpus*, a declaration and an injunction. The Queen's Bench would also have the power to set a decision aside instead of granting a declaration, and it would have the power to remit. It would also have the power to refuse relief against a formal or technical defect if no substantial wrong or miscarriage of justice has occurred. All this seems to us to provide a body of law that can usefully be applied to judicial review of the actions of a commission of inquiry.

(g) Application by commission

There may be cases in which a commission of inquiry is in doubt how to proceed without infringing the law or in which it is threatened with legal proceedings. In such cases, we think that it would be useful for a commission to be able to apply for the advice and directions of the Queen's Bench. We recommend that it should have power to make such an application.[178]

RECOMMENDATION 32

(1) Decisions, acts or omissions of a commission of inquiry should be subject to judicial review on any question of law or jurisdiction.

(2) A commission of inquiry should be able to apply to the Queen's Bench for the advice and direction of the court.

Draft Act, sections 23, 24.

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[178] Ontario's s. 6(1) allows a commission to do much the same thing by stating a case for the court.

CHAPTER 5 — OTHER STATUTES CONFERRING THE SAME POWERS AS A PUBLIC INQUIRIES ACT

There are many Alberta statutes that confer on various functionaries the powers of a commissioner under the Public Inquiries Act. Those disclosed by a computer search of those Alberta statutes that can be searched by computer[179] are listed in Appendix D. A revision of the Public Inquiries Act would affect the powers granted by those statutes.

The LRCC thought that this cross-referencing practice is bad. It means that powers are not tailored to fit need. It is likely to result in inappropriate grants of power and inaccessibility of information as to what powers are granted. The LRCC's preference was that ultimately references in other statutes to the Inquiries Act or its successor should be deleted and the powers set out in those statutes.

There is much to be said for requiring the legislative mind to think about what powers each statutory functionary needs to carry out their duties. The present practice, however, has practical advantages. One is that it avoids the need to work up a solution to the problem of powers every time. Another is that it saves the space in the statute book that would be taken up by putting a little code into every statute that grants similar powers. We do not recommend the dedication of the resources needed to review every statute that now confers the powers of a commissioner and to devise a specific answer to the question of powers for that statute.

One point does require attention. In our view, a grant in another statute of the powers of a commissioner under the Public Inquiries Act should carry with it the limitations on those powers and the safeguards against them that are imposed by the Public Inquiries Act. We think that the best way to do this is to put a provision in a reformed Public Inquiries Act that make the limitations and safeguards apply.

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[179] This does not include statutes not included in the Revised Statutes of Alberta, 1980, nor does it include regulations.

RECOMMENDATION 33

If another statute grants the powers of a commissioner under the Public Inquiries Act, the limitations on those powers and the safeguards against those powers that are imposed by the Public Inquiries Act should apply to the exercise of the powers under the other statute.

Draft Act, sections 25, 26.

CHAPTER 6 — CONCLUSION

It is inevitable that public inquiries into matters of public importance will be expensive and time-consuming. It is also inevitable that reputations and careers will suffer from investigative inquiries. A reformed Public Inquiries Act would not do away with these disadvantages. However, we believe that a reformed Public Inquiries Act based on the proposals made in this report would provide the machinery for independent, open and effective public inquiries that would have due regard for the interests of persons affected by them, and would, on balance, be in the interests of the public.

An example of draft legislation that would give effect to our proposals appears in Part IV of this report. The precise form of this draft is not important. We believe that the enactment of a statute that would give effect to our proposals would be an important step forward.

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CHAIRMAN

DIRECTOR

November 1992

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Public inquiries should be retained but should be governed by a reformed Public Inquiries Act along the general lines of the draft Act set out in Part IV of this report.

RECOMMENDATION 2

(1) A public inquiry should be established only if

(a) it is expedient and in the public interest that the inquiry be held, and

(b) the matter inquired into is within the jurisdiction of the Legislature and either concerns the good government of Alberta or the conduct of government business or is a matter of public concern.

(2) Nothing in a reformed Public Inquiries Act should preclude the establishment of joint public inquiries involving the federal government or other provinces.

Draft Act, section 2.

RECOMMENDATION 3

The Lieutenant Governor in Council should have power, upon being satisfied of the things set out in Recommendation 2,

(a) to establish public inquiries,

(b) to define their scope,

(c) to choose the members of the commission, and

(d) to fill vacancies arising from resignation, incapacity or dismissal.

Draft Act, section 2.

RECOMMENDATION 4

The reformed Public Inquiries Act should require that a public inquiry be independent.

Draft Act, section 2.

RECOMMENDATION 5

(1) Detailed estimates of the cost of a public inquiry should be established when the inquiry is established or soon thereafter as is practicable. Consultation with the commission of inquiry is desirable, but the minister who recommends the establishment of the inquiry should be responsible for ensuring that the estimates are prepared, necessary approvals given, and the money appropriated by the Legislature or by special warrant.

(2) The estimates should be

(a) tabled in the Legislative Assembly, either at the time they are approved or when the Assembly next sits, and

(b) published in the Alberta Gazette at the time of approval.

(3) The same procedures should apply to changes in the estimates that are needed from time to time.

(4) Subject to standard accounting controls of the Government and any ground rules laid down as to rates payable for services and facilities required for the inquiry, the spending of the money, once it is properly allocated, should be in the discretion of the commission of inquiry.

(5) Costs of participants that the commission of inquiry recommends for payment should be dealt with by the same budgetary process.

RECOMMENDATION 6

The Lieutenant Governor in Council should be authorized to specify in the order in council establishing a public inquiry a date by which the inquiry is to be finished and its report delivered, with power to substitute another date from time to time. A commission of inquiry that misses a deadline should still have power to complete and deliver its report.

Draft Act, section 2(1)(c),(d) and (3).

RECOMMENDATION 7

Unless the order in council establishing a public inquiry otherwise provides,

(a) an act or decision of a majority of

(i) the commissioners, or

(ii) the commissioners present at a meeting of the commission if the commissioners present constitute a quorum

should be an act or decision of the commission;

(b) half of the members of a commission should be a quorum;

(c) a commission should be able to function despite vacancies if the number of the remaining members is not less than a quorum;

(d) a commission should have power to authorize a properly qualified person to inquire into a matter within the scope of the inquiry;

(e) a commission should have power to delegate the power to make procedural and administrative decisions and to revoke any such delegation.

Draft Act, section 4(2), 6.

RECOMMENDATION 8

A commission of inquiry should have power, subject to our recommendation about budgetary control, to engage counsel and staff.

Draft Act, section 4.

RECOMMENDATION 9

A commission of inquiry should have

(a) the power to control its proceedings, and

(b) the power to maintain order in its proceedings and to require the assistance of a peace officer in doing so.

Draft Act, section 11.

RECOMMENDATION 10

A commission of inquiry

(a) should not be bound by the rules of evidence, and

(b) should have a discretion to refuse to receive evidence.

Draft Act, section 12

RECOMMENDATION 11

(1) Commissions of inquiry, commissioners and commission counsel should have the immunities of superior court judges for any act done or omitted in the execution of their duty in conducting an inquiry and making a report.

(2) All counsel who participate in a public inquiry should be immune from action for things said in hearings and arguments.

(3) Witnesses in an inquiry should have the immunities of witnesses in court proceedings.

Draft Act, section 5.

RECOMMENDATION 12

(1) The report of a commission of inquiry should be made to the Lieutenant Governor in Council in writing.

(2) The Lieutenant Governor in Council should be required to table a report of a public inquiry in the Legislature within 30 days from receipt, and if the Legislature is not sitting at the end of that period, forthwith after the commencement of the next sitting.

(3) Before tabling the report, the Lieutenant Governor in Council should have power to delete any portion of the report if, in the opinion of the Lieutenant Governor in Council, the interest of the public in the disclosure of the matters set out in that portion is significantly outweighed by another reason or consideration, such as that disclosure would unduly prejudice public security, privacy of personal or financial matters, or the right of any person to a fair trial.

(4) The tabled copy of the report should indicate where a deletion has been made.

Draft Act, section 7.

RECOMMENDATION 13

A commission of inquiry should be required to exercise its control of its proceedings, where appropriate, with a view to

(a) enabling the public to be informed about the commission's proceedings, and

(b) facilitating public participation in the proceedings.

Draft Act, section 9.

RECOMMENDATION 14

(1) Subject to Recommendation 13, a commission of inquiry should not be required to hold hearings.

(2) A commission should be required, except as otherwise provided in Recommendation 15, to hold in public the hearings that it does hold.

Draft Act, section 10(1), (3).

RECOMMENDATION 15

A commission of inquiry should be permitted to hold a hearing to which the public is not admitted if

(a) considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in having the hearing held in public; or

(b) information or documents that, but for the Act, would have been subject to public interest immunity or statutory confidentiality will be disclosed at the hearing.

Draft Act, section 10(2).

RECOMMENDATION 16

A commission of inquiry should be allowed to deal with the reporting and televising of hearings on the basis of its control over its proceedings, the openness principle and the freedom of the press.

RECOMMENDATION 17

A commission of inquiry should have the power to restrict or ban publication of proceedings before it on the same grounds as it can decide to hold private hearings.

Draft Act, section 10(2).

RECOMMENDATION 18

(1) It should be in the discretion of a commission of inquiry to determine who may participate in the inquiry and the manner and extent of their participation.

(2) In exercising its discretion under this recommendation, a commission should have regard to

(a) the openness principle, and

(b) the commission's duty to allow a person against whom a finding of misconduct is made a full right of reply to the allegations and evidence on which the finding is made.

Draft Act, section 14(1).

RECOMMENDATION 19

The Lieutenant Governor in Council should be required to make provision for the preservation of the report and records of a commission of inquiry, having due regard for the confidentiality of confidential or privileged information.

Draft Act, section 9.

RECOMMENDATION 20

(1) The Lieutenant Governor in Council, if satisfied that the powers listed below are required for the full investigation of the matters into which a commission of inquiry is appointed to inquire, should be able to confer upon a commission of inquiry

(a) the power to compel testimony before the commission,

(b) the power to compel production of documents and things, including information in electronic form, to the commission or a person designated by the commission to receive them, and

(c) the power to have contempt of the commission punished.

(2) A commission on which powers have been conferred under subsection (1) should be able

(a) to give notice to a person requiring the person to appear and give testimony before the commission or to produce documents and things, or

(b) to apply to the Queen's Bench for an order requiring the person to do so.

(3) A person who does not comply with a proper notice or order under subsection (2) should

(a) be guilty of an offence punishable on summary conviction, and

(b) be in contempt of the commission or the Court as the case may be

but if a charge is laid by the Crown or the commission under paragraph (a), it should not be possible to bring or maintain proceedings for contempt on the basis of the same facts.

(4) A person who is given notice to appear before a commission should be entitled to be paid in advance their reasonable expenses for appearing.

(5) An application for an order to appear and give testimony or to produce documents or things should be made on notice, but the court should have power to make an order *ex parte*. If an order is made *ex parte*, a person who is required to give testimony or to produce documents or things should be able, by application returnable on or after the business day next following the service of the order, to require the commission to show cause why the order should not be set aside.

(6) If the Lieutenant Governor in Council declares that the relevant provision of a reformed Public Inquiries Act applies to an inquiry, the Queen's Bench should have power to confer on a commission of inquiry the right to enter and inspect public buildings and take possession of documents and things found there that are reasonably required for the purposes of the inquiry, subject to such terms and conditions as the court may by its order impose.

(7) The Queen's Bench should have, in respect of conduct in respect of a commission of inquiry that would constitute contempt if it were in respect of the court, the same powers as it has in respect of a contempt of the court. However, neither publishing a discussion of a subject being inquired into by a commission nor making comments about a commission should in itself be contempt.

(8) No other power of search or seizure should be available to a commission.

Draft Act, sections 17, 18, 20, 21.

RECOMMENDATION 21

(1) A commission of inquiry should be able to appoint a person to take evidence and report it to the commission.

(2) On the application of a commission of inquiry, the Queen's Bench should have power to make orders and give directions with respect to the taking of evidence for a public inquiry as if the public inquiry were a proceeding in the Court.

Draft Act, section 8(3),(4).

RECOMMENDATION 22

A commission of inquiry that takes a document or paper into possession under recommendation 20, or admits it in evidence, should be required, upon the request of the previous custodian of the document or paper, to return the document or paper upon taking a photocopy, which may be admitted in evidence in place of the original.

Draft Act, section 22.

RECOMMENDATION 23

(1) A person who appears before a commission of inquiry should have the right to be represented by counsel.

(2) Though it will often be appropriate for a commission of inquiry to allow a "target" to be examined first by their own counsel, a reformed Public Inquiries Act should not confer such a right.

Draft Act, section 13.

RECOMMENDATION 24

(1) A commission of inquiry should be prohibited from making findings in its report that could reasonably be construed as bringing discredit on a person unless, before the finding is made, that person

(a) has been adequately informed about the allegations on which the finding is made and the supporting evidence, and

(b) has had a fair opportunity to rebut or explain the allegations on which the finding is based, including where appropriate, a fair opportunity to give evidence, cross-examine witnesses and make representations to the commission.

(2) The protection of this recommendation should apply to individuals and corporations.

(3) The fact that a notice of intention to make a finding has been given should not have to be made public.

(4) Substantial compliance with this recommendation by a commission of inquiry should be sufficient unless a manifest injustice has resulted or may result.

(5) A commission should be able to comply with this recommendation in respect of any person at any time after the appointment of the commission and before the delivery of its report.

Draft Act, section 16.

RECOMMENDATION 25

Subject to Recommendation 4 about budgetary control, a commission should have power to recommend that the Government pay such costs of participation in a public inquiry as the commission thinks reasonable.

Draft Act, section 14(2).

RECOMMENDATION 26

A reformed Public Inquiries Act should not attempt to define or regulate the function of commission counsel.

RECOMMENDATION 27

(1) A commission of inquiry should be entitled to make any finding of fact that falls within its mandate but should not express a conclusion of law regarding legal liability.

(2) A commission's report should not be admissible in any proceedings in court under the law of Alberta to prove the facts found by the commission.

Draft Act, section 15.

RECOMMENDATION 28

(1) Except as provided below, a person should have the same evidentiary privileges in a public inquiry as they have in a court.

(2) Public interest immunity and statutory secrecy should not in general apply to the disclosure of information *to* a commission of inquiry.

(3) Information that, but for this recommendation, would have been subject to public interest immunity or statutory secrecy should not be disclosed *by* a commission of inquiry without the written permission of the Attorney General.

(4) Public interest immunity and statutory secrecy should apply if the Attorney General certifies that in their opinion disclosure would infringe Cabinet confidentiality, would be contrary to the public interest, or would prejudice the interests of a person not concerned in the inquiry.

(5) A commission should be able to apply to the Queen's Bench to determine any question that arises under the section; upon such application the Queen's Bench should have any power that it would have under the common law if the matter were a proceeding in the court, including any power to review a certificate of the Attorney General; and the Queen's Bench should have power to determine the question and give consequential orders and directions.

Draft Act, section 19.

RECOMMENDATION 29

A reformed Public Inquiries Act should not confer on a witness any special privilege or immunity against self-incrimination on a witness in respect of testimony given in a public inquiry in addition to the use immunity conferred by section 13 of the Charter.

RECOMMENDATION 30

A reformed Public Inquiries Act should not confer any special privilege upon persons who are required to produce documents and things in public inquiries.

RECOMMENDATION 31

No person should be summoned to testify or produce evidence at a public inquiry about any matter in relation to which they have been charged with an offence unless the charge has been finally disposed of.

Draft Act, section 18(2).

RECOMMENDATION 32

(1) Decisions, acts or omissions of a commission of inquiry should be subject to judicial review on any question of law or jurisdiction.

(2) A commission of inquiry should be able to apply to the Queen's Bench for the advice and direction of the court.

Draft Act, sections 23, 24.

RECOMMENDATION 33

If another statute grants the powers of a commissioner under the Public Inquiries Act, the limitations on those powers and the safeguards against those powers that are imposed by the Public Inquiries Act should apply to the exercise of the powers under the other statute.

Draft Act, sections 25, 26.

PART IV — DRAFT LEGISLATION

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PART IV - DRAFT LEGISLATION

PART 1

INTERPRETATION

Definitions

1 In this Act,

(a) "commission" means a commission of inquiry appointed by the Lieutenant Governor in Council under section 2.

(b) "Court" means the Court of Queen's Bench of Alberta.

(c) "document includes a recording or reproduction of information in writing or in electronic or pictorial form.

PART 2

ESTABLISHMENT AND CONTROL OF PUBLIC INQUIRIES

Establishment of inquiry

2

(1) If he considers it expedient and is satisfied that it is in the public interest to do so, the Lieutenant Governor in Council may by order in council

(a) order that an independent public inquiry be made into and concerning a matter within the jurisdiction of the Legislature

(i) that is connected with the good government of Alberta or the conduct of the public business thereof, or

(ii) that is declared by the order in council to be a matter of public concern,

(b) appoint a commission of inquiry consisting of one or more commissioners to make the inquiry and report on it,

(c) prescribe a date for the termination of the inquiry and delivery of the report, and

(d) substitute another date for a date prescribed under paragraph (c).

(2) Nothing in this Act precludes the appointment of one commission of inquiry under the authority of both this Act and an Act of Canada or another province to make an independent public inquiry into matters that are sufficiently similar that they the same or that may conveniently be dealt with in one inquiry.

(3) The Lieutenant Governor in Council may appoint a commissioner to fill a vacancy on a commission arising from the resignation, incapacity or dismissal of a commissioner.

(4) A commission may complete and deliver its report although the latest date prescribed under paragraphs (1)(c) and (d) has passed.

[Source: Recommendations 2, 3, 4, 6, pages 28, 31, 34, 37. Section 2(1) follows PIA section 1 with minor drafting changes, references to an order in council, and the addition of the words "independent public" before the word "inquiry". Section 2(2), (3) and (4) are new.]

Comment:

1. The only limits that section 2 imposes upon the scope of a public inquiry are:

(a) the matters to be inquired into must be within the jurisdiction of the Legislature;

(b) the Lieutenant Governor in Council must be satisfied that it is expedient and in the public interest to hold the inquiry; and

(c) either the matter must be connected with the good government of Alberta or the conduct of public business or the Lieutenant Governor in Council must declare it to be a matter of public concern.

The Lieutenant Governor in Council thus has a broad discretion to establish public inquiries within the limits set by the constitution. The section directs their mind to expediency and the public interest but these, in this context, are not justiciable or reviewable issues.

2. An inquiry must be "independent". This word is not defined, but, in context has two elements: the commission conducting it must not be subject to control by the Government and the commission must think and act for itself. (See Oxford English Dictionary, Definitions 1 and 5.)

3. An inquiry must be "public". This word is also not defined. In context, it implies that an inquiry is made on behalf of the public and is "open to general observation, sight or cognizance; existing, done or made in public". (See Oxford English Dictionary, Definitions 3 and 5.) It also carries with it the idea of public

participation, though this is subject to practical constraints. See section 9, Openness of public hearings, which requires a commission of inquiry, unless it is inappropriate to do so, to have regard to public information and participation.

4. Section 2 does not prescribe qualifications for commissioners. The Lieutenant Governor in Council has freedom of choice of commissioners, so long as the inquiry will be independent.

Funding of inquiry

3 ***Section 3 should incorporate the following principles:***

(1) Detailed estimates of the cost of a public inquiry should be established when the inquiry is established or soon thereafter as is practicable. Consultation with the commission of inquiry is desirable, but the minister who recommends the establishment of the inquiry should be responsible for ensuring that the estimates are prepared and necessary approvals given.

(2) The estimates should be

(a) tabled in the Legislative Assembly, either at the time they are approved or when the Assembly next sits, and

(b) published in the Alberta Gazette at the time of approval.

(3) The same procedures should apply to changes in the estimates that are needed from time to time.

(4) Subject to standard accounting controls of the Government and any ground rules laid down as to rates payable for services and facilities required for the inquiry, the commission of inquiry should have responsibility for the spending of the money once it is properly allocated.

(5) Costs of participants that the commission of inquiry recommends for payment should be dealt with by the same budgetary process.

Comment:

1. A public inquiry will not be effective unless it is properly funded. Therefore, if an inquiry is established, proper funding should be made available for it. A public inquiry will not be independent unless the commission of inquiry can make decisions about the conduct of the inquiry that will have financial consequences. Therefore, a commission should be able to make such decisions.

2. On the other hand, the public purse must be controlled by the executive acting under authority granted to it by the Legislature. Therefore, a commission of inquiry cannot have uncontrolled access to public funds.

3. Section 3 of the reformed Public Inquiries Act should balance these considerations. However, the Institute does not think that it would be helpful to try to draft at this time a detailed plan for doing so that will fit into the intricacies of government finance. Instead of drafting a section we have therefore repeated the principles set out in Recommendation 5 of our report.

4. Section 14 authorizes a commission to recommend that the Government provide funding for participants in the inquiry. In recent years, "targets" of an investigatory inquiry have usually been funded by public money, and this is an essential element in fair treatment. Funding of interest groups is often necessary to ensure that all points of view are adequately put to an advisory inquiry. The initial responsibility for determining who should be funded and to what extent is the commission's. The ultimate responsibility for making funding available is the government, acting within the authority conferred on it by the Legislature.

Administrative powers of commission
4
(1) Subject to section 3, a commission may engage the services of

(a) counsel, clerks, reporters and assistants, and

(b) experts, persons having special technical or other knowledge or any other qualified person

to assist it in the inquiry.

(2) The commission may authorize a person referred to in subsection (1)(b) to inquire into any matter within the scope of the inquiry.

(3) A person authorized under subsection (2) has the same powers, privileges and immunities that the commission has under this Act.

(4) A person authorized under subsection (2) shall report the evidence and his findings, if any, to the commission.

[Source: Recommendations 7 & 8, pages 39, 40.]

Comment:

1. Section 4(1) is intended to promote the effectiveness and independence of public inquiries by enabling a commission of inquiry to retain such assistance as it finds necessary. This power is subject to the budgetary control provided for by section 3.

2. Section 4(2) allows a commission of inquiry to delegate authority to hear evidence or perform other inquiry functions. We are not aware of any case in which a commission has done this, but we recommend that the delegation power be carried forward to the reformed Act. It now appears in section 2(2) of the Public Inquiries Act.

Immunities

5

(1) A commission, commissioners and commission counsel have the same privileges and immunities as a judge of the Court for any act done or omitted in the execution of their duty in the conduct of an inquiry and making a report.

(2) All counsel who appear before or make representations to a commission have the same immunities as counsel who appear before or make representations to a court.

(3) A witness who appears before a commission has the same immunities as a witness who appears before the Court.

[Source: Recommendation 11, page 48.]

Comment:

1. Section 5(1) confers on commissioners "the same privileges and immunities" as a Queen's Bench judge "for any act done or omitted" in the inquiry. A commissioner therefore could not be sued for anything done in the course of the inquiry even though what was done was outside the commission's jurisdiction. The exceptions to the immunity would apply only if the commissioner knew that they were acting outside their jurisdiction and were acting in bad faith or not acting judicially: see the discussion in the text of the report at pages 41-43. Commission counsel would enjoy similar protection and would have similar liability.

2. Section 5(2) confers on all counsel the immunities of a counsel appearing in court. That means that counsel could not be sued for anything said in a hearing or in argument. Section 5(3) confers a similar immunity on a witness while the witness is appearing before the commission.

Decisions of commission

6

(1) Unless an order in council otherwise prescribes, if a commission consists of 3 or more commissioners

(a) an act or decision of a majority of

(i) the commissioners, or

(ii) the commissioners present at a meeting of the commission if the commissioners present constitute a quorum

is an act or decision of the commission;

(b) half of the commissioners are a quorum; and

(c) **the commission may exercise its powers despite a vacancy if the remaining commissioners are a quorum.**

(2) **A commission may**

(a) **delegate the commission's powers to make procedural and administrative decisions on behalf of the commission, and**

(b) **revoke or amend a delegation of such a power.**

[Source: Recommendation 7, page 39.]

Comment:

Under section 6(1), the general rule is that the majority of the commissioners control a commission of inquiry. However, flexibility is achieved by enabling the Lieutenant Governor in Council to provide otherwise — e.g., that the chair controls proceedings — if circumstances make this appropriate. The rest of the section is intended to enable the work of a commission to be carried on efficiently under ordinary circumstances and in the event of vacancies in the commission.

Report

7

(1) **A commission's report to the Lieutenant Governor in Council must be in writing.**

(2) **The Lieutenant Governor in Council**

(a) **shall table a copy of a commission's report in the Legislature within 30 days of receiving it, or, if the Legislature is not in session at the end of that period, forthwith after the commencement of the next sitting, but**

(b) **may delete from the tabled copy any portion of the report if in his opinion the interest of the public in the disclosure of the matters set out in that portion is significantly outweighed by another reason or consideration such as that disclosure would unduly prejudice public security, privacy of private or personal matters or the right of any person to a fair trial.**

(3) **Each place at which a portion of a report has been deleted from a report under subsection (2)(b) shall be indicated on the copy of report that is tabled under subsection (2)(a).**

[Source: Recommendation 12, page 51.]

Comment:

1. Tabling the report in the Legislature will make a report available for public and media inspection within a reasonable time, while giving the government a reasonable opportunity to prepare its reaction before the report becomes public.

2. Section 2(2)(b) will allow the Lieutenant Governor in Council to delete from the public report much the same kind of injurious matter as that which a commission will be allowed to hear in private under section 10(2)(a) to (c). It is somewhat narrower as it clearly restricts the grounds for excision to reasons or considerations "such as" the listed reasons.

3. The tabled copy will have to disclose every point in the report from which a deletion is made under section 7(2).

Records

8 The Lieutenant Governor in Council shall make provision for the preservation of a commission's records, having due regard for the preservation of the confidentiality of information that is confidential or privileged.

[Source: Recommendation 19, page 66.]

Comment:

A public inquiry under the Act is by definition something in which the public has a substantial interest. Section 8 therefore requires the Lieutenant Governor in Council to ensure that the records of inquiries are preserved. Generally speaking, records of public interest should be stored in the Provincial Archives. However, the section does not legislate that this be done but leaves to the Lieutenant Governor in Council to decide how the records are to be preserved. It recognizes the need to protect the confidentiality of information that is confidential or privileged.

PART 3

CONDUCT OF PUBLIC INQUIRIES

Openness of proceedings

9 Unless it considers it inappropriate to do so in the particular circumstances of the inquiry, a commission shall conduct its inquiry and exercise its powers under this Act with a view to

(a) enabling the public to be informed about the proceedings of the inquiry, and

(b) facilitating public participation in the proceedings.

[Source: Recommendation 13, page 53.]

Comment:

Section 9 requires commissions of inquiry to conduct inquiries in an open manner and with a view to participation by or on behalf of the public. However, since circumstances vary, the section gives a discretion to commissions to depart from the openness principle if its application would be inappropriate.

Hearings
10
(1) The hearings of a commission are open to the public.

(2) A commission may

(a) hold a hearing to which the public is not admitted, or

(b) restrict or prohibit the public reporting of its proceedings,

if

(c) considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in an open hearing or in the public reporting of a hearing, or

(d) section 18(6) applies.

(3) A commission may, in its discretion, receive evidence without a hearing.

[Source: Recommendations 14, 15, pages 56, 58-59.]

Comment:

1. The Act does not require commissions of inquiry to hold hearings, though most will do so both as a matter of practicality and to satisfy section 9 (which sets out the openness principle) or section 16 (which may require a hearing before a commission of inquiry makes a finding of misconduct). However, if a commission does hold a hearing, section 10(1) lays down the general rule that the public must be admitted to the hearing.

2. Situations may arise in which it is desirable for a commission to hold a hearing in private. Section 10(2)(c) lists specific circumstances that enables a commission to do so. Because flexibility is desirable, it then leaves a general discretion if "any other reason" outweighs the public interest in public hearings. Section 10(2)(d) cross-references section 18(6), which provides, in effect, that

information and documents that would but for the section be subject to public interest immunity or statutory secrecy must be received in private.

Control of proceedings

11 A commission has power to

(a) control the proceedings of the inquiry,

(b) maintain order in a proceeding in the inquiry, and

(c) require a peace officer to assist it in maintaining order.

[Source: Recommendation 9, page 41.]

Comment:

1. A commission of inquiry is entrusted with an inquiry. In order to conduct the inquiry effectively it must be able to decide how to go about it. Section 11(a) therefore confers on it control of its proceedings. A commission must be able to maintain order in its proceedings, and section 11(b) and (c) therefore confer the power to do so and to obtain assistance from the civil authorities.

2. A person who disrupts a commission's proceedings in a way which would be contempt of court if it occurred in court proceedings may be subject to proceedings for contempt under section 20(5).

Evidence

12 A commission

(a) is not bound by any rule of law concerning evidence in judicial proceedings, and

(b) may in its discretion refuse to receive evidence.

[Source: Recommendation 10, page 43.]

Comment:

1. Rules of evidence that are appropriate for a party-driven adversarial proceeding for the adjudication of a specific dispute are usually not appropriate for a commission-controlled inquiry into large matters of public concern. Section 12(a) therefore frees commissions of inquiry from the rules of evidence.

2. Persons appearing before a commission of inquiry may want to bring in quantities of evidence that, even if it is relevant to the inquiry, is not worth the time and effort spent on it, or will have more tendency to smear others than to advance the inquiry. Section 12(b) therefore makes it clear that a commission has a broad discretion to refuse to hear evidence.

3. Section 16 will protect a "target" of an investigatory public inquiry. A commission cannot make a finding of misconduct without giving the "target" a due process opportunity to rebut the evidence allegations on which the finding is based. If this requires a commission to receive certain evidence, the commission will have to receive it despite section 12(b).

Counsel

13 Any person appearing before a commission may be represented by counsel.

[Source: Recommendation 23, page 84.]

Participation in inquiry

14

(1) Subject to sections 9 and 16, a commission may determine who may participate in the inquiry and the manner and extent of his participation.

(2) A commission may recommend that the Government of Alberta provide funding for counsel and other expenses of a person referred to in subsection (1) in the amounts approved by the Government.

[Source: Recommendations 18, 25, pages 64-65, 91.]

Comment:

1. The general effect of section 14(1) is to leave the extent and nature of participation in an inquiry to the discretion of the commission. This is intended to achieve flexibility. The discretion is subject to section 9, which requires a commission to exercise the discretion with a view to enabling the public to participate, so that a commission cannot simply ignore the public. In a particular case, it may also be subject to section 16, which requires a commission to give a "target" a hearing before it makes a finding of misconduct against them.

2. With respect to section 14(2), see the discussion of funding in the comment on section 3.

Findings

15

(1) A commission

(a) is entitled to make any finding of fact that falls within its mandate, but

(b) shall not express a conclusion of law about the legal liability of a person.

(2) The report of a commission is not admissible in any proceedings in court under the law of Alberta to prove the facts found by the commission.

[Source: Recommendation 27, page 96.]

Comment:

The purpose of section 15 is to ensure that a commission of inquiry can make any finding of fact that it needs to make in order to report on its inquiry. A commission can make a finding even if the facts that it states, if true, would render a person subject to criminal prosecution or civil action. However, the commission does not need to say that a person is civilly or criminally liable on the facts found by the commission and should not do so.

Findings of misconduct

16

(1) A commission shall not make a finding of misconduct against a person unless the commission

(a) has informed the person of the facts in its possession or the allegations of misconduct made or to be made to it tending to show such misconduct in sufficient detail

(i) to permit the person to understand the facts or allegations and

(ii) to afford the person a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,

(b) has given the person a reasonable opportunity of furnishing relevant evidence to the commission,

and

(c) has given the person an adequate opportunity of making representations by way of argument to the commission.

(2) Where a person

(a) is entitled under subsection (1) to contradict or explain facts or allegations before a commission makes a finding of misconduct against the person, but

(b) will not have a fair opportunity of doing so without cross-examination of the person making the statements that constitute the facts or allegations,

the commission shall afford the person so entitled an opportunity of cross-examination in the presence of the commission or of a person authorized to hear or take evidence for the commission.

(3) A commission may give a person information under subsection (1)(a) and (b) privately.

(4) A commission may comply with this section at any time or times after it is appointed and before it delivers its report.

(5) Substantial compliance with this section is sufficient unless manifest injustice has occurred or may occur as a result of a technical failure to comply.

(6) In this section, "misconduct" means conduct that could reasonably be construed as bringing discredit on a person.

[Source: Recommendation 24, pages 89-90.]

Comment:

1. A commission's finding that an individual has engaged in discreditable conduct has no effect in law. However, section 16 recognizes that such a finding may destroy a reputation, hinder a career, or make it difficult for the "target" to obtain a fair trial of a criminal charge. Special protection has to be given to the "target" of a finding.

2. The intention of section 16 is that a "target" must be given a fair opportunity to rebut the allegations and evidence supporting a finding of misconduct before a commission makes the finding. The first element of such an opportunity is knowledge of the allegations or evidence of misconduct so that the "target" can prepare their rebuttal. The next element is a fair opportunity to rebut. The minimum fair opportunity is an opportunity to make representations to the commission. That may well be insufficient. If so, the "target" must also be permitted to put evidence before the commission. It may well be that the "target" must also be allowed to cross-examine witnesses who have given evidence about the alleged misconduct. The essential point is that a finding of misconduct cannot be made unless the "target" has been given due process.

3. Section 16 does not lay down rigid procedural rules. The giving of a formal notice by the commission is likely to be the most effective way of communicating the allegations and evidence, but the question is whether the "target" has received enough information to enable them to understand and rebut the allegations, not how they received the information or when. The further question is whether, having received the information, the "target" has been given a fair opportunity of rebuttal.

4. Section 16 refers to a "person". The usual case is that of an individual. However, "person" would include a corporation against which a finding of misconduct is to be made.

PART 4

COERCIVE POWERS

Application of coercive powers
17 Either

(a) section 18, or

(b) section 21

applies to a commission only if the Lieutenant Governor in Council by order in council promulgated at or after the time that an inquiry is established

(c) declares that in his opinion, the commission requires the powers conferred by the section for the full investigation of the matters into which the commission is appointed to inquire, and

(d) declares that the section applies to the commission.

[Source: Recommendation 20(1), pages 78-79.]

Comment:

Section 18 makes available to a commission of inquiry the power to compel testimony and production. Section 21 makes available the power to inspect public buildings and take possession of documents found there. Section 17 is based on the principle that these powers should be made available to a commission of inquiry only if the powers are needed. The purpose of the section is to require the Lieutenant Governor in Council to turn their mind to the question whether a specific public inquiry needs compulsory powers and to take the responsibility for conferring or denying them.

Power to compel testimony and production
18
(1) A commission has power to

(a) summon any person to appear before it and give evidence, orally or in writing,

(i) on oath, or

(ii) where section 18 of the Alberta Evidence Act applies, by affirmation and declaration; and

(b) require any person to produce

(i) to the commission, or

(ii) to a person designated by the commission,

any documents, papers and things that the commission considers to be required for the full investigation of the matters into which it is appointed to inquire.

(2) A person shall not be summoned by a commission to give evidence about any matter in which he has been charged with an offence unless the charge has been finally disposed of.

(3) If a commission considers it advisable because of the distance a person resides from where his attendance is required or for any other reason, the commission

(a) may appoint a person to take the evidence of that person and to report it to the commission, and

(b) shall require the person so appointed to be sworn to faithfully execute that duty before a person authorized to take affidavits in Alberta.

(4) On the application of a commission, the Court may make orders and give directions with respect to the taking of evidence for an inquiry established under section 2 as if the inquiry were a proceeding in the Court.

[Source: Recommendations 20, 21, 31, pages 78-80, 80-81, 110.]

Comment:

1. Section 18(1) makes available to a public inquiry the power to compel testimony and production. This gives effect to the principal purpose of the Act, which is to provide for effective public inquiries. Testimony may be compelled only before the commission. Customarily, in investigative inquiries commission counsel interview witnesses in advance, but the section does not make available any legal power to require witnesses to come in for an informal interview. Production, however, can be required to be made to a person designated by the commission, so that its staff will be able to examine documents before the commission hearings. "Document" is defined in section 1(c) to include electronic, pictorial and other records.

2. The protection conferred by section 18(2) is analogous to the right of an accused not to give evidence at their trial. However, since an inquiry is likely to cover much more than questions of criminal conduct by a "target", the protection given to a person who has been charged is that they cannot be required to give evidence about the subject matter of the charge. The accused can be required to give testimony about other matters.

3. Section 18(3) is analogous to taking evidence on commission in court proceedings. It is effective only within Alberta. Section 18(4) makes available to a public inquiry the powers of the Queen's Bench with respect to the taking of evidence.

4. Under section 20, the powers made available by section 18 can be enforced only by application to the Queen's Bench and order of that court.

Evidentiary privileges

19

(1) Every person has the same privileges in relation to the disclosure of information and the production of documents, papers and things under this Act as the person has in relation to the disclosure and production in any court.

(2) Notwithstanding subsection (1), the rule of law that authorizes or requires

(a) the withholding of any document, paper or thing, or

(b) the refusal to disclose any information

on the ground that the disclosure would be injurious to the public interest does not apply in respect of an inquiry.

(3) Notwithstanding subsection (1),

(a) no provision in an Act, regulation or order requiring a person to maintain secrecy or not to disclose any matter applies with respect to an inquiry, and

(b) no person who is required by a commissioner or a person referred to in section 4(1)(b) to furnish information or to produce any document, paper or thing or who is summoned to give evidence at an inquiry shall refuse to disclose the information or produce the document, paper or thing on the ground that an Act, regulation or order requires him to maintain secrecy or not to disclose any matter.

(4) Any information disclosed or document, paper or thing produced to a commission to which subsection (2) or (3) applies shall not be published, released or disclosed in any manner without the written permission of the Attorney General, and the portion of the inquiry relating to the information or the document, paper or thing shall be held in private.

(5) Notwithstanding subsection (2) or (3), if the Attorney General certifies that in his opinion the production of any document, paper or thing or the disclosure of any information might involve the disclosure of

(a) the deliberations or proceedings of the Lieutenant Governor in Council, the Executive Council or a committee of either of them,

(b) matters of a secret or confidential nature or matters the disclosure of which would not be in the public interest, or

(c) matters the disclosure of which cannot be made without prejudice to the interests of persons not concerned in the inquiry,

that document, paper, thing or information is privileged and shall not be produced or disclosed at the inquiry without an order of the Court.

(6) The commissioner or commissioners may include in their report on the inquiry a reference to any occasion on which the Attorney General certifies a document, paper, thing or information under subsection (4).

(7) A commission may apply to the Court to determine any question that arises under this section and upon such application the Court has any power that it would have under the common law if the inquiry were a proceeding in court, including any power of reviewing a certificate of the Attorney General, and may determine the question and give consequential orders and directions.

(8) No person is liable to prosecution for an offence against any Act by reason of his compliance with this section.

[Source: Recommendation 28, page 99.]

Comment:

1. Section 19 operates by way of exception to the power to compel testimony and production. The general rule that it lays down is that privileges that apply in court apply to a public inquiry.

2. The rest of section 19 is complex. It

(a) makes available to a commission information and documents that would otherwise be protected by public interest immunity or statutory secrecy;

(b) prohibits the commission from disclosing the information and documents unless the Attorney General permits disclosure; and

(c) gives the Attorney power to restore the public interest immunity and statutory secrecy in some cases.

3. Generally speaking, section 19 carries forward the substance of section 8 of the Public Inquiries Act. However, section 19(5) and 19(7) would allow the Queen's Bench to examine a certificate of the Attorney General prohibiting disclosure to a commission in the same way as it examines ministerial certificates that the disclosure of information would not be in the public interest.

Failure to comply

20

(1) A commission may exercise its powers under section 18(1)

(a) by notice summoning a person to appear and give evidence or to produce documents, papers and things, or

(b) by application to the Court for an order requiring a person to do so.

(2) A person who does not comply with a notice under subsection (1)(a) or an order under subsection (1)(b) is

(a) guilty of an offence, and

(b) in contempt of the commission or of the Court as the case may be

but if a charge is laid by the Crown or the commission under paragraph (a) no proceedings may be taken for the contempt under paragraph (b).

(3) Failure to appear is excused unless it is proved that the person who is given the notice was given, at a reasonable time prior to the time at which he was required to attend, an amount of money sufficient to pay his reasonable costs of attending.

(4) An application under subsection (1)(b) shall be made on notice unless the Court orders that it may be made *ex parte*.

(5) If the Court makes an order *ex parte* under subsection (4), the order shall provide that a person who is required to give testimony or to produce documents or things may by application returnable on or after the business day after service of the notice require the commission to show cause why the order should not be rescinded.

(6) A person whose conduct in respect of a commission is such that the same conduct in relation to the Court would constitute a contempt of the Court is in contempt of the commission.

(7) Publishing a discussion of a subject being inquired into by a commission or making comments or allegations about a commission is not in itself contempt of a commission.

(8) Upon application by a commission, the Court may exercise in respect of a person who is in contempt of the commission the same powers as it may exercise in respect of a person who is in contempt of the Court.

[Source: Recommendation 20, pages 78-80.]

Inspection of public buildings

21

(1) In this section

(a) "Government funded service" means a service that is provided on behalf of the Government and in respect of which the Government makes a payment by grant or under an agreement;

(b) "public buildings" includes

(i) a facility as defined in the Social Care Facilities Review Committee Act,

(ii) a hospital as defined in the Health Facilities Review Committee Act, and

(iii) any other building or part of a building where a Government funded service is carried on.

(2) A commission that has reasonable grounds to believe that a view or inspection of any public building will assist the inquiry may apply ex parte to the Court for an order

(a) permitting any person named in the order, together with any peace officers that person calls on to assist him, to enter, if necessary by force, and view or inspect the public building, and

(b) permitting the person to take possession on behalf of the commission of any document, paper or thing that is reasonably required for the purposes of the commission's inquiry.

(3) The Court

(a) shall not make an order under paragraph (2)(b) unless it has reasonable grounds to believe that a document, paper or thing situated in the building is reasonably required for the purposes of the inquiry being conducted by the commission, and

(b) may impose terms and conditions on an order under this section.

(4) Subject to section 22, a commission on behalf of which a person takes possession of a document, paper or thing under paragraph (2)(b)

(a) may retain the document, paper or thing until the conclusion of the inquiry or until the document, paper or thing is no longer required, and

(b) shall then return the document, paper or thing to the person from whose custody it was removed or the person entitled to it.

[Source: Recommendation 20, pages 78-80.]

Comment:

Section 21 carries forward the substance of section 6 of the Public Inquiries Act by making available to a commission of inquiry a power to inspect public buildings and take possession of documents and things found there. It makes the following changes that are primarily designed to ensure that private information in government hands is not made public without good reason:

(a) the power can be exercised only by application to and order of the Queen's Bench. The present section 6 permits a commissioner who is a Queen's Bench judge to make the order.

(b) the Queen's Bench cannot grant a power to take possession of documents or things unless it has reasonable grounds to believe that documents or things situated in the building are reasonably required (rather than merely "relevant") for the purposes of the commission's inquiry.

(c) the Queen's Bench has power to attach conditions to an order under the section.

Photocopy evidence

22

(1) If a document or paper has been taken into possession under section 18 or 21 or admitted in evidence at an inquiry, the commission shall, at the request of the person from whose custody it was removed or the person entitled to it, have the document or paper photocopied and release the document or paper to the person who makes the request or provide the photocopy of the document or paper to that person.

(2) If a commission has a document or paper photocopied and released under subsection (1), the commission may authorize the photocopy to be admitted in evidence at the inquiry in place of the document or paper.

[Source: Recommendation 21, pages 80-81.]

Comment:

Section 21 carries forward the substance of section 7 of the Public Inquiries Act.

PART 5

POWERS OF COURT

Applicability of judicial review

23

(1) The decisions, acts and omissions of a commission are subject to judicial review on a question of law or jurisdiction.

(2) The Alberta Rules of Court that apply to judicial review of the decisions, acts and omissions of an administrative body apply to judicial review of the decisions, acts and omissions of a commission.

[Source: Recommendation 32(1), page 117.]

Advice and directions

24 A commission may at any time apply to the Court for the advice and direction of the Court on any matter concerning the inquiry being carried out by the commission.

[Source: Recommendation 32(2), page 117.]

PART 6
POWERS OF A COMMISSIONER CONFERRED BY OTHER ACTS

Powers conferred by other Act

25

(1) This section applies if another Act confers upon a person, functionary or body referred to in the other Act the powers of a commissioner under the Public Inquiries Act.

(2) The powers conferred on the person or functionary are the powers conferred on a commission by section 18.

(3) Sections 16, 19, 20 and 22 apply to an inquiry conducted by the person or functionary.

[Source: Recommendation 33, page 119.]

Comment:

Section 25 recognizes the long-standing practice of including in another statute a provision that a named body or functionary has the powers of a commissioner under the Public Inquiries Act. Section 25(3) is intended to ensure that the powers conferred on such bodies and functionaries are subject to the restrictions and safeguards that apply to the use of the powers in public inquiries.

APPENDIX A

PUBLIC INQUIRIES ACT

CHAPTER P-29

TABLE OF CONTENTS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Appointment of commissioner

1 When the Lieutenant Governor in Council considers it expedient and in the public interest to cause an inquiry to be made into and concerning a matter within the jurisdiction of the Legislature and

(a) connected with the good government of Alberta or the conduct of the public business thereof, or

(b) that he declares by his commission to be a matter of public concern,

The Lieutenant Governor in Council may by his commission appoint one or more commissioners to make the inquiry and to report on it.

Powers of commissioner

2(1) The commissioner or commissioners may engage the services of

(a) counsel, clerks, reporters and assistants, and

(b) experts, persons having special technical or other knowledge or any other qualified person

to assist them in the inquiry.

(2) The commissioner or commissioners may authorize a person referred to in subsection (1)(b) to inquire into any matter within the scope of the inquiry.

(3) A person authorized under subsection (2) has the same powers, privileges and immunities that the commissioner or commissioners have under this Act.

(4) A person authorized under subsection (2) shall report the evidence and his findings, if any, to the commissioner or commissioners.

Evidence

3 The commissioner or commissioners have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which he or they are appointed to inquire.

Attendance of witnesses

4 The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.

Contempt

5(1) When a judge of the Court of Queen's Bench is appointed as a commissioner or as one of several commissioners, the commissioner or commissioners so appointed have the same power of committal for contempts of the commissioner or commissioners as a judge of the Court of Queen's Bench has in respect of that Court.

(2) When pursuant to an Act of the Legislature a person or group of persons is or may be vested with the power to inquire into any matter and that Act grants to that person or group of persons the powers of a commissioner under this Act, subsection (1) applies thereto if the person so appointed or any of the persons composing the group appointed is a judge of the Court of Queen's Bench.

Inspection of public buildings

6(1) This section does not apply to an inquiry unless the Lieutenant Governor in Council declares that this section applies.

(2) In this section

(a) "Government funded service" means a service that is provided on behalf of the Government and in respect of which the Government makes a payment by grant or under an agreement;

(b) "public buildings" includes

(i) a facility as defined in the *Social Care Facilities Review Committee Act*,

(ii) a hospital as defined in the *Health Facilities Review Committee Act*, and

(iii) any other building or part of a building where a Government funded service is carried on.

(3) If a commissioner who is also a judge of the Court of Appeal, the Court of Queen's Bench or the Provincial Court is of the opinion that a view or inspection of any public building will assist the inquiry, he may issue an order permitting any person whom he names in the order, together with any peace officer that person calls on to assist him, to enter, if necessary by force, and view or inspect the public building.

(4) A commissioner other than one referred to in subsection (3) who has reasonable grounds to believe that a view or inspection of any public building will assist the inquiry may apply ex parte to the Court of Queen's Bench for an order permitting any person named in the order, together with any peace officers that person calls on to assist him, to enter, if necessary by force, and view or inspect the public building.

(5) A person who views or inspects a public building pursuant to an order under subsection (3) or (4) may take possession of any document, paper or thing that he considers to be relevant to the subject matter of the inquiry and may retain the document, paper or thing until the conclusion of the inquiry or until it is no longer required, and then he shall return it to the person from whose custody it was removed or the person entitled to it.

Photocopy evidence

7(1) If a document or paper has been taken into possession under section 6 or admitted in evidence at an inquiry, the commissioner or commissioners shall, at the request of the person from whose custody it was removed or the person entitled to it, have the document or paper photocopied and release the document or paper to the person who makes the request or provide the photocopy of the document or paper to that person.

(2) If a commissioner or commissioners have a document or paper photocopied and released under subsection (1), the commissioner or commissioners may authorize the photocopy to be admitted in evidence at the inquiry in place of the document or paper.

Admissibility of evidence

8(1) Every person has the same privileges in relation to the disclosure of information and the production of documents, papers and things under this Act as witnesses have in any court.

(2) Notwithstanding subsection (1), the rule of law that authorizes or requires the withholding of any document, paper or thing or the refusal to disclose any information on the ground that the disclosure would be injurious to the public interest does not apply in respect of an inquiry.

(3) Notwithstanding subsection (1),

(a) no provision in an Act, regulation or order requiring a person to maintain secrecy or not to disclose any matter applies with respect to an inquiry, and

(b) no person who is required by a commissioner or a person referred to in section 2(1)(b) to furnish information or to produce any document, paper or thing or who is summoned to give evidence at an inquiry shall refuse to disclose the information or produce the document, paper or thing on the ground that an Act, regulation or order requires him to maintain secrecy or not to disclose any matter.

(4) Notwithstanding subsection (2) or (3), if the Attorney General certifies that in his opinion the production of any document, paper or thing or the disclosure of any information might involve the disclosure of

(a) the deliberations or proceedings of the Lieutenant Governor in Council, the Executive Council or a committee of either of them,

(b) matters of a secret or confidential nature or matters the disclosure of which would not be in the public interest, or

(c) matters the disclosure of which cannot be made without prejudice to the interests of persons not concerned in the inquiry,

that document, paper, thing or information is privileged and shall not be produced or disclosed at the inquiry.

(5) The commissioner or commissioners may include in their report on the inquiry a reference to any occasion on which the Attorney General certifies a document, paper, thing or information under subsection (4).

(6) Any information disclosed or document, paper or thing produced to which subsection (2) or (3) applies shall not be published, released or disclosed in any manner without the written permission of the Attorney General, and the portion of the inquiry relating to the information or the document, paper or thing shall be held in private.

(7) No person is liable to prosecution for an offence against any Act by reason of his compliance with this section.

Commissioned evidence

9(1) If the commissioner or commissioners consider it advisable because of the distance a person resides from where his attendance is required or for any other reason, the commissioner or commissioners may appoint a person to take evidence of that person and to report it to the commissioner or commissioners.

(2) A person appointed to take evidence under subsection (1) shall, before doing so, be sworn before a justice of the peace to faithfully execute that duty.

Right to counsel

10 Any person appearing before a commissioner or commissioners may be represented by counsel.

Right to call witnesses

11 Any witness who believes his interests may be adversely affected and any person who satisfies a commissioner or commissioners that any evidence given before a commissioner or commissioners may adversely affect his interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the discretion of a commissioner or commissioners, to call and examine or cross-examine witnesses personally or by his counsel in respect of the matter.

Notice of allegation of misconduct

12 No report of a commissioner or commissioners that alleges misconduct by any person shall be made until reasonable notice of the allegation has been given to that person and he has had an opportunity to give evidence and, at the discretion of the commissioner or commissioners, to call and examine witnesses personally or by his counsel in respect of the matter, notwithstanding that the person may have already given evidence or may have already called and examined witnesses personally or by his counsel.

APPENDIX B

PUBLIC INQUIRIES — COMPARISON OF PUBLIC INQUIRIES ACT AND ALRI, LRCC AND OLRC PROPOSALS

ALRI Recommendation [Numbers are recommendation numbers]	**Present Act** [Numbers are section numbers]	**LRCC Recommendation** [Numbers are LRCC draft Act section numbers]	**OLRC Recommendation** [Numbers are OLRC recommendation numbers]
1. Reform of Public Inquiries Act Retain public inquiries and enact a reformed Public Inquiries Act.		Enact reformed Act (page 3).	Retain and reform public inquiries (page 188).
2. Establishment Permit inquiry to be established if (a) expedient and in public interest (b) within jurisdiction of Legislature and (c) concerns good government or conduct of government business or is a matter of public concern. Joint inquiries with federal and provincial Governments permitted.	1. Same as ALRI.	1. Advisory commission may be established to advise the GiC on any matter relating to the good government of Canada. Investigatory commission may be established to investigate any matter the GiC deems to be of substantial public importance.	No recommendation for change.
3. Appointing authority LGiC should have power to establish inquiries, define scope, choose members and fill vacancies.	1. LGiC establishes and appoints. (By implication, defines scope, chooses members and fills vacancies.)	1. GiC establishes and appoints commission. Other points not specifically dealt with.	No recommendation for change.
See Recommendations 4 (Independence) and 13 (Openness). No formal recommendation concerning minimizing prejudice to individuals or enhancing effectiveness and efficiency, but see specific recommendations below.	No legislative provision.	No recommendation.	Conduct of public inquiries should be guided by the following principles: (a) independence (b) minimize prejudice to individuals (c) facilitate public involvement (d) enhance effectiveness and efficiency while respecting fairness, independence and participation.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
4. Independence Inquiry should be independent.	No specific legislative provision, but see s. 2(1) (employment of counsel, staff, etc.) and s. 4 (privileges and immunities).	No specific legislative proposal, but see 4 (counsel, etc. and facilities) and 8 (immunity of commissioners and commission counsel from defamation actions).	1. Recognition and protection of independence should be a guiding principle. See also recommendations concerning offices, staff, counsel, etc. (Rec. 15), immunities of commissioners (Rec. 16) and publication and tabling of reports (Recs. 14, 21).
5. Funding Budget for inquiry should be established by order in council, tabled and published. Commission should have responsibility for spending allocated money subject to ground rules.	No legislative provision.	No recommendation.	No recommendation.
6. Termination date LGiC should be authorized to specify date with power of substitution. Commission should have power to complete and deliver report after date.	No legislative provision.	No recommendation.	20. Reporting date should be imposed on a public inquiry in constating order in council.
7. Majority control Unless order in council says otherwise, majority decision is decision of commission, with power to delegate inquiry into a matter and to delegate procedural and administrative decisions. Half of the members should be a quorum and a commission should be able to function so long as remaining members are a quorum.	Section 2(2) to (4) authorize delegation of a matter within scope of inquiry. Interpretation Act deals with the rest, except power to delegate procedural and administrative decisions.	No recommendation.	No recommendation.
8. Counsel and staff Commission should have power to engage counsel and staff, subject to budgetary control.	Section 2(1). The commission may engage counsel, clerks, reporters, assistants, experts and other qualified persons.	4. Commission may engage counsel, consultants, support personnel and arrange for physical facilities.	15. A commission should have power to retain offices, appoint staff, counsel, etc. at remuneration set by LGiC.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
9. Control of proceedings Commission should have power to control proceedings and power to maintain order and require peace officers to assist.	No legislative provision.	3. Commission shall establish and publish its rules of practice and procedure.	22. Conduct of inquiry should be under control and discretion of commission.
10. Evidence Commission should not be bound by rules of evidence and should have a discretion to refuse to receive evidence.	No legislative provision (Alberta Evidence Act applies).	10. All relevant evidence is admissible but may be excluded if its probative value is substantially outweighed by prejudice, confusion or waste of time.	13. Commission should not be bound by rules of evidence and should have discretion to disallow evidence or cross-examination of relevance would be outweighed by prejudicial impact.
11. Immunities from action Commissions and commission counsel should have immunities of Superior Court judges; all counsel should be immune from action for things said in hearings and arguments; and witnesses should have immunities of witnesses in court proceedings.	Section 5 deals with testimony and production and goes on to say that commissioners have the same privileges and immunities as a Queen's Bench judge. No other legislative provision.	8,9. Commissioners and commission counsel are immune from actions for defamation in the performance of their duties. Witnesses are also immune unless acting from malice.	16. Commissioners should have the same immunity as judges of the Ontario Court (General Division).
12. Tabling of report Commission's report must be in writing. LGiC must table report in Legislature within 30 days or at the commencement of the next sitting, with power to delete portions in which the interest of the public in disclosure is significantly outweighed by another reason or consideration such as prejudice to public security, privacy of person or financial matters, or the right of a person to a fair trial. Deletions must be indicated.	No legislative provision.	13. Commission shall submit report to GiC and shall publish it within 30 days unless the GiC otherwise directs.	21. Reports should be tabled in the Legislature or before a relevant legislative committee. 14. If report is not tabled or released to the public in 30 days, the commission should have the right to release the report.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
13. Openness principle Commission should exercise its control of proceedings so as to enable the public to be informed and facilitate public participation.	No legislative provision.	No general provision. See below re public and *in camera* hearings.	1(c). Public inquiries should facilitate public involvement. See below re public and *in camera* hearings.
14. Hearings Commission should not be required to hold hearings but except as otherwise provided should hold in public the hearings that it does hold.	No legislative requirement of hearings, though various provisions contemplate hearings.	No recommendation that hearings be required though various provisions contemplate hearings. See provision concerning reporting.	No recommendation that hearings be required though various provisions contemplate hearings.
15. Private hearings A commission of inquiry should be able to hold a hearing to which the public is not admitted if public security, privacy, the right to a fair trial or any other reason outweighs the interest in public hearings, or documents subject to public interest immunity or statutory confidentiality would be disclosed.	No legislative provision for private hearings except where public interest immunity or statutory secrecy applies.	See provision concerning reporting.	17. A commission should have discretion to hold hearings *in camera*, taking into consideration the effect of publicity on the ability of an individual to be treated fairly in the inquiry's proceedings or subsequent proceedings, public security, and an individual's privacy.
16. Media reporting A commission of inquiry should be allowed to deal with the reporting and televising of hearings on the basis of its control over its proceedings, the openness principle and the freedom of the press.	No legislative provision.	12. Hearings may be reported without restriction.	17. Implies that hearings may be reported.
17. Ban on publication A commission of inquiry should have power to restrict or ban publication of proceedings before it on the same grounds as those on which it may hold private hearings (Recommendation 15).	No legislative provision.	12. Commission may forbid or restrict reporting if public security, personal or financial privacy, right to a fair trial or any other reason outweighs the public interest in reporting.	17. Commission should have discretion to prohibit the publication of specified matters, taking into consideration the effect of publicity on fair treatment in inquiry and other proceedings; public security; and individual's privacy.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
18. Participation A commission of inquiry should have discretion to determine who may participate and the manner and extent of their participation, having regard to the openness principle and the need to allow a person against whom a finding of misconduct is made to have a full right of participation and reply.	11. Witness who believes his interests adversely affected and any person who satisfies commissioners his interests are adversely affected must be allowed to give evidence. 11. Calling and examining witnesses discretionary.	11,15. Any person who complains that testimony may adversely affect his interest shall be heard. An advisory commission shall hear anyone with a real interest. Commission may authorize complainant to examine witnesses personally or by counsel.	18. Any individual or organization with genuine interest should be entitled to make submissions, the form and extent to be in the commission's discretion.
19. Preservation of records The LGiC should make provision for the preservation of the report and records of a public inquiry, having regard for confidentiality and privilege.	No legislative provision.	No recommendation.	No recommendation.
20. Coercive powers (1) LGiC, if satisfied that it is in the public interest, should be able to confer upon a commission the power to compel testimony before the commission and the power to compel production of documents and things to the commission or a person designated by the commission. The commission should be able to give notice to testify and produce but the power should be enforced by application to the Queen's Bench.	3. Commission has power to summon witnesses to give evidence and produce documents, papers and things considered to be required for the full investigation of the matter.	17(1),18. An investigatory commission has power to summon witnesses but must pay travelling expenses and has power to summon or subpoena a person to produce any document or thing relevant to the commission's mandate. **[whh-check re difference between investigatory and advisory commissions]**	2. All inquiries should have the same range of powers but need not use them. From text, these powers are enforceable by the Divisional Court on stated case.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
20. Coercive powers (2) If LGiC declares provision applicable, commission may apply to Queen's Bench for order permitting inspection of public building and taking possession of documents and things found there that are reasonably required for the purposes of the inquiry, subject to terms and conditions.	6. Similar provision to ALRI 20(2). Commissioner who is Queen's Bench judge can make the order. Document may be taken if considered relevant. No provision for imposing terms.	20,21. Investigatory commission has access to any public office or institution and any record or papers. Judge of Superior Court of criminal jurisdiction may issue a search warrant for an investigatory commission if he has reasonable ground to believe there is anything that may be of assistance to the investigation.	8. Judge of the Ontario Court (General Division) should be permitted to issue a search warrant authorizing a search for any documents or things on showing that they are material; the public interest in obtaining access outweighs privacy interests; and reasonable grounds to believe that the documents or things will not be produced in a full and accurate condition under the power to summon production.
(3) The Queen's Bench should be able to punish contempt of a commission in the same way as a contempt of court. (4) A commission of inquiry should not have any further power of search or seizure.	5(1). A Queen's Bench judge who is commissioner has power to hold in contempt.	Refusal to appear, testify, produce, comply with publication restriction, or disrupts hearing commits an offence.	
21. Delegation Commission should be able to appoint a person to take evidence and Queen's Bench should be able to use its powers to get evidence as in court proceeding.	9. Same as ALRI.	19. Commission may authorize a person to take evidence and report.	No recommendation.
22. Return of documents A commission of inquiry that takes a document or paper into possession or admits it into evidence should be required to photocopy and return the document, and the photocopy should be admissible in evidence.	7. Same as ALRI.	No recommendation.	No recommendation.
23. Right to counsel A person appearing should have a right to counsel. The Act should not confer a right to be examined by one's own counsel.	10. Any person appearing may be represented by counsel.	6. Any person appearing may be represented by counsel.	No specific recommendation.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
24. Right to rebut finding of misconduct A commission of inquiry should be prohibited from making a finding that brings discredit on the person unless the person has had an informed and fair opportunity to rebut or explain the facts and allegations, including where appropriate, a fair opportunity to give evidence, cross-examine and make representations. Protection extends to corporations. Substantial compliance to be sufficient in the absence of manifest injustice.	12. Same principle as ALRI 24. Refers to "misconduct" without definition and drafting improvements needed.	14. No report alleging "misconduct" (undefined) until reasonable notice and opportunity to be heard. Discretion to give opportunity to call witnesses.	9,10,11. Person to be given notice of serious allegations of misconduct (ie., any finding or conclusion that could reasonably be construed as bringing discredit) in public proceedings or commission report, with right to respond and discretionary right to cross-examine and call witnesses.
25. Costs of participation Subject to budgetary control, a commission should have power to recommend that the government pay such costs of participation as the commission thinks reasonable.	No legislative provision.	7. A commission may, in order to promote the full expression of information and opinion, pay any expenses or losses incurred by a person for the purpose of making representations.	19. Commission should have discretion, in appropriate cases, to recommend that the government pay any costs incurred for representation.
26. Commission counsel The Act should not attempt to define or regulate function of commission counsel.	No legislative provision.	No recommendation.	Do not codify the office of commission counsel (page 212).
27. Finding of legal liability A commission should be entitled to make any finding of fact within its mandate but not express a conclusion of law regarding legal liability. A commission's report should not be admissible in a court to prove the facts found by the commission.	No legislative provision.	No recommendation.	12. A commission should not be permitted to express any conclusion of law regarding the civil or criminal responsibility of any individual or organization.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
28. Evidentiary privileges and immunities Evidentiary privileges should apply. Public interest immunity and statutory secrecy should not apply unless the Attorney General certifies that disclosure would infringe Cabinet confidentiality, be contrary to the public interest, or prejudice the interests of a person not concerned in the inquiry. Information otherwise subject to public interest immunity should not be disclosed by a commission without the written permission of the Attorney General. A commission should be able to apply to the Queen's Bench to determine any question that arises under the provision and the court should be able to review an Attorney General's certificate.	8. Provisions similar to ALRI 28. (No power to apply to the Queen's Bench for review of Attorney General's certificate.)	24. Same privileges against disclosure of evidence given at a commission hearing as he would have if the evidence were given at a judicial hearing.	No specific recommendation.
29. Privilege against self-incrimination A witness should not have a special privilege in respect of testimony given in a public inquiry in addition to the use immunity conferred by section 13 of the Charter.	No legislative provision granting special privilege. Alberta Evidence Act, section 6 repeats section 13 of the Charter which grants use immunity.	No specific recommendation.	5. A witness should have a statutory right to refuse to give self-incriminating evidence, except about the execution of official duties, unless a grant of immunity has been received from the proper prosecutorial authorities. 3. Sworn testimony given by a witness at an inquiry should not be admissible for any purpose in subsequent proceedings governed by Ontario law.
30. Self-incriminating documents and things There should be no special privilege for persons who produce documents and things in public inquiries.	No legislative provision.	No specific recommendation.	6. A lawful excuse for a refusal to produce a document or thing should include circumstances in which the person's right of privacy outweighs the commission's interest in production. Otherwise there should be no special privilege.

ALRI Recommendation [Numbers are recommendation numbers]	Present Act [Numbers are section numbers]	LRCC Recommendation [Numbers are LRCC draft Act section numbers]	OLRC Recommendation [Numbers are OLRC recommendation numbers]
31. Person charged with offence No person should be summoned to testify or produce evidence about any matter in relation to which they have been charged with an offence unless the charge has been finally disposed of.	No legislative provision.	No recommendation.	4. Recommendation similar to ALRI recommendation, but test is whether an information has been laid and not finally disposed of.
32. Judicial review Decisions, acts or omissions of a commission should be subject to judicial review on any question of law or jurisdiction. A commission should be able to apply to the Queen's Bench for advice and direction.	No legislative provision.	Proposed section 28 of Federal Court Act under LRCC Report 14, Judicial Review and the Federal Court, would provide a complete scheme of judicial review.	No special recommendation, but implication that present provision permitting judicial review on application for stated case will continue.
33. Powers conferred by other statutes If another statute grants the powers of a commissioner under the Public Inquiries Act, the limitations on those powers and the safeguards against them that are imposed by the Public Inquiries Act should apply to the exercise of the powers under the other statute.	No legislative provision.	No recommendation.	No recommendation.

APPENDIX C

Selected list of Alberta inquiries

Reproduced from *Provincial Royal Commissions, Commissions of Inquiry, 1867-1982,*

compiled by Lise Maillet

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ALBERTA

623 **1908**

Royal Commission on the Coal Mining Industry in the Province of Alberta, 1907.
Report, Edmonton, [1908?] 11 *l.* (typescript)

Chairman/Président: A.L. Sifton.

Commissioners/Commissaires: W. Haysom, L. Stockett.

Loc.: AEA, AEP, AEU, OOL, OONL

624 **1909**

Commission on the Pork Industry in the Province of Alberta, 1908.
Report. Edmonton: J.W. Jeffery, Government Printer, 1913 [1909] 24 p.

Chairman/Président: R.A. Wallace.

Commissioners/Commissaires: J. Bower, A.G. Harrison.

Loc.: ACG, AEP, OONL

625 **1910**

Royal Commission onthe Alberta and Great Waterways Railway Company.
Report. [Edmonton, 1910] 58 p.

Commissioners/Commissaires: N.D. Beck, H. Harvey, D.L. Scott.

Loc.: AE, AEA, AEP, AEU, OONL, OOP

626 **1915**

Commission Appointed for the Investigation and Enquiry into the Cause and Effect of the Hillcrest Mine Disaster.
Report. In Alberta. Dept. of Public Works. Mines Branch. *Annual report, 1914.* Edmonton: J.W. Jeffery, Government Printer, 1915. p. 160-169.

Commissioner/Commissaire: A.A. Carpenter.

Loc.: AEA, AEP, BVAG, BVAU, OKQ, OOG, OONL, OOSS

627 **Commission Appointed to Consider the Granting of Degree-Conferring Powers to Calgary College.**
Report. Edmonton: J.W. Jeffery, Government Printer, 1915. 17 p. (Sessional paper no. 1, 1915)

Chairman/Président: R.A. Falconer.

Commissioners/Commissaires: A.S. MacKenzie, W.C. Murray.

Loc.: AEA, AEP, OONL

628 **1918**

Inquiry into and Concerning Compensation for Injuries Received by Workmen in Alberta.
Report of investigation regarding workmen's compensation. [Edmonton] 1918. *l* ix p.

Chairman/Président: J.T. Stirling.

Commissioners/Commissaires: J.A. Kinney, W.T. McNeill.

Loc.: AEP, OOL, OONL

629 **1919**

Coal Mining Industry Commission.
Report. [Edmonton: J.W. Jeffery, King's Printer] 1919. 13 p.

Chairman/Président: J.T. Stirling.

Commissioners/Commissaires: J. Loughran, W.F. McNeill, H. Shaw, W. Smitten.

Loc.: AC, ACG, AEA, AEMM, AEP, OOAG, OOL, OONL

630 **1922**

Commission on Banking and Credit with Respect to the Industry of Agriculture in the Province of Alberta.
Report. [Edmonton?] 1922. 49 *l.* (typescript)

Commissioner/Commissaire: D.A. McGibbon.

Loc.: AEA, AEP, AEU, OOA, OOAG, OOCC, OONL, OTMCL

631 **The Survey Board for Southern Alberta.**
Report. Edmonton: King's Printer, 1922. 44 p.

Chairman/Président: C.A. Magrath.

Commissioners/Commissaires: A.A. Carpenter, W.H. Fairfield, G.R. Marnoch.

Loc.: AC, ACG, ACU, AEP

632 **1925**

Commission to Inquire into and Concerning the Circumstances Attending the Reception at the Provincial Gaol at Lethbridge of One Edward Moore.
Report. 1925. 28 *l.* (typescript)

Commissioner/Commissaire: W.L. Walsh.

Also known as/Également connue sous le nom de: Lethbridge Gaol Inquiry.

Loc.: AEA, AEP

633 **1926**

Alberta Coal Commission, 1925.
Report. Edmonton: W.D. McLean, Acting King's Printer, 1926. vii, 391 p.

Chairman/Président: H.M.E. Evans.

Commissioners/Commissaires: R.G. Drinnan, F. Wheatley.

Loc.: AC, ACG, AEA, AEP, AEU, MWP, OOG, OOL, OOM, OONL, OOP

634 **Commission Appointed to Enquire into, Report on and Make Recommendations in Regard to Matters Affecting the Welfare of that Part of the Province of Alberta Generally Known as the Tilley East Area.**
Report. Edmonton, 1926. 2, 22 *l.* (typescript)

Chairman/Président: E.J. Fream.

Commissioners/Commissaires: Z. McIlmoyle, J.W. Martin, V. Meek.

Loc.: AEA, AEP, OONL

635 **1927**

Commission Appointed to Inquire into the Advisability of the Establishment of a Forty-Eight Hour Working Week in Alberta.
Majority report. [Minority report] [Edmonton, 1927] 11, 3 *l.* (typescript)

Chairman/Président: A.A. Carpenter.

Commissioners/Commissaires: N. Hindsley, E.E. Roper.

Loc.: AEA, AEP, OONL

636 **Commission to Investigate any Cases in which Difficulties, Differences of Opinion or Hardships Were Alleged to Have Arisen as Affecting Minorities of Either the United Church of Canada, the Presbyterian Church in Canada, the Methodist Church or the Congregational Churches.**
Report. 1927. 20 *l.* (typescript)

Chairman/Président: J.E.A. Macleod.

Commissioners/Commissaires: S.H. McCuaig, D.G. McQueen, H.J. Montgomery, A.S. Tuttle, C.E. Wilson.

Loc.: AEA, AEP, OONL

637 **1927**

Commission to Make an Inquiry for the Purpose of Ascertaining as Far as Possible the Cause of an Explosion which Occurred on the 23rd Day of November, 1926, in a Coal Mine Operated by the McGillivray Creek Coal and Coke Company at Coleman.
Report. [Edmonton, 1927] 18 *l.* (typescript)

Commissioner/Commissaire: H. Harvey.

Loc.: AEA, AEP, OONL

638 **1928**

Commission of Inquiry as to the Equipment, Maintenance, Supervision, Control and Management of the Innisfail Municipal Hospital.
Report. [Calgary, Alta, 1928] 22 *l.* (typescript)

Commissioner/Commissaire: W.L. Walsh.

Loc.: AEA, AEP, OONL

639 **1929**

Commission Appointed to Investigate the Provincial Training School at Red Deer, Provincial Mental Institute at Oliver, Provincial Mental Hospital at Ponoka.
Report. Toronto, 1929. 59 *l.* (typescript)

Commissioners/Commissaires: C.B. Farrar, C.M. Hincks.

Loc.: AEA, AEP

640 **1930**

Commission Appointed to Report on the Lethbridge Northern and Other Irrigation Districts of Alberta.
Report. Edmonton: King's Printer 1930. 42 p.

Chairman/Président: M.L. Wilson.

Members/Membres: L.C. Charlesworth, W.H. Fairfield.

Loc.: AEA, AEP, AEU

641 **1931**

Inquiry into Certain Matters Pertaining to the Administration of the Affairs of the Municipal District of Inga, No. 520.
Report. 1931 50 *l.* (typescript)

Commissioner/Commissaire: T.M.M. Tweedie.

Loc.: AEA, AEMA, AEP

642 **1934**

Commission Regarding Administration of Justice.
Report. [Edmonton, 1934] 9 *l.* (typescript)

Commissioner/Commissaire: H. Harvey.

Loc.: AEA, AEP, OONL

643 **1935**

Alberta Taxation Inquiry Board on Provincial and Municipal Taxation.
Preliminary report. 1935. 87 p. (typescript)

_____.
Report. Edmonton: A. Shnitka, King's Printer, 1935. 147 p.

Chairman/Président: J.F. Percival.

Commissioners/Commissaires: J.J. Duggan, J. Gair, W.D. Spence, J.C. Thompson.

Loc.: AC, ACG, AEA, AEP, AEU, OOB, SRL

644 **Royal Commission Respecting the Coal Industry of the Province of Alberta, 1935.**
Report. Edmonton: A. Shnitka, King's Printer, 1936. 103 p.

Commissioner/Commissaire: M. Barlow.

Loc.: AC, ACG, AEA, AEP, AEU, OOCI, OOL, OOM, OONL, OOP, QMU

645 **1936**

Enquiry into and Concerning the Problems of Health, Education and General Welfare of the Half-Breed Population of the Province.
Report. [Edmonton, 1936] 15 *l.* (typescript)

Commissioners/Commissaires: E.A. Braithwaite, J.M. Douglas, A.F. Ewing.

Loc.: ACG, AEA, AEP, OONL

646 **1937**

Commission Appointed in 1936 to Inquire into the Various Phases of Irrigation Development in Alberta.
Report. [Lethbridge, Alta] The Lethbridge Herald, 1937. 32 p.

Chairman/Président: A.F. Ewing.

Commissioners/Commissaires: R.W. Risinger, F.A. Wyatt.

Loc.: ACG, AEA, AEP, AEU, OOA, OOG, OONL, OOS

647 **Special Committee Appointed to Enquire into Fluid Milk and Cream Trade of the Province of Alberta.**
Department report. [Edmonton] 1937. 24 *l.* (typescript)

Chairman/Président: R. Sheppard.

Commissioners/Commissaires: W. King, D. Lush, W.E. Masson, W.L. White.

Loc.: AEA, AEP, OONL

648 **1938**

Enquiry Concerning the Construction and Re-construction and Maintenance of the Highway between the City of Edmonton and the City of Wetaskiwin, in the Province of Alberta, and the Highway between the City of Edmonton and the Town of Jasper, in the Province of Alberta.
Report. [Edmonton, 1938] 117 *l.* (typescript)

Commissioner/Commissaire: H.W. Lunney.

Loc.: AEA, AEP

649 **1939**

Commission Appointed to Inquire into Alleged Irregularities in the Conduct and the Management of the Business and Affairs of the Eastern Irrigation District.
Report. [Lethbridge, Alta, 1939] 5 *l.* (typescript)

Commissioner/Commissaire: J.A. Jackson.

Loc.: AEA, AEP, OONL

650 **1940**

Royal Commission Appointed to Inquire into Matters Connected with Petroleum and Petroleum Products.
Alberta's oil industry: the report. Calgary, Alta: [Imperial Oil Limited] 1940. 278 p.

Chairman/Président: A.A. McGillivray.

Commissioner/Commissaire: L.R. Lipsett.

Loc.: AC, ACG, AE, AEP, AEU, BVAS, BVAU, MW, MWP, NBFU, NBSAM, NBSM, NFSM, NSHPL, OH, OKQ, OLU, OOB, OOCC, OOF, OOFF, OOG, OOM, OONE, OONL, OOP, OOSH, OOU, OTH, OTP, OTY, OWAL, QMG, QQL

651 **1942**

Commission Appointed to Inquire into a Disaster which Occurred at the Mine of Brazeau Collieries Limited at Nordegg, Alberta, on October 31st, A.D. 1941.
Report. [Edmonton, 1942?] 34 *l.* (typescript)

Commissioner/Commissaire: A.F. Ewing.

Loc.: AEA, AEP, OOL, OONL

652 **1948**

Commission of Inquiry to Investigate Charges, Allegation and Reports Relating to the Child Welfare Branch of the Department of Public Welfare.
Report. [Edmonton, 1948] 96 *l.* (typescript)

Chairman/Président: W.R. Howson.

Commissioners/Commissaires: E.B. Feir, J.W. McDonald.

Loc.: AC, ACG, AEA, AEHSD, AEP, AEU, OOL, OONL, OOP, OOSC, OTLS, SRL

653 **Royal Commission on Taxation.**
Report. Edmonton: A. Shnitka, King's Printer, 1948. 101 p. (Sessional paper no. 71)

Commissioner/Commissaire: J.W. Judge.

Loc.: AC, ACG, ACU, AEA, AEMA, AEMM, AEP, AET, AEU, BVA, BVAU, NSHPL, OOB, OOF, OOG, OOL, OONL, OTCT, SRL

654 **1949**

National Gas Commission.
Enquiry into reserves and consumption of natural gas in the Province of Alberta: report. Edmonton: A. Shnitka, King's Printer, 1949. 127, xv p.

Chairman/Président: R.J. Dinning.

Commissioners/Commissaires: R.C. Marler, A. Stewart

Loc.: AC, ACSP, AEA, AEMM, AEP, AER, AET, AEU, OONL

655 **1952**

Commission to Conduct an Inquiry into Causes and Conditions Contributing to Floods in the Bow River at Calgary.
Report. 1952. 55 *l.* (typescript)

Chairman/Président: W.J. Dick.

Commissioners/Commissaires: D.W. Hayes, A. McKinnon.

Loc.: AEEN, AEP

656 **1956**

Royal Commission on the Metropolitan Development of Calgary and Edmonton.
Report. Edmonton: A. Shnitka, Printer to the Queen's Most Excellent Majesty, 1956. various pagings

Chairman/Président: G.F. McNally.

Commissioners/Commissaires: G.M. Blackstock, P.G. Davies, C.P. Hayes, I.C. Robison.

Loc.: AC, ACG, ACU, AEA, AEHSD, AEHT, AEMA, AEP, AET, AEU, BVA, BVAU, BVIP, OH, OOCM, OOF, OOGB, OONL, OTU, OTY, OTYL, SRL, SSU

657 **Royal Commission to Investigate the Conduct of the Business of Government.**
Report. Edmonton, 1956. 88, 229 p. (typescript)

Chairman/Président: H.J. Macdonald (1955-1956), J.C. Mahaffy (1956).

Commissioners/Commissaires: M.L. Brown, J.D. Dower, J.H. Galbraith, G.H. Villett.

Also known as/Également connue sous le nom de: Royal Commission Appointed to Investigate Certain Charges and Allegations Made during the Provincial Election Campaign of 1955.

Loc.: AC, AEA, AEP, BVA, OONL, OTP

658 **1958**

Royal Commission on the Development of Northern Alberta.
Report. Edmonton: [Commercial Printers] 1958. xiii, 115 p.

Chairman/Président: J.G. MacGregor.

Commissioners/Commissaires: R.C. Marler, J.O. Patterson.

Loc.: AC, ACG, ACSP, AE, AEA, AEMA, AEP, AEU, BVAS, BVAU, BVIP, OH, OOAG, OOFF, OOG, OORD, OOTC, OTP, OTU

659 **Royal Commission on the Feasibility of Establishing a Scale or Scales of Salaries for Teachers in the Province of Alberta and Allied Matters.**
Report. Edmonton, 1958. 134 *l.* (typescript)

Chairman/Président: G.M. Blackstock.

Commissioners/Commissaires: J. Harvie, H.E. Smith.

Loc.: AC, AE, AEA, AEP, BVAU, MWP, OONL, OTER, OTU, OW

660 **1959**

Royal Commission on Education in Alberta.
Report. Edmonton: L.S. Wall, Printer to the Queen's Most Excellent Majesty, 1959. xxiii, 451 p.

Chairman/Président: D. Cameron.

Commissioners/Commissaires: J.S. Cormack, N.W. Douglas, D.A. Hansen, G.L. Mowat, W.C. Taylor.

Loc.: AC, ACG, AEP, AEU, BVA, BVAS, BVAU, BVI, BVIP, BVIV, MWP, MWU, NFSM, NSHPL, OKQ, OLU, OOCC, OOCU, OOL, OONL, OOP, OOSS, OPET, OSTCB, OTC, OTLS, OTP, OTV, OTY, OWA, OWTU, QMM, QMU, QQL, QQLA, SRL, SSU

661 **1963**

The Royal Commission on Prearranged Funeral Services.
Report. Edmonton, 1963. v, 21 p. (typescript)

Commissioner/Commissaire: C.C. McLaurin.

Loc.: AEA, AESHD, NSHPL, OONL, OTLS, OTYL, SRL

662 **1965**

Inquiry into the Administration, Management and Financial Affairs of the Lethbridge Central Feeder's Association Limited, and the General Operation in Respect to the Participation of the Members Therein.
Report. 1965. 2 v.

Commissioner/Commissaire: L.S. Turcotte.

Loc.: AEA, AEP

663 **1966**

Public Inquiry into the Appointment by the Minister of Education of an Official Trustee for Fort Vermilion School Division No. 52.
Report. 1966. 45 p. (typescript)

Commissioner/Commissaire: N.V. Buchanan.

Loc.: AEA, AEP

664 **1967**

Alberta Royal Commission on Juvenile Delinquency.
Report. [Edmonton] 1967. 62 *l.* (typescript)

Loc.: AC, ACMR, AE, AEA, AEE, AEHSD, AEP, BVA, BVAS, BVAU, BVIP, NFSM, NSPL, OKQL, OLU, OONL, OOP, OOU, OTP, OTU, OTYL, OWAL, QMML, QSHERU, SRU, SSU

_____.
Supplementary report on juvenile delinquency in Alberta submitted by Jean Clyne Nelson. [Edmonton] 1967. 107, 2 *l.* (typescript)

Chairman/Président: F.H. Quigley.

Commissioners/Commissaires: J.C. Nelson, F. Kennedy.

Also known as/Également connue sous le nom de: The Provincial Commission on Juvenile Delinquency.

Loc.: AC, ACMR, AE, AEA, AEE, AEHSD, AEP, BVAS, NSHPL, OONL, OTLS, OTU, OWAL, QSHERU

665 **Public Inquiry into the Adequacy of the Provisions of the Mechanics Lien Act, 1960.**
Report. 1967. 193 p. (typescript)

Commissioner/Commissaire: N.V. Buchanan.

Loc.: AC, AEP

666 **1968**

Prairie Provinces Cost Study Commission.
Report. Regina: L. Amon, Queen's Printer, 1968. xxi, 463 p.

Chairman/Président: M.J. Batten.

Commissioners/Commissaires: W. Newbigging, S.M. Weber.

Also known as/Également connue sous le nom de: Royal Commission on Consumer Problems and Inflation.

Loc.: AC, ACU, AEA, AEP, AEU, BVI, MWA, MWP, OOAG, OONL, SRL, SRPC, SSU

667 **Royal Commission Respecting the Use or Attempted Use by the Honourable Alfred J. Hooke of his Office as a Member of the Executive Council of Alberta, and the Use or Attempted Use by Edgar W. Hinman of his Office as a Member of the Executive Council of Alberta.**
Report. [Edmonton, 1968] 362 p. (typescript)

Commissioner/Commissaire: W.J.C. Kirby.

Loc.: AC, AEP, OONL, OOP

668 **1970**

Commission to Investigate the Services to Single Transient Men in the City of Edmonton, the Methods of Providing such Services and to Assess Allegations of Mistreatment.
Report. [Edmonton] 1970. 14 *l.* (typescript)

Commissioner/Commissaire: M.B. O'Byrne.

Loc.: AEA, AEHSD, AEP, OONL

669 **Inquiry on the Operations of the Edmonton Real Estate Board Co-operative Listing Bureau Limited.**
Report. [Calgary, Alta, 1970] 24 *l.* (typescript)

Commissioner/Commissaire: C.C. McLaurin.

Loc.: AEP, OONL

670 **1971**

Inquiry into the Conduct of Public Business of the Municipality of Calgary.
Interim report with respect to the Police Commission. Yellowknife, N.W.T., 1971. 30 *l.* (typescript)

_____.
Report. Yellowknife, N.W.T., 1971. 156 *l.* (typescript)

Commissioner/Commissaire: W.G. Morrow.

Loc.: AC, AEP, AEU

671 **1972**

Commission on Educational Planning.
A future of choices, a choice of futures; report. [Edmonton: L.S. Wall, Queen's Printer for the Province of Alberta, 1972] 325 p.

Commissioner/Commissaire: W.H. Worth.

Loc.: AC, ACG, AEA, AEAG, AEE, AEECA, AEML, AEOM, AEP, AEU, BVA, BVAS, BVAU, MW, MWP, NBFU, NBSU, NSHPL, OKQL, OOC, OOF, OONL, OOP OOS, OOSH, OOU, OPAL, OTB, OTER, OTU, OTYL, OWTU, QMBM, QMMLS, QMMN, QMU, QQLA, SRL, SSM

672 **1972**

The Red Deer College Inquiry.
Report. Edmonton, 1972. 107 p.

Commissioner/Commissaire: T.C. Byrne.

Loc.: AEAE, AEE, AEIC, AEP, AET, AEU

673 **1973**

Grande Cache Commission.
Final report. [Edmonton, 1973] 160 p. (typescript)

Chairman/Président: N.R. Crump.

Commissioners/Commissaires: D. Graham, T.H. Patching.

Loc.: AC, AEFIA, AEHSD, AEHT, AEP, AEU, BVA, BVAS, MWP, OONL, OOP, OOSS, OTYL

674 **Inquiry into the Alleged Excessive Use of Force at the Calgary Correctional Institute.**
Report. [Calgary, Alta, 1973?] unpaged (typescript)

Commissioner/Commissaire: A.M. Harradance.

Loc.: AEP, AEU, BVAS, BVAU, OONL, OOSG, OTYL

675 **1974-1978**

Board of Review, Provincial Courts.
Administration of justice in the provincial courts of Alberta: the coroner system in Alberta. [Edmonton: Queen's Printer for the Province of Alberta, 1974] xix, 23 p. (Report of the Board of Review, Provincial Courts; no. 1)

_____.
Administration of justice in the provincial courts of Alberta. Edmonton, 1975. xiii, 222 *l.* (Report of the Board of Review, Provincial Courts; no. 2)

_____.
The juvenile justice system in Alberta. [Edmonton, 1977] x, 104 p. (Report of the Board of Review, Provincial Courts; no. 3)

_____.
Native people in the administration of justice in the provincial courts of Alberta. [Edmonton, 1974] ix, 88 p. (Report of the Board of Review, Provincial Courts; no. 4)

Chairman/Président: W.J.C. Kirby.

Members/Membres: J.E. Bower, M. Wyman.

Loc.: AC, AEP, AEU, BVAU, MWU, NFSM, OKQL, OLU, OONL, OOP, OOSC, OOSG, OOU, OTMCL, OTUL, OTYL, QMML, QQL, QSHERU

676 **Inquiry Made into Matters Concerning Establishment, Operation and Failure of the Cosmopolitan Life Assurance Company and PAP Holdings Ltd.**
Report. Edmonton, 1974. 137, 72 *l.* (typescript)

Commissioner/Commissaire: R.P. Kerans.

Loc.: AECA, AEP, OONL, OOP, OOU, OTYL, OWAL

677 **1975**

Inquiry Made into Matters Concerning a Grant or Sale of Bull Semen to the Government of Brazil between the 1st Day of January, 1973 and the 28th Day of May, 1975.
Report. [Edmonton, 1975?] 39 *l.* (typescript)

Commissioner/Commissaire: S.V. Legg.

Loc.: AEP, OONL, OTY

678 **Royal Commission to Inquire into the Affairs of the Alberta Housing Corporation.**
Report. [Calgary, Alta, 1975] 160 p.

Commissioner/Commissaire: J.M. Cairns.

Loc.: AEA, AEP, NFSM, OKQL, OONL, OTYL

679 **1978**

Commission of Inquiry into the Affairs and Activities in the Province of Alberta of Royal American Shows Inc.
Royal American Shows Inc. and its activities in Alberta: report. [Edmonton] 1978. various pagings.

Commissioner/Commissaire: J.H. Laycraft.

Loc.: AC, AEP, OOCI, OONL, QMML

680 **1982**

Royal Commission to Ascertain Whether any Confidential Information in Possession of the Government of Alberta in Connection with the Annexation of Certain Lands to the City of Edmonton as Provided for in Order in Council 538/81 of June 11, 1981, or in Connection with a Proposed Land Assembly by the Government of Alberta within the Area to be Annexed Was Improperly Made known to any Person, or Whether any Former Member of the Executive Council Made Representations Affecting the Said Annexation and Land Assembly Decisions.
Report. Calgary, Alta, 1982. 60 *l.* (typescript)

Commissioner/Commissaire: W.R. Brennan.

Also known as/Également connue sous le nom de: Brennan Inquiry.

Loc.: OONL, OOP

APPENDIX D

List of Alberta statutes conferring powers of a commissioner under the Public Inquiries Act

Alberta Corporate Income Tax Act

Alberta Income Tax Act

Burial of the Dead Act

Coal Conservation Act

Credit Union Act

Criminal Injuries Compensation Act

Dairy Industry Act

Debtors' Assistance Act

Department of Consumer and Corporate Affairs Act

Department of Education Act

Department of Municipal Affairs Act

Dependent Adults Act

Election Finances and Contributions Disclosure Act

Energy Resources Conservation Act

Expropriation Act

Fatality Inquiries Act

Fire Prevention Act

Hospitals Act

Individual's Rights Protection Act

Insurance Act

Irrigation Act

Labour Relations Code

Land Agents Licensing Act

Law of Property Act

Liquor Control Act

Local Authorities Pension Plan Act

Members of the Legislative Assembly Pension Plan Act

Mental Health Act

Municipal Government Act

Municipalities Assessment and Equalization Act

Nursing Homes Act

Occupational Health and Safety Act

Police Act

Police Officers Collective Bargaining Act

Prearranged Funeral Services Act

Provincial Court Judges Act

Public Health Act

Public Service Employee Relations Act

Public Service Management Pension Plan Act

Public Service Pension Plan Act

Real Estate Agents' Licensing Act

School Act

Special Forces Pension Plan Act

Surface Rights Act

Transportation of Dangerous Good Control Act

Universities Academic Pension Plan Act

Workers' Compensation Act

APPENDIX E

Consultants interviewed

Consultants interviewed at TORONTO

Robert P. Armstrong, Q.C.
Tory Tory DesLauriers & Binnington

Ronald D. Collins
Fasken, Campbell, Godfrey

The Honourable Chief Justice Charles L. Dubin
Court of Appeal, Osgoode Hall

The Honourable W.Z. Estey, Q.C.
McCarthy Tétrault

The Honourable Gregory T. Evans, Q.C.
Commissioner on Conflict of Interest

Stephen T. Goudge, Q.C.
Gowling, Strathy & Henderson

The Honourable Mr. Justice Samuel Grange
Court of Appeal, Osgoode Hall

The Honourable Mr. Justice Lloyd W. Houlden
Court of Appeal, Osgoode Hall

The Honourable S.H.S. Hughes

The Honourable Mr. Justice Horace Krever
Court of Appeal, Osgoode Hall

Paul Lamek, Q.C.
Genest, Murray, DesBrisay, Lamek

John I. Laskin
Davies Ward & Beck

Professor Kent Roach
Faculty of Law, University of Toronto

The Honourable Ian Scott, Q.C.
Gowling, Strathy & Henderson

Frederick R. von Veh, Q.C.
Stikeman, Elliott

Consultants interviewed at OTTAWA

Ward P.D. Elcock
Privy Council Office

Gordon F. Henderson, Q.C.
Gowling, Strathy & Henderson

Professor E.J. Ratushny
Common Law Section, University of Ottawa

David W. Scott, Q.C.
Scott & Aylen

The Honourable Mr. Justice W.A. Stevenson
The Supreme Court of Canada

John C. Tait, Q.C.
Deputy Minister of Justice
& Deputy Attorney General of Canada

Martin Freeman
Advisory & Administrative Law,
Department of Justice

Consultants interviewed at EDMONTON

The Honourable David C. McDonald
Court of Queen's Bench of Alberta

The Honourable Mr. Justice A.T. Murray
Court of Queen's Bench of Alberta

Consultants interviewed at CALGARY

The Honourable Mr. Justice J.C. Major
Court of Appeal of Alberta

Neil C. Wittmann, Q.C.
Code Hunter

Edmonton Advisory Committee

Robert S. Abells
Witten Binder

Jack N. Agrios, Q.C.

Brian R. Burrows, Q.C.
McLennan Ross

Professor Gerald Gall
Faculty of Law, University of Alberta

Brian J. Kickham
Bishop & McKenzie

Peter M. Owen, Q.C.
Field & Field

James E. Redmond, Q.C.
Milner Fenerty

Michael G. Stevens-Guille, Q.C.
McLennan Ross

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Professor Eugene Dais
Faculty of Law, University of Calgary

James T. Eamon
Code Hunter

William Y. Kennedy
Natural Resources Conservation Board

Professor A.R. Lucas
Faculty of Law, University of Calgary

Dennis A. McDermott, Q.C.
Milner Fenerty

The Honourable J.V.H. Milvain, Q.C.
Atkinson McMahon

Helpful comments were also received from:

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Toronto

Professor Peter Russell
Department of Political Science
University of Toronto

The Honourable Mr. Justice R.P. Kerans
Court of Appeal of Alberta