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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

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PREFACE
and
INVITATION TO COMMENT

This Issues Paper is published by the Alberta Law Reform Institute in order to stimulate discussion about the form, content, function and operation of the *Public Inquiries Act* (Alberta). It is the Institute's intention, following consultation on the issues relating to public inquiries, to make a final report setting out the Institute's proposals with respect to that act. These could involve the repeal, reform or continuation of the act.

The Institute has noted with pleasure that the Ontario Law Reform Commission has on foot a similar, though not identical, project on public inquiries. The resulting exchange of views and research materials between the Commission and the Institute at a late stage of the preparation of this issues paper has been beneficial, as will be the results of the studies of the two bodies. The Institute is grateful to Ms. Rosalie Abella, Chairperson of the OLRC, and to the OLRC's project research director, Professor Kent Roach, for the cooperative and open approach they have taken to the conduct of the two projects; and to the authors of the OLRC research papers: Professors Jamie Benidickson, Marilyn L. Pilkington, Alan Mewett, and Alan Young.

Since all the federal, provincial and territorial jurisdictions of Canada have similar legislation, the Institute hopes that this issues paper will be of interest throughout the country. It intends to distribute the paper outside as well as inside Alberta and to try to obtain the benefit of the expertise of persons outside as well as inside Alberta who have had experience in or given thought to the conduct of public inquiries in Canada.

The Institute therefore solicits the views of all persons interested in the subject. Views can be communicated in writing to

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Views may cover any or all of the issues raised by the issues paper or any other issues that the commentator thinks should be considered in a review of a public inquiries act. Please refer, where applicable, to specific issues or pages to which comments are addressed.

The Institute requests that all views be communicated to it by March 15, 1992. After that date, while the Institute will consider views received until it formulates its final proposals, views may be too late to infuence its consideration.

PUBLIC INQUIRIES

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Statutory instrument	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 Alberta act, or the 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

Statutory instrument	Abbreviated reference
Public Inquiries Act R.S.Y.T. 1986, c. 137	The Yukon act
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
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
Prerogative commission	A commission, commissioner or commissioners appointed under the royal prerogative to conduct an inquiry

LIST OF ISSUES RAISED BY THIS ISSUES PAPER

Commencing with Chapter 2, this issues paper discusses the various subjects that the Institute thinks relevant to a consideration of the public inquiries acts. At the end of each discussion, the issues that the Institute thinks should be addressed are set out. Those issues are collected here so that the reader may see the scope of the discussion and, if they wish, may go to the discussion of a specific issue.

For further ease of reference, the page numbers at which the discussion and issue appear are given under each issue.

The issues are as follows:

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Issue 3.3

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Issue 3.4

Should a public inquiries act include provisions designed to promote the independence and impartiality of commissions of inquiry? Should such provisions include a requirement of independence or a prohibition against the giving of executive directions to a commission of inquiry other than by order in council? Should they include anything about funding? Should they include anything requiring the appointment of independent or impartial commissioners?

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Issue 4.2

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Issue 4.3

Should a witness in a public inquiry have the right not to answer a question on the grounds that it might tend to incriminate them? Should the introduction in subsequent proceedings of evidence derived from testimony given in a public inquiry be prohibited? Should any use immunity apply to subsequent civil proceedings? Should any precaution be taken against violating section 7 or section 13 of the Charter? Should the prohibition against the use of evidence given by a witness be extended to evidence given in preliminary steps in a public inquiry?

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Issue 4.4

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Issue 4.5

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Issue 4.6

(1) If the contempt power is to be available, should (a) any commission of inquiry, (b) a commission which includes a Queen's Bench judge, or (c) the judge themself, have the power of contempt? Should any institution other than a court have power to set in motion the enforcement machinery of the state? Should the appeal from a Queen's Bench contempt order apply to a judge sitting in a commission of inquiry?

(2) Instead of a contempt power, should things that would constitute contempts in proceedings in court be made summary conviction offences?

(3) Should the procedure to enforce the contempt power be an application on behalf of the commission to the Queen's Bench? If so should this be put into the statute?

(4) Should a commission of inquiry be given the power to impose other punishments such as fines? If so, what types of punishment should the commission be able to impose? Should it be able to impose these punishments directly, or should punishment be imposed via application to a court?

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Issue 6.8

Should a person affected by an inquiry have the opportunity of being examined by their own solicitor or counsel?

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CHAPTER 9 — IMMUNITY AND PRIVILEGE: LIABILITY TO CIVIL ACTION

Issue 9.1

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Issue 9.2

Should witnesses appearing before an inquiry be granted absolute immunity against civil suit? Should witnesses be granted qualified immunity? If so, what should the limitations be? Should witnesses be treated differently depending on whether or not the commission has coercive powers? Should the protection afforded a witness depend on how directly that person's interests are affected?

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Issue 9.3

Should commission counsel be granted immunity from civil suit? If so, should it be an absolute immunity or a qualified immunity? If a qualified immunity is specified, what should the limitations be? If an immunity, absolute or qualified, is granted, should it apply to all stages of the commission's proceedings or only to matters such as examination of witnesses? Should a different level of immunity be granted depending on how court-like the proceedings of the commission are? Should the immunity granted depend on the actual role of commission counsel in that particular inquiry, i.e. whether prosecutorial or not?

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Issue 9.4

Should counsel representing witnesses or persons whose conduct is in issue have the same immunity as commission counsel? Should such counsel have the same immunity as counsel representing persons appearing in court? If the answer to both questions is "no", then what type of immunity (if any) should such counsel have? Should it apply in all circumstances or at all stages of the inquiry?

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CHAPTER 1 — INTRODUCTION

A. Purpose of Paper

The Institute has undertaken a study of the form, content, function and operation of the *Public Inquiries Act* (Alberta) with a view to deciding whether or not it should be replaced or reformed. This paper sets out the issues which have arisen during the study. It also sets out the considerations which appear to the Institute to be relevant to the issues. Comment is solicited.

Although the focus of the paper is the Alberta act, and the way it is used in Alberta, much of the discussion, apart from specific references to specific Alberta provisions, is relevant in the other provinces, the two Territories and in the federal jurisdiction. Comment is solicited from outside Alberta as well as from the province itself.

Some opinions are expressed in the paper. This is done solely to advance the discussion: the Institute is not committed to these opinions. The reader should feel free to disagree with anything in the paper.

B. Incorporation of the *Public Inquiries Act* by Other Provincial Statutes

This issues paper is primarily concerned with the *Public Inquiries Act* as the legal foundation for public inquiries conducted by commissions of inquiry established under that act. It must be recognized, however, that, in practice, the act serves another very significant purpose: a large number of other statutes confer upon various functionaries the powers of a commissioner under the *Public Inquiries Act*, thus incorporating some parts of the *Public Inquiries Act* by reference.

Two consequences flow from this. The first is that 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 estabished under the act. The second is that, unless something is done to the other statutes, changes in the *Public Inquiries Act* will automatically affect proceedings under the other statutes.

Chapters 2 to 9 of this paper are concerned with the primary purpose of the act, that is to say, the establishment and conduct of public inquiries under the act itself. Chapter 10 raises the questions that arise from the relationship between the *Public Inquiries Act* and the other statutes that refer to it.

C. 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 public inquiries have enough unique characteristics that they can be dealt with without waiting for completion of the administrative procedures project, and the thinking done in each project will be useful for the other.

D. Limitations on Scope of Proposed Project

The public inquiries acts confer power upon the Executive to appoint commissions of inquiry and to confer legitimacy and coercive powers upon the commissions so appointed. They leave the establishment of inquiries and the purposes for which they are established in the hands of the Executive, subject only to whatever political pressures may act upon it. For all that the acts say, the power to establish inquiries can be used and abused by the Executive as it wishes, though the courts may protect individuals against some kinds of excesses by a specific commission of inquiry.

It would be possible to question whether or not there should be public inquiries legislation at all. Discussion of that question would involve consideration of experience and whether or not, on balance, the benefits conferred upon the public by public inquiries outweigh any disadvantages to the public (including cost and any delays in addressing difficult questions) and any disadvantages to private individuals who have been caught up in public inquiries. The consideration of experience would not, however, be necessarily decisive, except to the extent that it can be inferred that the Executive will in the future act as it has acted in the past, and the potential both for benefit and for detriment would have to be considered.

The Institute has decided not to canvass these general questions, but rather to assume that legislatures will continue to maintain public inquiries legislation and that the Executive will continue to establish public inquiries under the legislation. This assumption is based on the fact that a need for such legislation has been felt in all Canadian jurisdictions and in all jurisdictions to which Canadians tend to look for comparisons, and on a general impression that, on the

whole, the beneficial results of the legislation have outweighed, and are likely to continue to outweigh, its adverse results.

The Institute's project is therefore about *legislation* covering public inquiries. It is not about

(a) the desirability and desirable functions of public inquiries,

(b) the administration and methods of operation of public inquiries, except to the extent that these require either enabling legislation or legislation protecting affected interests, or

(c) inquiries that do not depend for their establishment or powers upon the *Public Inquiries Act*.

It will, of course, be necessary to consider and understand public inquiries to which the *Public Inquiries Act* applies in order to determine whether or not the act as it stands is satisfactory, and, if it is not, what legislation should be enacted by way of amendment or substitution. However, the Institute accepts the assumption that public inquiries will be held in the future, and that they will be established for reasons and purposes similar to the reasons and purposes for which they have been established in the past.

E. Background Information

(1) Public Inquiries Legislation in Canada

Public inquiries legislation has existed in Canada for almost 150 years.[1] In 1846, the United Provinces of Canada enacted a public inquiries statute, which was enacted repeatedly until 1867.[2] The Ontario Legislature passed a public inquiries statute during its first session in 1867-68; *An Act to repeal Chapter 13 of the Consolidated Statutes of Canada, so far as the same relates to Ontario;—to authorize the publication of an Ontario Gazette, and to make provision for Inquiries concerning*

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1 In some cases, the acts have been traced back only to the first consolidation or revision in which they appear, due to library deficiencies.

2 See Henderson, Gordon F., *Abuse of Power by Royal Commissions*, 1979 Special Lectures of the Law Society of Upper Canada, 493 at 495.

public matters and official notices was given Royal Assent on February 28, 1868. The federal *Act respecting inquiries concerning Public Matters* was given Royal Assent on May 22, 1868[3] and was, apparently, a version of the 1846 act. It was the predecessor of Part I of the present Canada act. A further federal act, *An Act to authorize making certain investigations under oath*, which was the predecessor of Part II, was enacted in 1880.[4] Quebec's *Act respecting Inquiries concerning Public Matters* followed in less than a year. By 1880, British Columbia, Manitoba, Nova Scotia, and Prince Edward Island also had public inquiries legislation in place. The Northwest Territories had adopted an ordinance by 1898. Alberta replaced it by a statute in 1908 and Saskatchewan had done so by 1909, though it replaced its 1909 statute by another statute in 1929. Yukon enacted legislation in 1973, and the present Northwest Territories Ordinance was enacted in 1977.

(2) Public Inquiries Legislation in Alberta

In 1908, Alberta enacted *An Act respecting Inquiries Concerning Public Matters*.[5] It contained two sections and was almost identical to the original federal act.[6] Section 1 gave the Lieutenant Governor in Council the power to call an inquiry when he deemed it expedient. The inquiry could concern any matter within the jurisdiction of the province which was connected with the good government or public business thereof. Section 2 permitted the Lieutenant Governor in Council to grant certain powers to the commissioners: these were the powers of summoning witnesses and compelling testimony or production of documents. The commissioners were given the same power to enforce attendance and testimony as is vested in a civil court of record.

Section 1 was amended in 1916[7] to its modern form. The amendment conferred power on the Lieutenant Governor in Council to appoint a commission to inquire into anything which he declares to be a matter of public concern. This

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3 LRCC Working Paper 17, *infra*, note 22 at 7.

4 *Ibid.* at 7-8.

5 S.A. 1908, c. 2.

6 The only difference was that the Alberta act did not provide that a wilfully false statement was punishable in the same manner as perjury or that a witness need not answer questions which might render him liable to criminal prosecution.

7 *An Act to Amend the Statute Law*, S.A. 1916, c. 3, s. 34.

was in addition to the power to appoint a commission to inquire into a matter concerning the good government or public business of the province.

The Statute Law Amendment Act of 1919[8] gave the power of committal for contempt to any commissioner who is a judge. This provision survives today as section 5.[9]

An important change was made in 1960.[10] The commissioners were granted the same privileges and immunities as a judge of the Supreme Court of Alberta. It was at this time that sections 3 and 4 took their current form.

The act remained unaltered for the next twenty years. Then one minor and two major amendments within three years produced the act as we have it today. First, section 2 was added: this section permits the commissioners to hire staff and experts, and to delegate parts of the inquiry to experts and persons with special knowledge.[11] Later in 1980, section 6 (search and seizure in public buildings), section 7 (release of seized documents) and section 8 (privilege from disclosure of information and documents) were added.[12] The final additions to the Act were made in 1983, when the current section 9 (commissioned evidence), section 10 (right to counsel), section 11 (right to call witnesses) and section 12 (notice of allegations of misconduct) were added.[13] Thus the first half of the 1980s saw a major expansion in both the powers granted to the commissioners and the protection granted to individuals involved in the inquiry process.

This history of specific successive amendments to satisfy felt needs suggests that an overall study of the resulting Alberta act is due.

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8 *The Statute Law Amendment Act*, S.A. 1919, c. 4, s. 31.

9 The 1919 statute read, "Whenever such commissioner is a judge he shall have the same power of committal for contempt and all such other disciplinary powers as he would have if he were sitting in the court of which he is a judge." The present wording was substituted by S.A. 1939, c. 75.

10 *An Act to amend The Public Inquiries Act*, S.A. 1960, c. 80.

11 *The Public Inquiries Amendment Act, 1980*, S.A. 1980, c. 41.

12 *The Public Inquiries Amendment Act, 1980 (No. 2)*, S.A. 1980, c. 84.

13 *Public Inquiries Amendment Act, 1983*, S.A. 1983, c. 95.

(3) Terminology

Under the Alberta act, the Lieutenant Governor in Council appoints one or more "commissioners" by a "commission". This paper will refer to a such a commissioner or commissioners as a "commission of inquiry". It will refer to the process in which a commission of inquiry engages as a "public inquiry", though at times it may refer to the process in ways which may indicate that a public inquiry has an institutional existence of its own. It will extend the same usage to include commissioners, commissions and inquiries under other federal and provincial public inquiries acts.

Alternatively, the Lieutenant Governor in Council may, by letters patent issued under the royal prerogative, appoint a commission to conduct an inquiry.[14] Such an appointment does not involve the *Public Inquiries Act* at all. It appears that, strictly speaking, such a commission is the only true "royal commission", as a commission appointed under statutory authority is not really "royal". As Dean Macdonald has said:

> Royal Commissions are established through the exercise of the Crown Prerogative; Public Inquiries are creatures of legislation or, occasionally, delegated legislation; Investigations tend to result from the exercise of a Minister's power to manage his department, although federally they may in certain cases derive their power from statutory authority under the *Inquiries Act*.[15]

The distinction was recognized by Mr. Justice Iaccobucci:

> Prerogative or true "royal commissions" are no longer utilized. The basic structure of federal commissions of inquiry is established by Part I of the *Inquiries Act* although such inquiries are still often referred to as Royal Commissions.[16]

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[14] It can be argued that the *Public Inquiries Act*, by implication, has excluded the prerogative power.

[15] Macdonald, *The Commission of Inquiry in the Perspective of Administrative Law*, (1980) 18 Alta. Law Rev., 366 at 369.

[16] Frank Iacobucci, "Commissions of Inquiry and Public Policy in Canada" in Pross, A. Paul; Christie, Innis; and Yogis, John A.; *Commissions of Inquiry*, Carswell, 1990 at 23. The contents of this book also appear as (1990) 12 Dalhousie Law Journal at (iii)-(vi) and 1-216.

Common usage is not, however, uniform. Others use "royal commission" to include commissions of inquiry under public inquiries acts.[17] In order to avoid confusion, this paper will eschew the use of the term "royal commission" entirely. It will refer when necessary to "prerogative commissions" to mean royal commissions appointed under the prerogative. For convenience, it will restrict "commission of inquiry" to commissions appointed under the *Public Inquiries Act* (Alberta) and its legislative counterparts elsewhere because they are the subject of this issues paper and of the Institute's study.

(4) Reasons for Using Public Inquiries Legislation

The Government can establish an inquiry without reference to the *Public Inquiries Act*, though, without statutory authority, it cannot confer coercive powers upon those whom it appoints to conduct the inquiry. A royal commission established under the prerogative is an example. The 1989 Conflicts of Interest Review Panel (Alberta), which was established by order in council to inquire into conflicts of interest legislation at the provincial level, is another. The Government or a minister can appoint a "task force" or an "interdepartmental committee" which can hold inquiries. A minister may send out his executive assistant to investigate something. So long as an inquiry does not need legal powers, it does not require the authority of a statute.[18]

The establishment of a public inquiry under a public inquiries act legitimizes the inquiry and confers significant legal powers upon the commission of inquiry, the most important of those powers being the power to compel oral testimony and the production of documents. It also confers protections and immunities on participants. Therefore, important public inquiries, particularly inquiries into specific activities, are likely to be established under the act.

(5) Authority to Establish Inquiries under the Act

Under section 1 of the Alberta act, the Lieutenant Governor in Council may by commission appoint commissioners to make an inquiry and report on it if

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17 Indeed, Gordon F. Henderson Q.C. said that "by statute it [a Royal Commission] is granted coercive powers", etc., thus equating a royal commission with a commission established under a statute: Henderson, *supra*, note 2 at 499.

18 In *A.G. Quebec and Keable* v. *A.G. Canada*, [1979] S.C.R. 218 at 240.

(a) the Lieutenant Governor in Council considers it expedient and in the public interest to cause the inquiry to be made,

(b) the matter into or concerning which the inquiry is to be made is within the jurisdiction of the Legislature, and

(c) either

(i) the matter is connected with the good government of Alberta or the conduct of the public business thereof, or

(ii) the Lieutenant Governor in Council, by the commission, declares the matter to be a matter of public concern.

(6) Nature and Purpose of Public Inquiries

(a) Fact-finding and recommending

A public inquiry has two essential legal characteristics. The first is that it has power to inquire into facts and make recommendations. The second is that it has no power to make a legally binding decision about the matters into which it inquires. These characteristics are significant in the attitude of the courts towards judicial review of public inquiries, which is discussed below.

It is the Executive that establishes public inquiries. If the inquiry is into the Executive's own workings, it can be said, as Mr. Justice David McDonald did say in connection with the public inquiry into the activities of the RCMP of which he was chairman, that "the Executive branch, through its chosen Executive instrument, is examining itself".[19] However, although it is the Executive which presses the starting levers, a public inquiry has a life of its own, and it may well proceed in ways that are inimical to the Executive of the day, which may suffer the inquiry only under the compulsion of political pressures.

The formal purposes of a public inquiry are to provide (a) factual information and assessment, and (b) policy advice, to (c) a government through (d) an open process. A government's actual purposes in establishing a public

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19 *Re Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (1979), 94 D.L.R. (3d) 365 at 370.

inquiry may, however, be quite different from the formal purposes. A government may establish a public inquiry in order to defer decision about a thorny issue; in order to shift responsibility; in order to defuse controversy; or in order to legitimize what it proposes to do. The establishment of an inquiry may be the course of action which is most likely to minimize political damage.

Facilitating the accomplishment of ulterior purposes is not part of the role of public inquiries legislation. A public inquiries act should merely provide machinery and ensure that the machinery is appropriate for the purposes of an important inquiry and that affected interests are properly protected.

(b) Distinction between advisory and investigatory inquiries

Public inquiries are often said to fall into two categories:

(a) *advisory* inquiries, "which advise. They address themselves to a broad issue of policy and gather information relevant to that issue"; and

(b) *investigatory* inquiries, "which investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the function of government". Often the purpose is to find out whether someone did something wrong.

These definitions come from LRCC Report 13, page 5. The LRCC recommended that only investigatory inquiries should be given coercive powers.[20]

The dichotomy is not strict. Even the LRCC, which emphasizes the dichotomy, says that "of course, many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy." "However", the LRCC says, "almost every inquiry either primarily advises or primarily investigates".

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[20] Anyone who reads English and Australian literature should be aware that "investigatory" there is likely to mean what is meant by "advisory" in the Canadian discussions, while "inquisitorial" there is likely to mean what is meant by "investigatory" here.

It appears to the Institute that there is a continuum rather than a dichotomy. It is doubtful that there has ever been such a thing as a purely advisory inquiry which does not ascertain facts, as all commissions must make recommendations and recommendations must be based on facts. There can be such a thing as a purely investigatory inquiry: the Royal American Shows inquiry, for example, was purely investigatory. The continuum runs from the commission with the highest ratio of advisory to fact finding functions, at one extreme, to a purely investigatory commission, at the other. Public inquiries will be sited at various points along the continuum.

However, it is certainly true that there is a considerable difference between a royal commission on the economic union and development prospects for Canada, on the one hand, and an inquiry into the failure of a financial institution, on the other. This paper will use the terms "advisory" and "investigatory", subject to the caution that few inquiries are purely one or the other.

(7) Selected List of Alberta Inquiries

Attached as Appendix B is a selective list of Alberta inquiries compiled under the auspices of the National Library of Canada. It covers the period from 1867-1982.[21] This list does not differentiate between prerogative commissions and other kinds of commissions, but is mostly composed of inquiries under the Alberta act. The purpose of the list is to show the importance that public inquiries have had in the public life of the province.

Inquiries included in the list range from inquiries which were primarily advisory, such as the Buchanan *Mechanics Lien Act* inquiry, to commissions which were primarily investigatory, such as the Hooke-Hinman inquiry. Many related to events that were important in the political life of the province, including the Alberta and Great Waterways scandal, the MacDonald-Mahaffy inquiry into the allegations made by the Liberal leader in an election campaign in the '50s, and the Child Welfare inquiry of the '40s. Many dealt with subjects of considerable general importance, such as the Kirby Board of Review of the '70s, and various industry inquiries.

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[21] Maillot, Lise, *Provincial Royal Commissions and Commissions of Inquiry, 1867-1982: A Selective Bibliography*, (National Library of Canada, 1986).

F. Law Reform Commission of Canada Recommendations

In 1977, the Law Reform Commission of Canada issued a working paper on commissions of inquiry, and in 1979 it issued final reports on that subject and on judicial review, including judicial review of public inquiries.[22] Obviously, the fact that a Canadian law reform agency has done a project in the area is of great importance to this project, even though the reports have not been implemented.

We will summarize here the effect of reforms recommended by the LRCC:

1. That a public inquiries act provide for 2 kinds of commissions of inquiry:

   (a) *advisory* commissions to advise on any matter relating to the good government of Canada, and

   (b) *investigatory* commissions to investigate any matter the Governor in Council deems to be of substantial public importance.

   Only investigatory commissions would have coercive powers.

2. That the following provisions apply to all commissions of inquiry, both advisory and investigatory:

   (a) Hearings are open to the public unless the commission is satisfied that considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweighs the public interest in open hearings.

   (b) Any person who complains that testimony may adversely affect his interests shall be heard, and any person who appears is entitled to be represented by counsel, with a discretion in the commission to pay expenses or losses incurred for the purpose of making representations.

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[22] Working Paper 17, *Administrative Law, Commissions of Inquiry* (1977); Report 13, *Advisory and Investigatory Commissions* (1979); Report 14, *Judicial Review and the Federal Court* (1979). This summary is an effort to convey the essence of the LRCC's recommendations. The reader who wants to understand them thoroughly should read Reports 13 and 14.

(c) Commissioners and commission counsel are immune from defamation actions, and witnesses are immune from defamation actions unless they act out of malice.

(d) All relevant evidence is admissible, but evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues or undue consumption of time.

(e) Commission hearings may be reported without restriction, but a commission may forbid or restrict reporting for public security, privacy, the right to a fair trial, or any other reason outweighing the public interest in having hearings reported without restriction.

(f) A Commission is to submit its report to the Governor in Council and *shall* publish it within 30 days unless the Governor in Council otherwise directs.

The LRCC requirement that a person must be given notice of an allegation alleging misconduct and an opportunity to be heard, which is similar to present provisions in the public inquiries acts, applies to all commissions of inquiry.

3. That the following provisions apply to advisory commissions only:

(a) The commission shall hear anyone who satisfies it that they have a real interest in any matter relating to its mandate.

(b) The Governor in Council may confer upon an advisory commission any of the powers of an investigatory commission, with the consequence that the privileges and protections afforded those who appear before investigatory commissions apply.

4. That the following provisions apply to investigatory commissions:

(a) The commission has power to compel witnesses to appear and testify, upon payment of conduct money, and power to compel production of documents.

(b) The commission can delegate power to take evidence and report to the commission.

(c) The commission is entitled to access to public offices and records.

(d) The commission is entitled to apply to a judge of a superior court of criminal jurisdiction for a search warrant on reasonable grounds to believe that there is in the specified place anything that may be of assistance to the investigation.

(e) A peace officer who makes a search may remove anything that may be relevant to the mandate of the commission and deliver it to the commission, which may, in the absence of an order by a judge of a superior court, keep it up to 3 months.

(f) A person has the same privileges against disclosure of "evidence given at a commission hearing" and the subsequent use of such evidence as they would have if the evidence were given in a judicial proceeding.

(g) A person who refuses to testify or produce documents, who refuses to comply with a prohibition against publication, or who disrupts a hearing, is guilty of an offence.

5. That the Governor in Council can confer any of the powers of a commission upon a foreign advisory or investigatory commission.

6. That recommendations by commissions of inquiry and other such "preliminary decisions" should be subject to review, in the discretion of the court, like other decisions of administrative bodies. Grounds for judicial review would include failure to observe natural justice (including a failure to act fairly); failure to observe prescribed procedures; *ultra vires* action; error in law; fraud; failure to reach a decision or to take action where there is a duty to do so; unreasonable delay in reaching a decision or performing a duty; and lack of any evidence to support a decision.[23]

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[23] Law Reform Commission of Canada, *Judicial Review and the Federal Court*, Report 14, 1980.

CHAPTER 2 — MAJOR POLICY CONSIDERATIONS

A. Introduction

There are a number of general considerations which anyone who is considering the subject of public inquiries should have in mind. Although they are not all related to each other, we think it desirable to outline them all in this preliminary chapter.

B. Efficiency

The purpose of public inquiries legislation is to provide machinery, which will be efficient in that it will enable public inquiries to complete their work effectively. The machinery should be designed for the conduct in public of inquiries of public importance.

Some public inquiries depend for their effectiveness upon the testimony of witnesses and the production of documents. These are usually—possibly invariably—investigatory inquiries established to ascertain the facts of certain events. The machinery for such inquiries cannot be efficient unless it includes the power to coerce individuals to testify and to produce documents.

Other public inquiries can depend for their facts upon research, expert opinion, and the voluntary giving of information by those affected. These are usually advisory inquiries established to make broad policy recommendations. The machinery for such inquiries need not include coercive powers. One question which will arise below is whether a new public inquiries act should confer coercive powers on some but not all public inquiries.

The efficiency of public inquiries depends to some extent on immunities against some kinds of legal liability being conferred on participants. Statutory immunities are less invasive of private rights than are statutory coercive powers. A case can be made for saying that a commission of inquiry that is set up to look into a broad policy area should be free of worries about being sued for what it says, on the basis that the public interests in having the Executive receive good advice and in making the public better informed outweigh the private interest of individuals in being protected against defamation, particularly since the incidence of defamatory remarks by advisory commissions is probably very low. That is,

it may be that the granting of immunities to a commission of inquiry can be justified even if the granting of coercive powers cannot.

C. Protection of Individual Rights

But public inquiries with coercive powers can do much damage to the reputations and careers of individuals, and they can subject an individual to the likelihood of criminal prosecution. Public inquiries legislation must balance the importance of efficiency against the importance of protecting individual rights.

A specific problem is the way in which allegations of wrongdoing come out in many public inquiries long before the persons affected by the allegations have an opportunity to rebut them. So long as contemporaneous public reporting of hearings is permitted, this problem is implicit in the nature of things, because both fairness to persons affected and efficiency in getting to the bottom of things require that the entire case against persons whose conduct is in question be laid out for them to answer before they are called upon to answer it. Prohibiting contemporaneous public reporting might alleviate unfairness, but, as indicated below, might have worse consequences than allowing it, and such a prohibition will stand in the way of the public airing of the facts that is one of the principal purposes of an investigatory inquiry. A related problem is the difficulties that a person affected may have in dealing with what amounts to a case against them when there is no formal statement of that case and it has come out of a relatively unstructured accumulation of allegations and evidence.

The very nature of a public inquiry into specific facts precludes giving affected persons the safeguards of criminal proceedings, because the inquiry starts with a mandate to discover facts, and facts appear as the proceedings go on, so that there is likely to be no structured case for an affected individual to meet. The swirl of allegation and counter-allegation and the media-show atmosphere of an investigatory inquiry can create great difficulties for those whose careers and reputations are at stake.

Therefore, public inquiries legislation, if it confers coercive powers upon commissions of inquiry, must balance such protection for the rights of individuals as can be provided against the public interest in having inquiries perform their functions. Indeed, the possibility that the protection of individual rights may require that a public inquiry not be held at all must not be ruled out of hand.

The general tenor of the literature and cases on public inquiries emphasizes the positive aspects. We will start by referring to some dissenting voices.

First, Mr. Justice Lionel Murphy of the High Court of Australia:[24]

> 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 offences. 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 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:[25]

> The present use of public inquiries in Canada poses a threat to the basic principles of our criminal processes. That threat cannot

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[24] *Victoria* v. *ABCE and BLF (No. 1)* (1982), 141 C.L.R. 182, 198 (H.C. Aust.).

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

> 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 is 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 getting 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 out cases elsewhere in Canada, including Alberta, that, in his view, have suffered from at least some of the flaws of the Quebec procedure.

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.[26]

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

Finally, reference should be made to the article by Gordon F. Henderson Q.C. in the 1979 Special Lectures of the Law Society of Upper Canada.[27] 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, starting with a requirement of a legislative resolution before coercive powers are conferred, and continuing through 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 concerns cannot be entirely satisfied except by not having public inquiries which may cause damage to individuals. They can be met in part--though Professor Ratushny's concern that giving some protection will be used as justification for denying the rest should be borne in mind--by ensuring that procedural fairness is adhered to and by providing for judicial review. They should be borne in mind throughout the parts of this issues paper which deal with the coercive powers of public inquiries.

D. To Codify or Not To Codify

There are a number of options with respect to legislating procedural safeguards. A new act could remain silent on safeguards, or it could specifically grant certain rights--the question then would be, which ones? If the LRCC advisory/investigatory distinction is adopted, the new act could grant procedural protections only in investigatory inquiries. The act could grant different levels of protection depending on whether the person is merely a witness or actually the subject of the investigation. The act could grant procedural protections only where coercive powers are being invoked, or increased protection under these circumstances.

This question will be dealt with below.[28]

E. Time and Cost: Balancing Efficiency and Protection of Individual Rights

Public inquiries tend to be very costly. The great advisory inquiries into large subjects of public policy require much research and may require extensive

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[27] *Supra*, note 2.

[28] See Chapter 6.D.: Legislation of Protections.

hearings. An investigatory inquiry into a fact situation which lies at the centre of public controversy needs an organization which can cope with masses of information, and it costs money to provide those affected by an inquiry with the means of seeing that their rights are properly and fairly protected.

There seems to be nothing that legislation can, or should, try to do to decrease the cost of purely advisory public inquiries. That cost is a function of the pressures to get the job done and to be seen to be getting it done properly and fairly, and is entirely a matter for the discretion of those who establish and operate each commission. There is no legal rule that can be laid down which will be effective. Similar remarks can be made about the time which an inquiry takes.

In the case of investigatory public inquiries there is inevitably pressure to ensure that commissions act fairly towards individuals who may be affected by their reports. Fairness costs money. Individuals affected need an effective right to counsel (which is likely to mean a financially supported right to counsel), the right to appear and lead evidence, the right to cross-examine, and the right to argue; that is, it means making an investigatory hearing more and more like a piece of litigation. Though Mr. Justice Estey's remarks in the following paragraph lead into the different question of funding lawyers, they are relevant here:

> That takes me to something else that I would like to dwell upon because it is a real, true, present-day, modern problem. As commissions of inquiry become more and more complex, as a mirror of our complicated society, it becomes more difficult for the uninstructed general member of the public to appear without risk before this creature, the royal commission. Therefore, most witnesses now come with at least one lawyer. In the Banking Commission we had a kind of a roll call kept by our secretary. Some days, we had 40 lawyers. Now, all of that is paid for by you and me, but think about the other side. People who are going to be examined look at this army of lawyers and they say, "by George, this is risky. I need a lawyer".[29]

And his concluding remark on this point is

> . . . I think that tomorrow or the next day, [funding lawyers for witnesses] is going to become such a great factor that we might make the institution of the commission of inquiry into the dinosaur

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[29] Estey, Willard, *The Use and Abuse of Inquiries: Do They Serve a Policy Purpose*, in Pross, Christie and Innis, *supra*, note 16 at 213.

> of our legal institutions. They will just become prohibitively expensive, too invasive and, therefore too expensive.

And his summation at the end of his paper is ambivalent:

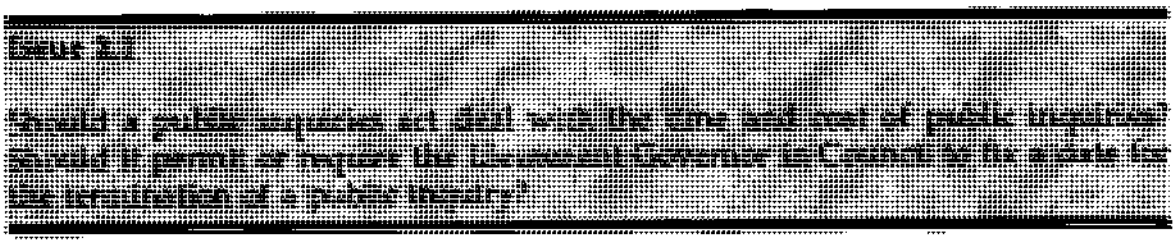
> Where does all this lead to? What future, if any, does the institution of the inquiry have? Well, I think if you go back over the past, you can build a pretty good case that the usefulness of an inquiry as a fact-gathering and conclusion-drawing organization is on the wane. We have probably seen the last of the purely political inquiries. We probably have seen the last of the great major economic studies because they cost so much relative to what the legislature seems to extract from them. But that does not mean we have come to the end. Probably the economics can be overcome by a more professional approach from the government itself in staffing these inquiries and keeping control of how much they are going to cost, how long they will sit and so on. I think as long as we have lawyers active in the community, we will have these show trials periodically as a cathartic in democracy and it is not bad.
>
> I am sure that, whether we like it or not, inquiries will be here for a long time. I sometimes wonder if there will be a commission of inquiry appointed about the year 2100 whose subject of inquiry is "Why did we abolish the commission of inquiry about 1990?"

Important public inquiries also tend to be time-consuming. Commission staff need time to organize evidence and documents. Those involved need time to prepare their submissions and their cases. Hearings are lengthy, and have to be juggled to meet the exigencies of the schedules of participants. Preparing a report from masses of material takes time.

On the one hand, it may be argued that the problems of time and cost do not lend themselves to legislative solutions. They must be resolved on an individual basis by those who establish and conduct public inquiries, and if they cannot be resolved their consequences must be borne. If the prospective benefits of a proposed inquiry do not outweigh the disadvantages of cost and delay, the inquiry should not be established.

However, it should be noted that section 19 of the Quebec act requires the Government to fix the date when the commissioners shall complete their labours and report. Further, J.G. Godsoe, Q.C., said that a "sunset" clause in a commission's mandate (such as the one in the mandate of the MacDonald Commission on the economic union, of which he was secretary) is useful.

> It really does help if you have a finite duration because there is always a tremendous trade-off between speed and efficacy and, on the other hand quality. Always your researchers will be telling you, "for God's sake, if you only give us six more months or another year or even six more weeks, it can make a big difference to quality".[30]



F. Constitutional Issues

(1) Division of Legislative Powers

The first constitutional issue is whether or not the subject matter of a particular public inquiry is within the legislative jurisdiction of the Province. If it is, provincial legislation can authorize the Lieutenant Governor in Council to establish the inquiry and the Lieutenant Governor in Council can establish it.

The most common jurisdictional problem is whether a provincial inquiry encroaches on the federal jurisdiction over criminal law and criminal procedure. A series of Supreme Court of Canada cases have dealt with this question. In *Faber* v. *The Queen*,[31] the Court said that a coroner's inquest is within provincial jurisdiction because it is in substance concerned with matters other than the investigation and prosecution of a specific crime. In *Attorney General (Que.) and Keable* v. *Attorney General (Canada)*,[32] the constitutionality of a provincial inquiry set up to investigate wrongdoing by the R.C.M.P. was challenged. It was the view of the court that a provincial inquiry could not investigate the administration of a federal agency, but that an inquiry into "certain illegal or reprehensible acts" was within the competence of the provincial authority over the administration of justice. Although certain specific types of actions were being investigated, the

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30 Godsoe, J.G., "Comment on Inquiry Management" in Pross, Christie and Yogis, *supra*, note 16 at 71.

31 [1976] 2 S.C.R. 9.

32 (1979), 90 D.L.R. (3d) 161 (S.C.C.).

inquiry was not empowered to investigate specific crimes committed by named individuals. In *O'Hara* v. *British Columbia*,[33] which was approved by the Supreme Court of Canada in *Starr* v. *Houlden*, the Chief Justice said that provincial inquiries may have a double aspect, but they will be *intra vires* as long as the predominant feature is the administration of justice rather than the investigation of a specific crime by a particular individual. Where the intent or the effect of the inquiry is to determine criminal responsibility of specific individuals and thereby to bypass the safeguards of normal criminal procedure, the inquiry will be *ultra vires* the province.

In *Starr* v. *Houlden*,[34] a provincial inquiry was held to have trespassed on federal jurisdiction. The inquiry was to determine whether private individuals (including a corporation) had engaged in activities that were described in words similar to the words of a Criminal Code section. Because the actual wording of the order in council in the *Starr* case was unique, or close to it, the decision is quite narrow, but it will no doubt cast a chill upon provincial investigatory inquiries for a time, and may even be applied more broadly than its words suggest. In *Castle* v. *Brownridge*,[35] a Saskatchewan Queen's Bench judge extended the principle. He struck down an inquiry that covered *public* officials; that did not clearly track the Criminal Code; and that purported to include a broader purpose than a criminal investigation. In two other cases the principle has been construed fairly narrowly: *Fleischer* v. *B.C.*[36] and *Re Ontario (Colter Commission) Inquiry into Niagara Regional Police Force*.[37]

Additional questions may arise as to whether a provincial inquiry is directed to a matter that is for some other reason within strictly federal competence.

The Alberta act already restricts its application to inquiries into matters that are within the jurisdiction of the Legislature. That does not tell the Lieutenant Governor in Council whether an inquiry is within that jurisdiction. Can anything

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33 [1987] 2 S.C.R. 591.

34 [1990] 1 S.C.R. 1366 (S.C.C.).

35 [1990] 6 W.W.R. 354 (Sask. Q.B.).

36 (1990), 49 B.C.L.R. (2d) 23 (B.C.S.C.).

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

further be done? As the section stands, every time the Government proposes to establish a public inquiry the Lieutenant Governor's advisers must satisfy themselves that the subject of the inquiry is within provincial jurisdiction.

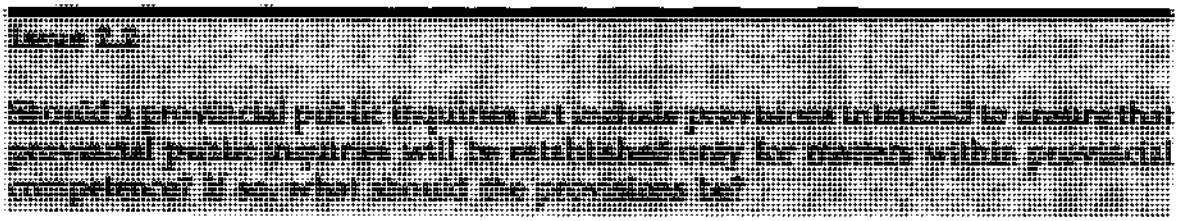
(2) The Canadian Charter of Rights and Freedoms

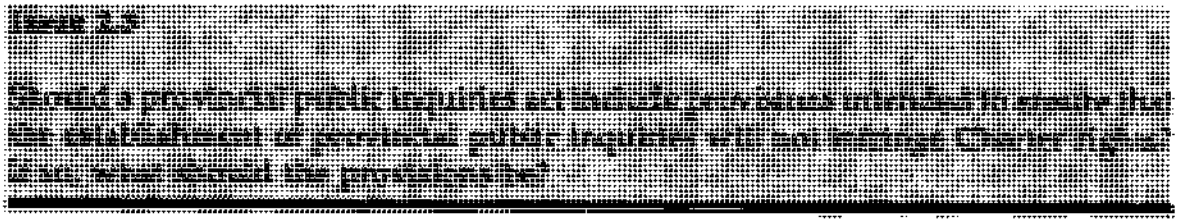
The Canadian Charter of Rights and Freedoms applies to public inquiries. It may strike down the exercise of coercive powers by a commission of inquiry. The following provisions may be relevant:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search and seizure.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 11. Any person charged with an offence has the right . . .
>
> > (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
> >
> > (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Sections 7 and 9 may be relevant to the exercise of a contempt power by or on behalf of a tribunal, including the exercise of the contempt power in order to compel a witness to testify or the holder of documents to produce them; and the power to compel production may be a seizure under section 8. It is conceivable that deprivation of reputation will be held to be a deprivation of life, liberty or security of the person and that the proceedings of a public inquiry are not consistent with fundamental justice, particularly as a commission of inquiry does not have the trappings of independence that courts have. It is also possible that the power to hold a hearing in camera will be held to infringe freedom of the press.

These possibilities will be considered below in connection with specific subjects. It is sufficient to say here that unlikely prospects of Charter interpretation should not inhibit the enactment of public inquiries legislation which is thought to be fair to individuals.





CHAPTER 3 — APPOINTMENT AND POWERS

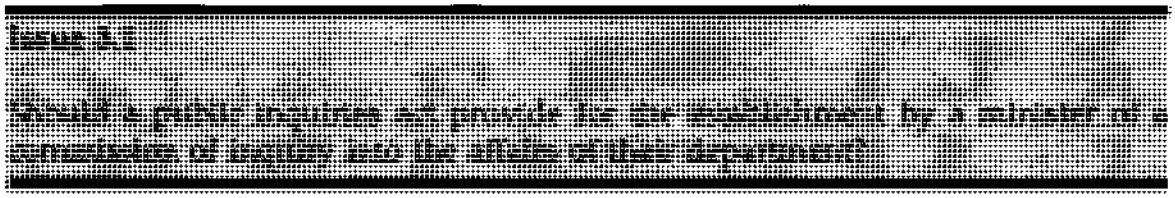
A. Appointing Authority

(1) Establishment of Public Inquiries: Present Act

The Alberta act confers on the Lieutenant Governor in Council the power to establish commissions of inquiry by order in council. The only limitations on the power are that the matter to be inquired into must be within the jurisdiction of the Legislature and that the Lieutenant Governor in Council must form two opinions: that the inquiry is expedient and in the public interest; and that the inquiry is connected with the good government of Alberta or the conduct of the public business thereof. As an alternative to the second opinion, the Lieutenant Governor in Council can declare the matter to be one of public concern.

The British Columbia, New Brunswick, Quebec and Canada acts empower ministers to establish inquiries into matters within their departments. Alberta does not seem to have suffered from a lack of a counterpart to these provisions.

It is therefore the Executive branch that establishes a commission of inquiry under the existing acts. Except for departmental inquiries, there is no reason to consider giving the power to any subordinate organ of the Executive.



(2) Establishment of Public Inquiries under a New Act

The Lieutenant Governor in Council can appoint a prerogative commission or an *ad hoc* inquiry body.[38] Various emanations of the Government can appoint a task force or departmental or interdepartmental committee to conduct an inquiry. If no coercive powers and no legal immunities are required, there is no reason why the Executive should not be able to establish inquiries.

If a commission of inquiry is to have special legal powers which affect the rights of individuals, different considerations apply. An argument can be made that such powers should be conferred only with the specific sanction of the legislative authority, that is, the Legislature.

The 1966 U.K. Salmon Commission[39] made the argument for requiring a legislative resolution. The Commission's view was that tribunals of inquiry should be used very sparingly, and only when some matter of really great public importance must be inquired into: only then could the risk of damage to individuals be justified. Requiring a resolution of both Houses would help to ensure that the procedure would not be too readily invoked, both because scarce parliamentary time is not likely to be devoted to such a subject except in cases of real importance and because of the public nature of the debate involved. Gordon F. Henderson Q.C. took a similar view.[40]

On the other hand, it is more efficient to have public inquiries established by order in council, particularly since the Legislature may not be in session when an inquiry should be established. Requiring a resolution of the Legislature would

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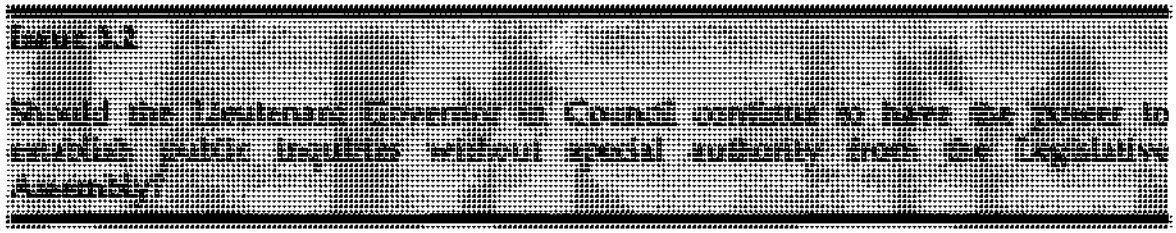
[38] The High Court of Australia has held that the Executive can establish inquiries: *Clough* v. *Leahy* (1905), 2 C.L.R., *McGuiness* v. *Attorney General* (1940), 3 C.L.R. 73. The point was material because the statute did not provide for the creation of commissions but did provide for conferring coercive powers upon appointed commissions. The New Zealand Court of Appeal held otherwise in *Cock* v. *Attorney General* (1909), 28 N.Z.L.R. 405, but did so on the ground that the effect of the commission in question was to put someone to answer in a manner not prescribed by law, a point which applies only where conduct is called in question.

[39] Royal Commission on Tribunals of Inquiry, *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, 1966, Cmnd. 3121, 29.

[40] Henderson, *supra*, note 2 at 530.

not confer significant protection as the Cabinet which would promulgate an order in council can usually procure the adoption of a resolution by the Legislature. The inhibiting effect of having to have a debate in the Legislature on the resolution does not seem likely to be very great, particularly since Oppositions tend to be more anxious to have public inquiries than are Governments. There is no reason to think that persons who have been involved in public inquiries in Alberta would have been better protected if intervention of the Legislature had been required. There is, however, an issue to be considered.



(3) Possible Limitations on the Power of Establishing Public Inquiries

If the Executive is to have power to establish public inquiries with coercive powers and statutory immunities, it would be possible to place limitations on the cases in which that power could be exercised. The present act, broadly paraphrased, does require the Lieutenant Governor in Council to have formed an opinion that the subject matter is important enough to justify the establishment of an inquiry, but that is not very confining and it is doubtful that anyone affected could effectively challenge the establishment of an inquiry on the grounds that the opinion had not been formed, at least in the absence of demonstrable bad faith. The requirements of the other provincial acts and the Canada act, while sometimes differently framed, lead to much the same conclusion.

There are a number of things that a revised act could do. For example, it could:

(a) require that the Lieutenant Governor in Council form the opinion that a matter to be inquired into by an investigatory inquiry is of *substantial* public importance,[41] thus adding the word "substantial" to the criterion. This would be a direction to the Government to consider that an investigatory public inquiry should not be established without weighty

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[41] This is, in effect, the LRCC's suggestion.

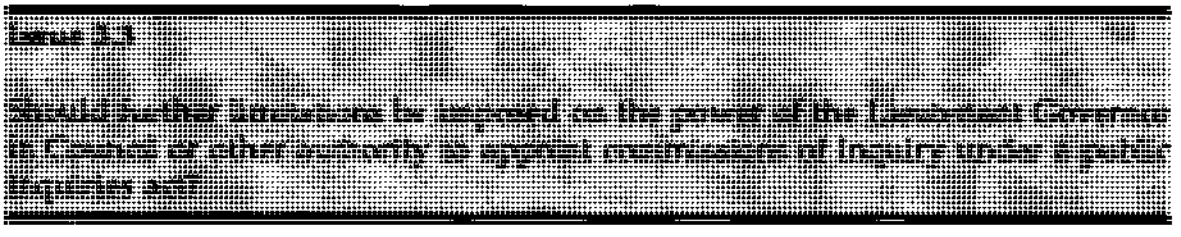
reason, but it is unlikely that it would significantly restrict the Government's discretion.

(b) require the Lieutenant Governor in Council to determine that the public interest in having the inquiry outweighs the interests of those likely to be affected by the inquiry. This would help to direct the Government's mind to the most serious of the issues surrounding the decision to establish an investigatory public inquiry. There would still be no control over the Government's discretion.

(c) set out a list of factors that the Lieutenant Governor in Council must consider before establishing a public inquiry. This is an elaboration of (b).

(d) provide that there are certain cases in which the Lieutenant Governor in Council may not establish a public inquiry, for example, a case in which the inquiry is into private sector circumstances in which there is no real public interest, or a case in which there is enough evidence to mount a criminal charge covering all or a substantial part of the proposed subject matter of the inquiry.

A revised act could adopt any of these proposals. If it were to adopt one of them, it could state what is to be considered and leave the Lieutenant Governor in Council to be the sole judge as to whether the prescribed conditions were met by a specific proposal for a public inquiry. Alternatively, it could make the question justiciable, that is, leave it open for an interested person to challenge the decision in court, either in all cases or only if a pre-condition is met, e.g., either the person's conduct is being called into question in the inquiry or the commission of inquiry is to have coercive powers.



B. Independence of Commissions of Inquiry[42]

The public inquiries acts are silent on the question of the independence and impartiality of commissions of inquiry. There are a number of ways in which the Executive, if it wishes, can exercise control over commissions:

(1) *Choice of personnel.* The Lieutenant Governor in Council can appoint a commission of inquiry composed of people who are well disposed towards the Government or who are even employed by the Government. If the Government wants biased advice, it can get it. It may pay a political price, and the commission's report may be considered tainted, but the remedies are all in the political realm.

(2) *Dismissal.* The power to appoint probably includes the power to dismiss, and this power could in theory be used to control members of commissions of inquiry.[43] We are not aware of any dismissals in Canada, but there have been instances in Australia.[44] The Manitoba act specifically provides for revocation of the commission.[45]

(3) *Terms of reference.* The Lieutenant Governor in Council sets the terms of reference that control what a commission may inquire into. This is inherent in the nature of things, as the machinery is there for the use of the Government. The Lieutenant Governor in Council can attach restrictions and conditions through the terms of reference: the Alberta act is silent on the subject but the power is implicit

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42 This discussion relates to independence as it bears on the information and advice which a commission of inquiry gives to the Government. Independence, impartiality and bias as they affect the interests of individuals will be discussed below in Chapter 6—Protection of the Rights of Individuals.

43 Mr. Justice David McDonald suggested in *Re Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, supra,* note 19 at 370 that the Governor in Council could abrogate the appointment of a commission under the federal act, which is no different from the Alberta act for this purpose. He did not say anything about the dismissal of a member of the commission.

44 Hallett, *supra,* note 26 at 294.

45 *Manitoba Evidence Act,* s. 83(2).

in the power to set terms of reference. In the *Nelles*[46] case, the Ontario Court of Appeal rigorously held a public inquiry to the provision in its terms of reference under which the inquiry was to inquire into the means by which certain children came to their deaths "without expressing any conclusion of law regarding civil or criminal responsibility". Mr. Justice McDonald, while holding that it was for the Commission of inquiry into activities of the R.C.M.P. to decide when to hold proceedings *in camera*, implied that if the order in council were amended to require *in camera* hearings, that would change the situation.[47]

(4) *Funding*. The funding for a commission of inquiry must come from the Government. It is the duty of the Government to ensure that money allocated to a commission of inquiry is needed and is properly spent, and the performance of the duty can be used as a means of control.

(5) *Control of implementation*. A commission of inquiry is likely to want to have its findings and recommendations implemented. Only the Government can implement them (though the political situation may upon occasion compel an unwilling Government to implement a report). Since a commission generally wants its recommendations accepted, it has a reason to make them as acceptable to the Government as circumstances permit.

There may be a question whether the Executive can give directions to a commission of inquiry. Mr. Justice McDonald[48] specifically said that even the Privy Council, except by order in council, could not give directions to the RCMP Commission, but that statement implies that the Governor in Council *can* give directions to a commission of inquiry by order in council.

It is clear that the law does not make commissions of inquiry independent of control by the Executive. There are legal and practical means of control available to the Executive if it chooses to use them.

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46 *Re Nelles and Grange* (1984), 9 D.L.R. (4th) 79 (O.C.A.).

47 *Re Commission of Inquiry*, etc., *supra*, note 19. The passage suggesting that the order in council could require *in camera* hearings is at 374.

48 *Ibid.*

In practice, however, commissions of inquiry do appear to operate independently, within the scope of their terms of reference. Mr. Justice Le Dain[49] has said that a commission established under Part I of the Canada act is an independent body which as a matter of formal relation is on equal footing with the other institutions of government and is not subject to anyone's directions or supervision or any degree of ministerial control, despite the formal ways in which control might be exercised. The LRCC appeared to be of the view that commissions of inquiry do act independently. At page 20 of Report 13, it referred to the objectivity of commissions, and said that fears about the consequences of their independence were ill-founded.

Mr. Justice McDonald attributed to tradition the independence in fact of commissions of inquiry which are not independent in law: a commission, he said, "nevertheless by tradition exercises a spirit of detachment from the wishes of its creator as it pursues its assigned tasks, except in so far as those wishes have been expressed in the creating instrument and the general procedural law".[50] An Australian commentator gave this explanation:[51]

> When some inquiries are appointed the public *expect* that they will be independent. It becomes a political reality that the executive cannot ignore. To interfere with an inquiry, particularly one where its own competence was in issue, would be fraught with political danger. Another reason is the use governments have made of the inquiry procedure. It is pointed out elsewhere that one reason for the appointment of inquiries is to shed the responsibility for making difficult decisions. To achieve that result governments themselves have had to foster the independence of Commissions and Boards.

The discussion so far has assumed that independence of commissions of inquiry from the Executive is a good thing. The Law Reform Commission of Canada Working Paper and Report made that assumption. It is probably valid.

If the only interest involved in public inquiries were the Government's interest in obtaining good advice, it would probably be best to leave it to the

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49 Le Dain, Gerald E., "The Role of the Public Inquiry in our Constitutional System" in *Law and Social Change*, Jacob S. Ziegel (ed.), Osgoode/York, 1973.

50 *Supra*, note 19.

51 Hallett, *supra*, note 26 at 49 and 50.

Government to decide whether or not it would get the best advice from an inquiry acting quite independently of the Government. However, public inquiries, whether advisory or investigatory, usually involve other interests, including the public interest, which may not be the same as the Government's interest. Since the public inquiry machinery is used to legitimize the process, a strong argument can be made that commissions of inquiry should be independent of the Government, though it does not necessarily flow from that argument that the legislation should try to ensure that they are independent.

A question which is not usually addressed is whether the members of a commission of inquiry should be impartial. If the inquiry is an investigatory inquiry, it seems clear that the members of the commission should be impartial insofar as the specific facts under consideration are concerned, as those whose conduct is under investigation are entitled to an unbiased "tribunal", and bias, real or reasonably apprehended, is likely to provoke judicial review. If the inquiry is an advisory inquiry, the situation is not so clear. For one thing, if an inquiry involves expertise, it may be difficult to find expert commissioners who have not expressed opinions on a subject addressed by the inquiry. For another, a device that is sometimes used is to draw the members of a commission of inquiry from different groups with different and possibly opposing interests in the subject, and such a device is not necessarily improper. For yet another, it can be argued that if the Government chooses biased advisers, it is for the political process to exact the price.

In the light of this discussion, should legislation do anything to ensure either the independence or impartiality, or both, of members of commissions of inquiry?

The LRCC, though it thought that commissions of inquiry should be independent of the Government, did not make any proposals for legislation to ensure independence or impartiality. Its draft act provides for public hearings (with power to go *in camera* if certain listed considerations apply) and requires advisory commissions to hear everyone with a real interest, but it does nothing to require them to do so impartially. The LRCC, in its Working Paper,[52] specifically approved the silence of the present federal act about qualifications for commissioners.

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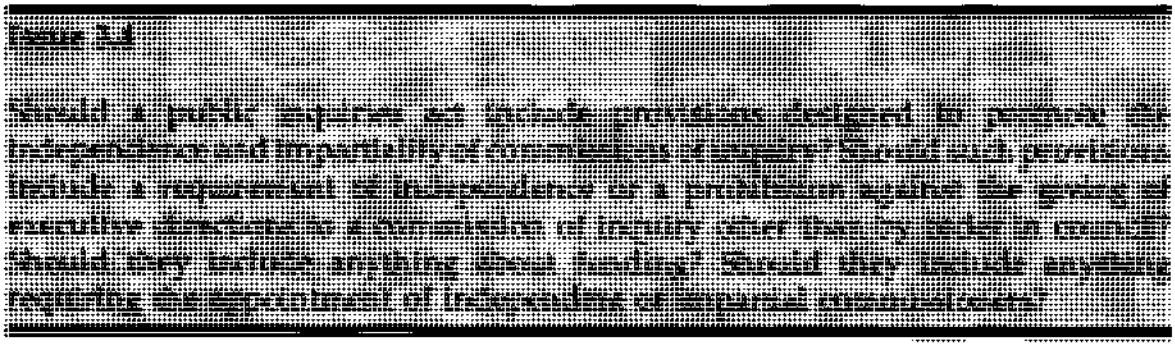
52 *Supra*, note 22 at 44.

Consideration could be given to providing that, once a commission of inquiry is established, the Executive may give directions only by order in council, or to making a legal declaration that a commission of inquiry is independent of the Executive except as to directions given by order in council. Something along these lines should be done if there is a demonstrated, or even reasonably apprehended, evil which requires to be remedied by statute rather than by the political forces involved in public inquiries.

It would be possible also to put something into the statute about the qualifications of commissioners, particularly a provision that commissioners must be independent of the political level of the Government. Insofar as advisory inquiries are concerned, this might be unduly hampering, particularly given the legitimate option of drawing members from affected interest groups.

Insofar as investigatory inquiries are concerned, the question of independence and impartiality becomes a question of bias and is of obvious importance in relation to the protection of individual rights. The question could be considered here, but is better considered in connection with the protection of individual rights and judicial review. If judicial review on natural justice or fairness grounds is allowed, there will then, in each individual case, be a concrete question of kinds which courts are accustomed to addressing, as to whether, under the particular circumstances, particular individuals have a reasonable apprehension of bias.



C. Conferring Coercive Powers

The view of the Law Reform Commission of Canada was that advisory public inquiries should not have coercive powers to compel the giving of evidence and production of documents:

> A commission of inquiry should be regarded as an unusual institution which may seriously affect individual rights. The power to compel people to give evidence under oath to a body appointed by the executive but responsible to no one is not to be given lightly. The inquiry system must provide a means of conducting an inquiry with the least possible danger to individuals or organizations that may be caught up in the process. Many kinds of inquiry do not require strong powers—for example, subpoena or contempt powers.[53]

On the other hand, the Commission said that "many inquiries have an investigatory task which can properly be discharged only if the commission has strong powers".

In its Working Paper, the LRCC referred to the argument that public officials and others who are actually willing to give evidence to an advisory public inquiry consider it prudent not to do so unless subpoenaed, so that a subpoena power is desirable even for advisory commissions. It gave three grounds for rejecting this argument as a justification for conferring coercive powers in all cases. These may be paraphrased as follows: (a) to confer a subpoena power for this reason would sanction hypocrisy, (b) the need for powers in unusual circumstances does not justify a grant of powers in all circumstances; and (c) if an advisory commission finds that it needs powers, it can specifically request them[54] (which the LRCC draft act would permit).

There is much to be said for the propositions

(a) that a commission of inquiry should be given coercive powers only where there is a strong public interest in conferring them, and

(b) that a commission of inquiry does not need coercive powers if all that it wants is advice and facts which are in the public domain or which people will give them voluntarily.

What about the present law? In Alberta, there are really two categories of public inquiries: (a) inquiries which do not have any coercive powers because they are established under the royal prerogative or because they are established

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53 LRCC, *Advisory and Investigatory Commissions, supra,* note 22 at 6.

54 *Supra,* note 22 at 28-29.

by the Lieutenant Governor in Council or some other emanation of government without statutory authority, and (b) inquiries established under the *Public Inquiries Act* which do have coercive powers. If that is a satisfactory division, there is no need to do anything further.

One objection to this arrangement is that public inquiries that do not need coercive powers are in fact established under the Alberta act and that it is wrong to confer coercive powers that are not needed. The use of the *Public Inquiries Act* may be because of a desire to give the inquiry prestige, or to persuade the public that the establishment of the inquiry represents a serious commitment. Or it may be due to mere thoughtlessness.

The LRCC proposals would, in effect, establish a third category (advisory inquiries), to which certain provisions of a public inquiries act would apply but which would not automatically be given coercive powers on appointment. The exercise of coercive powers has certainly resulted in legal contests, but it does not appear that that is because coercive powers have been conferred upon *advisory* commissions; nor do there appear to be reported cases in which an advisory commission unjustly coerced someone. The establishment of this third category might well be a good reform insofar as it would result in coercive powers not being automatically granted, but it is not clear that the reform would have a significant effect.

If a public inquiries act is to confer coercive powers upon some commissions of inquiry but not upon others, how should the choices be made?

The LRCC's distinction, as has been mentioned, is between "advisory" and "investigatory" commissions. Under section 1 of its draft act, the Governor in Council would have two choices:

(a) to appoint "advisory commissions to advise him on any matter relating to the good government of Canada" (which is presumably intended to mean a matter of general policy), and

(b) to appoint "investigatory commissions to investigate any matter he deems to be of substantial public importance" (which is presumably intended to mean a matter involving specific circumstances).

The LRCC draft act would confer coercive powers upon investigatory inquiries but not upon advisory inquiries. However, under section 16, the Governor in Council would be able to confer upon an advisory commission any of the powers of an investigatory commission, though only "if he deems it necessary to enable the commission to carry out its mandate".

Under the LRCC's proposals, the order in council would have to say one of two things: either that the commission is to advise on a matter relating to good government, or that it is to investigate a matter of public importance. The latter statement would make the commission an investigatory commission and thus confer coercive powers upon it; the former would not. This might be enough to cause the Governor in Council to take care in making the choice between the two kinds of inquiry.

Legally speaking, however, it seems likely that most matters relating to good government that are important enough for a public inquiry are of "substantial public importance", and that many matters of "substantial public importance" into which the government wants inquiries to be made would relate to the good government of Canada. If so, the LRCC proposals would give the Governor in Council a fairly free choice between calling an inquiry "advisory" or "investigatory".

There seems to us to be some doubt about the conceptual validity of the advisory/investigatory and good government/public importance dichotomies, and that consideration might be given to other ways of deciding when a commission of inquiry will have coercive powers.

One proposition which might be put forward is that the statute should

(a) put the coercive powers and anything else which should apply to an inquiry which is considered "investigatory" into a separate part of the statute,

(b) provide that that separate part applies only if the Lieutenant Governor in Council declares

(i) that in their opinion the powers contained in the separate part are required for the particular inquiry and are necessary in the public interest (or some such opinion), and

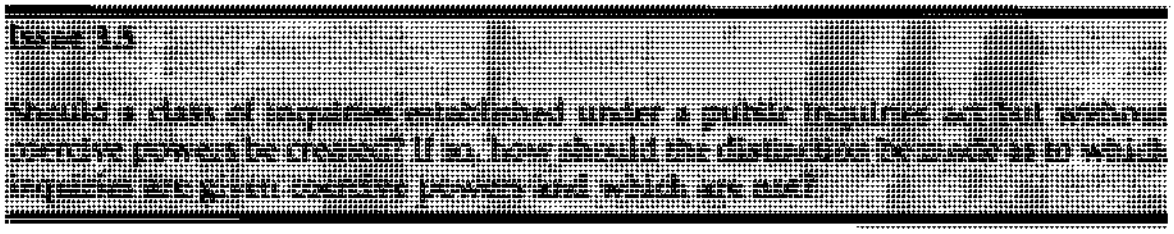
(ii) that the separate part containing the powers applies to the inquiry.

An argument can be made that such a requirement would

(a) direct the Lieutenant Governor in Council's governing mind to the true issues, that is, the need and justification for coercive powers, and

(b) require them to form the appropriate opinion about those issues.

Such a requirement would not stop the Executive from conferring coercive powers for the wrong reasons or the wrong motives, but no legislative requirement would do so unless it set up an objective standard and gave the courts power to decide whether that standard was met in the particular case.



CHAPTER 4 — COERCIVE POWERS

A. Introduction

Chapter 3 discussed the question: what commissions of inquiry should have coercive powers? This chapter considers two different questions: what coercive powers should commissions of inquiry have, and how should those powers be brought to bear on individuals?

B. Compelling Testimony and Production at a Hearing

(1) Description of Powers

The public inquiries acts of the ten provinces, the two territories and Canada give commissions of inquiry the power to summon witnesses and require them to testify or produce documents. All but one[55] expressly give a commission power to require witnesses to testify under oath.

Public inquiries are usually established for purposes in which the public has an interest that is likely to be at least as important as the private interest of a party to a lawsuit. A commission of inquiry may be seriously hampered in its work if it cannot compel the giving of testimony and the production of documents. Therefore, it can be argued that a commission of inquiry should have coercive powers to compel testimony and production that are not less than the powers of the courts. On the other hand, it is the coercive powers of a commission of inquiry that most clearly give rise to the conflict between the public interest in having facts known and private interests in the protection of reputation and personal liberty against undue state intervention, and the safeguards against the inappropriate use of coercive powers by courts are not necessarily available in a public inquiry. Therefore, it can be argued either that the powers should not be conferred or that safeguards against improper use of the powers should be provided.

(2) Exercise of Powers

Under sections 3 and 4 of the Alberta act it is "the commissioners" who have the coercive powers. The effect of section 17(1) and (2) of the *Interpretation*

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[55] The Prince Edward Island act is silent on the point.

Act (Alberta) is that a majority of a commission of three or more persons, acting at a meeting at which a majority of members is present, could exercise the powers; a two-member commission would have to be unanimous to exercise them. This appears to satisfy the requirements of operational efficiency, though it might be thought convenient to repeat in a new act the substance of the *Interpretation Act* provisions.

The Alberta act does not say how an oath is to be administered. So far as procedure is concerned, including the right to affirm rather than to take an oath, the *Alberta Evidence Act* applies, and, if its provisions are not satisfactory, it should be amended for all purposes and not merely for public inquiries. The *Public Inquiries Act* does not say who is to administer an oath, but the power to require a witness to give evidence on oath necessarily implies the power to have the oath administered, whether by a member of the commission of inquiry or by an official under its direction. Again, this appears to satisfy the requirements of operational efficiency.

(3) Extent of Power to Order Production

Under the Alberta act, it is section 3 that gives commissions of inquiry the power to compel production. The section reads as follows:

> **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.

If a person involved does not voluntarily testify or produce documents, the grammatical structure of section 3 suggests that a commission must summon the person to appear before the commission as a witness. If the commission considers that the person summoned has documents, papers or things that the commission "considers to be required for the full investigation of the matters into which he or they are appointed to inquire", it can require the person to produce the documents at that time. Presumably, having called a person as a witness, the commission of inquiry can ask them questions to determine whether they have relevant documents and can then order production.

It can be argued, on the wording of section 3, that a commission of inquiry cannot consider that a document, paper or thing is "required for the full investigation" of the subject of inquiry unless it knows what the document is. On this interpretation, a commission could not make a general order to a person to produce all relevant documents.

Mr. Justice Estey obviously thought that federal inquiries should have and do have the power to get documents without waiting for a hearing, and, as commissioner, he appears to have exercised such a power, although section 4 of the Canada act does not appear to be any stronger than section 3 of the Alberta act which is quoted above. He said[56] that ". . . it is amazing how papers get put in a different order if you give people time to shuffle them. You are far better to come down like Old Granny Hawk in *Peter Rabbit's Bedtime Stories* and grab them the first day . . .".

An issue for discussion is whether the broader interpretation under which a commission can get a class of relevant documents, or the narrower interpretation under which it can get only identified documents (or some other interpretation) is the correct interpretation, and whether the section, as correctly interpreted, either confines a commission unduly or leaves it unduly free to conduct foraging and fishing expeditions. Again, the public interest in efficient inquiries must be balanced against the public and private interests in protection of reputations, careers and personal freedom.

(4) Disposition of Documents Produced

Under sections 3 and 4 of the Alberta act, a person can be compelled to "produce documents and things", and the commission has the same powers to compel production as is vested in a court of record in civil cases. A civil court has power to require documents to be physically delivered to the court, and presumably a commission of inquiry can do the same.

Once a document is admitted in evidence, section 7(1) of the Alberta act requires the commission, upon demand, to photocopy the document and to release it to the person from whose custody it was removed. Under section 7(2) the photocopy may be admitted in evidence in place of the document. The act does not say anything about custody of documents in the meantime, or about

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[56] Estey, Willard, *supra*, note 29 at 213.

what is to be done with documents that are not admitted in evidence.[57] A question that might be raised is whether a public inquiries act should do more, particularly since the disposition of the documents might possibly enter into the question whether or not the compelled production is a reasonable seizure for the purposes of section 8 of the Charter, which is discussed below.

(5) Limits on Coercive Powers

(a) Evidentiary privileges

Section 8(1) of the Alberta act provides that "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". If the intention of this provision was to confer the same protection on everyone as they would enjoy in court, it may fall short of its objective because an evidentiary privilege is often the privilege of a person who is not a witness. For example, although it is a lawyer who is a witness, it is the lawyer's client who has the solicitor-client privilege, and conferring on a lawyer-witness in a public inquiry the same privilege as the lawyer-witness would have enjoyed in a court may not include the privilege the client would have enjoyed in the court.

Section 24 of the Law Reform Commission of Canada's draft act overcomes this drafting problem, if there is one, as it says that "a person" has the same privileges against disclosure as "he" would have if the evidence were given in a judicial proceeding, so that the client would have the same privilege against disclosure in an inquiry as the client would have against disclosure in judicial proceedings.[58] The Ontario and Northwest Territories provisions,[59] which are the only provincial acts which mention privilege, do not present the problem as

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[57] Other than those taken during an inspection of a public office under s. 6.

[58] What s. 24 of the LRCC's draft act actually says is that "a person has the same privileges against disclosure of evidence given at a public hearing . . .", etc. This seems to say that the privileges arise only when the evidence is given at the hearing. However, the commentary on s. 24 shows that it is intended that privileges will be conferred against the evidence being given at all.

[59] S. 11 and s. 10 respectively.

they say that "nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence".

There seems to be no reason to doubt that the public policy which confers privileges against the disclosure of information and the production of documents in courts applies equally to public inquiries, at least as a general rule.

The *Alberta Evidence Act* applies some privileges to a public inquiry, e.g., the privileges against being asked about sexual intercourse during marriage and about adultery, the privilege against having self-incriminating answers used in subsequent proceedings,[60] and the non-compellability of a spouse to disclose communications made by the other spouse (though any other spousal privilege is abrogated). The AEA talks about "actions" and "courts", but it defines "court" to include a "commissioner" and a "person having by law or by the consent of parties authority to hear, receive and examine evidence"; and it defines "action" to include an "investigation or inquiry".

Section 8(2) to section 8(7) of the Alberta act make some exceptions to the general proposition that privileges that apply in court apply in public inquiries. They then make an exception to the two exceptions. Analysis suggests that the exception to the exceptions could be used to make the exceptions virtually nugatory. The sinuosities of section 8 are somewhat difficult to follow, but it can be summarized thus:

1. Section 8(1), as mentioned above, confers on a person all privileges that the person has in court (subject to the drafting problem that is also mentioned above);

2. Section 8(2) and 8(3) make two exceptions:

   (a) no privilege based on the public interest applies; and

   (b) no statutory provision requiring secrecy or non-disclosure applies.

   If the section stopped at this point, no one would be able to decline to answer on either of these two grounds.

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[60] The privilege against the subsequent use of incriminating testimony is discussed below under the heading Protection Against Self-incrimination.

3. Section 8(4) makes an exception to each of the two exceptions. Despite section 8(2) and section 8(3), information or documents will be privileged if the Attorney General certifies

(a) that disclosure might involve disclosure of cabinet proceedings;

(b) that disclosure might involve disclosure of matters of a secret or confidential nature or matters the disclosure of which would not be in the public interest; or

(c) that disclosure might involve the disclosure of matters the disclosure of which cannot be made without prejudice to the interests of persons not involved in the inquiry.

It seems that the Attorney General's certificate that the disclosure of anything is against anyone's interest will make it privileged.

4. Section 8(6) then says that information or documents to which section 8(2) or (3) applies must not be published, released or disclosed without the written permission of the Attorney General and must be received in private. This seems to mean:

(a) that a commission is under a duty to identify evidence to which a public interest privilege or statutory duty of secrecy applies, as the subsection applies whether or not the Attorney General has given a certificate under section 8(4) and whether or not anyone has claimed the public interest privilege or raised the statutory duty of secrecy. The commission's stated duties are a duty not to publish, etc., without permission, information covered by the privilege or duty of secrecy, and a duty to hear it in private, and it can only perform these duties if it identifies the evidence to which the duties apply.

(b) that a commission cannot, without permission, advert in its report to any information covered by the public interest privilege or statutory duty of secrecy. If the Attorney General does not permit publication, the commission which receives such information will be in the awkward position of having in its possession information that it cannot mention. The awkwardness could be insupportable if the

> information would be decisive to the commission's findings. If it reported its finding, it would have to say that they are based on information which the commission has but cannot disclose, and such a report is likely to be useless and invite ridicule.

It should be noted particularly that the Attorney General may give their certificate in order to prevent the publication of information prejudicial to persons not involved in the inquiry. Though it is not unusual for the Attorney General to be the guardian of the public interest, it is unusual for the Attorney General to exercise a discretion to protect individuals from the disclosure of private information and documents. It is also unusual for the Attorney General to be able to create what amounts to a new privilege. Section 8(4) may enable them to do so, as it says that once the certificate has been issued the information or document is privileged, and it does not say in so many words that this result will follow only if the information or document would have been privileged but for section 8(2) or (3).

One important case of statutory secrecy is that of the Ombudsman. The combined effect of the *Public Inquiries Act* (Alberta) and the *Ombudsman Act* (Alberta) is not easy to follow. The cumulative effect of section 22(1) and 22(2) of the *Ombudsman Act* is that no Ombudsman's report or recommendation is to be the subject of an inquiry under the Alberta act without a resolution of the Legislative Assembly. Section 22(3) says that the Ombudsman is compellable in an inquiry mentioned in section 22(2). Section 22(4) makes the situation even more difficult because the Ombudsman is then made neither compellable or competent if they object on the ground that the proposed evidence relates to matters of a secret and confidential nature.

It is difficult to discern the policy behind section 8. It is really necessary to work out a policy as to how information and documents that are relevant to a public inquiry but that would be covered by a public interest defence or that would be prejudicial to the interests of a person not involved in the inquiry should be dealt with.

(b) Protection against self-incrimination

(i) Testimony

Under the common law, a person who was asked a question the answer to which might tend to incriminate them was entitled to refuse to answer the question. Section 6(1) of the *Alberta Evidence Act* and section 5(1) of the *Canada Evidence Act* abolish that privilege for all proceedings under Alberta law and federal law, including criminal proceedings, respectively.[61]

Section 6(2) of the *Alberta Evidence Act* substitutes for the privilege against self-incrimination "the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence".[62] This repeats section 13[63] of the Canadian Charter of Rights and Freedoms. Because of the Charter, it appears that the protection applies wherever the law of Canada or of a province applies.

Section 5(2) of the *Canada Evidence Act* also protects a witness from subsequent use of self-incriminating testimony. It is narrower than the Charter provision in that the protection is dependent upon the witness having objected to the question that produced the testimony, and upon it appearing that the

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61 *Batary* v. *A.G. for Saskatchewan*, [1965] S.C.R. 465 seems to say that s. 5(1) does not abolish the privilege for persons actually accused of a crime. *Faber* v. *Reg.*, [1976] 2 S.C.R. 9 confines *Batary* to a person actually accused, and the judgment of Dickson J.in *Di Orio* v. *Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, concurred in by four members of the court, supports the statement in the text, though *Starr* v. *Houlden* (*supra*, note 34) may give effective protection in certain specific cases, both to accuseds and suspects by invalidating provincial inquiries that are designed to get evidence for criminal prosecutions.

62 If s. 6(2) applies to criminal proceedings (as it appears to do), it may be *ultra vires: Klein* v. *Bell*, [1955] S.C.R. 309; though see the discussion below about the possibility that it might be upheld as incidental to the provincial power to establish an inquiry. Given that its wording is the same as that of s. 13 of the Charter, this point may be academic.

63 S. 11(c) of the Charter does not normally apply to public inquiries. It protects a person from being compelled to be a witness, but only if the person has been charged with an offence and only if the proceedings are against that person in respect of the offence.

witness would have had a privilege but for the *Canada Evidence Act* or a provincial evidence act. It is broader, because the protection extends to evidence that might render a witness civilly liable as well as to evidence that might render the witness criminally liable, and the protection is that the evidence "shall not be used or receivable in evidence against him" in a criminal proceeding other than a prosecution for perjury, which may be broader than a protection against a use of the evidence that might "incriminate" him.

This protection against the use of self-incriminating evidence is as extensive in relation to evidence taken in a public inquiry as it is in relation to evidence taken in a court proceeding. Since the Charter makes it impossible to detract from this protection (if that were thought desirable), there is no need to consider whether less protection is desirable. The only question is whether greater protection should be given to a witness at a public inquiry than in a court proceeding. In order that that question may be considered, a discussion of the extent of the protection is needed.

Geographical extent. The Charter immunity against subsequent use of self-incriminating testimony applies in all proceedings in Canada. It does not apply elsewhere, and protection against the use of self-incriminating evidence in later proceedings outside Canada would depend on the local law of the place where the later proceedings are brought.

Oral and documentary evidence. The protection applies only to "a witness who testifies". These words appear to apply only to oral testimony,[64] though it is possible, even on a literal construction basis, to interpret them to include the communication implicit in delivering up a document that the document exists and was in the possession of the person who delivers it up, and, possibly, that the document was authentic.

Evidence voluntarily given. The protection applies to self-incriminating testimony voluntarily given as well as to self-incriminating testimony that is given under compulsion. It probably applies even if the witness could not be compelled to give the testimony.

Testimony in a proceeding. In order to be given the protection, the witness must have testified in a "proceeding". The protection would, it seems, apply to a

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[64] See the discussion below, at pages 51 to 54.

witness who testifies at a hearing. It is not clear that the protection would apply to a person who gives preliminary information to commission counsel privately during the course of the preparation for a public inquiry. If it does not, and if prospective witnesses were to refuse to speak to commission counsel in advance because their evidence might be self-incriminating and would not be protected from use in later proceedings, this might interfere with the efficient conduct of inquiries.

"Incriminate the witness in any other proceedings". The protection applies in any later "proceedings", and this is not restricted to criminal proceedings. However, the protection would apply only against the use of the testimony to "incriminate" the witness. What this word means is not yet clear. It is unlikely that "incriminate" includes exposing the witness to mere civil liability. The British Columbia Court of Appeal has[65] held that the protection was available to a lawyer in a professional discipline proceeding, but the Saskatchewan Court of Appeal has held[66] that it was not available to a nurse in a similar proceeding. The Saskatchewan court approved the British Columbia decision, but would confine the Charter protection to a case in which the proceeding might have a true penal consequence such as the $10,000 fine to which the British Columbia lawyer might have been exposed. It said that exposure to a mere disqualification from employment as a registered nurse was not exposure to a true penal consequence and using the evidence to expose the nurse to disqualification therefore did not incriminate her. It applied to section 13 of the Charter the test that the Supreme Court of Canada applied to determine whether section 11 applies.[67]

Derivative evidence. The protection given by section 13 of the Charter and section 5(2) of the Alberta act is only against the use in later proceedings of self-incriminating evidence given in the first proceeding. There is no protection against the use of self-incriminating evidence by the authorities to plan and carry out an investigation to discover other evidence upon which to charge and convict the witness whose testimony cannot be used. The situation appears to be different in the United States, where the rule[68] under the Fifth Amendment to the

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65 *Donald* v. *Law Society of British Columbia,* [1984] 2 W.W.R. 46 (B.C.C.A).

66 *Knutson* v. *Registered Nurses' Association,* [1991] 75 D.L.R. (4th) 723.

67 *R.* v. *Wigglesworth,* [1987] 2 S.C.R. 541.

68 See e.g., Wilson J. in *Thomson Newspapers* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 69 D.L.R. (4th) 161, 196-97 (S.C.C.), citing *Kastigar* v. *United States* (1972), 406 U.S. 441.

Constitution is that evidence derived directly or indirectly from a statement made under compulsion cannot be used.

On the face of it, there is no reason to give a witness in a public inquiry a greater protection against self-incrimination than is given to a witness in a court proceeding. If reflection confirms that there is no such reason, the present law can be carried forward.

The LRCC was content with what is now the present situation under section 13 of the Charter, as it merely recommended that the testimony be inadmissible in the second proceeding even if the witness did not object to giving it in the first proceeding, and the Charter has effectively achieved that result. "Once it has been accepted", the Commission said[69] "that commissions to investigate are desirable in certain circumstances, it is irrational to introduce protection for witnesses that will in many instances prevent meaningful investigation. An inquiry barred from examining wrongdoing that may lead to criminal prosecutions would have very little room for manoeuvre". It can be argued that this view is too strong. Even restoring the common law privilege against self-incrimination would not stop a public inquiry from examining wrongdoing unless the inquiry could not be conducted without the evidence of witnesses who might be incriminated. This limited result may not justify refusing the protection in all cases.

If it were thought that the protection of witnesses in public inquiries against self-incrimination in later proceedings should be strengthened, the question arises how this should be done.

If good policy suggests it, the Alberta act could extend the protection against later use to cover information communicated in the steps preliminary to a public inquiry; to cover subsequent use against the witness for purposes other than "incriminating" the witness; or to cover derivative use of the compelled testimony. Provisions doing any of these things might be upheld in later criminal proceedings or in later proceedings in another province on the grounds that the power to restrict the later use of testimony is necessarily incidental to the power to compel it, which in turn is necessarily incidental to the provincial power to establish commissions of inquiry, though such an argument is likely to be restricted to the protection of testimony that could not have been compelled in

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[69] LRCC Working Paper 17, *supra*, note 22 at 36.

any other way. However, the only device the effectiveness of which could be guaranteed would be the conferring of a privilege against answering self-incriminating questions at all.

The argument in favour of conferring a privilege against self-incrimination in public inquiries is that, in its absence, a public inquiry can be used as a device to compel someone who may have engaged in criminal activity to appear and testify under oath, thus providing the authorities with information from which to build up a case and allowing an end run around the protections that are afforded accused persons in criminal proceedings for reasons based on fundamental public policy.[70] The contrary argument is that the public interest in ascertaining the truth through public inquiries overrides the interest of individuals in refusing to give self-incriminating evidence (though, as noted, under the Charter the evidence cannot itself be used to "incriminate" the individual).

(ii) Documents, papers and things

It will be remembered that section 3 of the *Alberta Evidence Act* confers power on a commission of inquiry to summon witnesses and require them "to produce any documents, papers and things that the commissioners consider to be required for the full investigation of the matters into which he or they are appointed to inquire". Most of the federal and provincial statutes have similar provisions, though in some cases the "things" that must be produced include only written things.

It seems that under the common law of England the privilege against self-incrimination extended to documents,[71] and that the same was true under the common law of Canada.[72] Two questions arise: (a) did the evidence act

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[70] For a discussion of the various arguments for and against prohibiting the use of derivative evidence, see *Thomson Newspapers*, *supra*, note 68.

[71] See, e.g., *Cross on Evidence* (6th ed.) at 380.

[72] *Klein* v. *Bell*, *supra*, note 62. See also *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) 245 (Ont. C.A.), and *Webster* v. *Solloway, Mills*, [1930] 3 W.W.R. 445, which deals with documents. It is obiter in *Klein* v. *Bell* and the Corning Glass case, and the Solloway Mills case dealt with discovery, but these cases do recognize the existence of the privilege. In *Marcoux* v. *R.*, [1976] 1 S.C.R. 763 Dickson J. used language which was

(continued...)

provisions that abolished the privilege that excused a witness from answering self-incriminating questions also abolish the privilege that excused a witness from producing self-incriminating documents? and (b) if so, does the evidence act protection against the use of "incriminating evidence so given" protect a witness against the use of incriminating documents produced by the witness in a previous proceeding?

The words of section 6(1) of the *Alberta Evidence Act* that abolish some or all of the privilege are as follows:

> A witness shall not be excused from answering any question on the ground that the answer may tend to incriminate him or may tend to establish his liability to prosecution under an Act of the Legislature.

Section 5(1) of the *Canada Evidence Act* also uses the words "excused from answering any question".

It has been held that these provisions abolished the common law privilege against self-incrimination in its entirety (though not the right of an accused person to remain silent), including the privilege against production of self-incriminating documents. In *Ziegler* v. *Hunter*,[73] for example, both Le Dain J. and Marceau J. said, in effect, that section 5(1) of the *Canada Evidence Act* dealt with the whole privilege against self-incrimination.[74] Earlier, the Federal/Provincial Task Force

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[72](...continued)
cited in *Ziegler* v. *Hunter*, [1984] 1 F.C. 608 (C.A.) as showing both that there was and that there was not a general common law privilege (as differentiated from a privilege against having oral evidence that had been turned into written form used against the deponent). Stevenson and Cote (*Civil Practice Guide 1989*, Juriliber 1989, at 477) say that tendency to criminate is a valid objection to the production of documents. The *Report on Evidence* of the Federal/Provincial Task Force on Evidence, Carswell 1982, at 436, refers to "the common law privilege concerning incriminating documents". Sopinka and Lederman (*Evidence in Civil Cases*, Butterworth 1974, at 220) say that a party could claim the privilege against discovery of documents.

[73] *Supra*, note 72. The third judge, Hugessen J., simply said that he saw no reason why there should be a privilege against being required to produce incriminating documents.

[74] Mr. Justice Sopinka in *R.* v. *Amway Corp.*, [1989] 1 S.C.R. 21, 36, said "that privilege of a witness against self-incrimination was replaced by s. 5 of the *Canada Evidence Act*", but the case was about oral discovery.

on Uniform Rules of Evidence said that some courts have said that evidence acts have abrogated the privilege concerning self-incriminating documents, while others have said that the privilege persists.[75]

It is not entirely clear why words that abolish a privilege against answering questions should be held to abolish a privilege against producing documents. In order to reach the conclusion that they do, it seems necessary to treat the privilege against self-incrimination as one and indivisible, so that abolishing part of it abolishes all of it. Should a special section be put into a public inquiries ac to clarify the situation for public inquiries?

Suppose that the evidence acts do abolish the privilege against being compelled to produce self-incriminating documents. If so, do they and the Charter confer the same immunity against the use of produced self-incriminating documents as they do against the use of self-incriminating testimony?

Section 6(2) of the *Alberta Evidence Act*, which is the same as section 13 of the Charter, is as follows:

> 6(2) A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

It will be seen that under Alberta section 6(2), Canada section 5(2) and Charter section 13 the use immunity is given to evidence "given" by a "witness" who "testifies". Literally construed, this language does not seem to confer use immunity on documents produced by a person under an order to produce. A person who produces documents does not, in ordinary parlance, "testify", and the person may not be a "witness". In *Ziegler* v. *Hunter*,[76] Mr. Justice Le Dain said that section 5(2) of the *Canada Evidence Act* has been held not to extend to protection against self-incrimination by the use of the compelled production of

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[75] *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, Carswell, 1982, at 436. The Task Force cited *R.* v. *Judge of the General Sessions of the Peace, supra*, note 72 for the proposition that the privilege was not abolished and *R.* v. *Sweeney (No. 2)* (1977), 16 O.R. (2d) 245 (Ont. C.A.) for the proposition that it was abolished.

[76] *Supra*, note 72 at 616

documents and referred without disapproval to *R. v. Simpson*.[77] In the same case, Mr. Justice Hugesson held that section 2(d) of the Canadian Bill of Rights (consideration of which was, in the Ziegler case, intermingled with consideration of section 5(2) of the *Canada Evidence Act*) extends only to "testimony", and that section 13 of the Charter does the same. Since the question before the court in the *Ziegler* case was whether production could be compelled, and not whether use immunity should be given after the compelled production had taken place, the comments are obiter.

The foregoing discussion suggests: (a) that there probably was a common-law privilege against self-incrimination by the compelled production of documents which would continue today but for the evidence act sections; (b) that significant authority holds that the evidence act sections revoked that privilege as part of the privilege against self-incrimination by compelled testimony; and (c) that there is at best considerable doubt as to whether the use immunity conferred by the evidence acts and section 13 of the Charter extends to self-incriminating documents produced at a public inquiry.

It seems strange that section 6(1) of the *Alberta Evidence Act*, by abolishing a privilege against compulsion to answer self-incriminating questions, abolishes a privilege against compulsion to produce documents, but that section 6(2), by substituting a use immunity for self-incriminating evidence given, does not confer the use immunity on self-incriminating documents produced. In the case of the *Canada Evidence Act*, it is even stranger that section 5(1) applies to documents and section 5(2) does not, because both subsections talk only about questions and answers to questions. Some of the authorities mentioned, however, lead to those conclusions.

The real question, though, is: what should the policy of a public inquiries act be? Arguments can be made both for and against either a privilege against self-incrimination through the compelled production of self-incriminating documents or the conferring of a use immunity on such documents in later proceedings:

Policy argument for such a privilege or immunity. Compelling a person to produce a self-incriminating document is little different from compelling a person to make

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77 (1943), 79 C.C.C. 344 (B.C.C.A.). Note that *Attorney General* v. *Kelly* (1916), 10 W.W.R. 131 (Man. C.A.) suggests that the use immunity does apply to documents produced under compulsion.

a self-incriminating statement. A power to require a person to produce self-incriminating documents to a commission of inquiry can be used to subvert the protection which the person would have if accused of a crime.

Policy argument against such a privilege or immunity. A document has an independent objective existence, and compelling a person to produce an independent, objective thing is not the same thing as compelling a person to give evidence that will prove or help to prove that the person was guilty of a crime.

If a use immunity were to be granted for documents produced under compulsion, it would be necessary to consider whether the production should make the document inadmissible even if it were obtainable from other sources, and, if that result is not desirable, what provision could be made to guard against it.

In Alberta a public inquiries act can effectively confer a privilege excusing a person from producing a self-incriminating document simply by saying that it confers the privilege. It cannot effectively confer a use immunity on the document except in subsequent proceedings governed by Alberta law: the reach of Alberta legislation does not extend to proceedings under federal law, and the implementation of a policy in favour of conferring a use immunity is dependent upon the law of the jurisdiction whose law applies to the subsequent proceedings.

It should be noted that, although the question whether there should be a privilege or use immunity for self-incriminating documents produced under compulsion has some aspects that are specific to public inquiries, the same question arises for the general purposes of the evidence acts. It should be noted also that, even if a privilege or use immunity is granted, the fact of the existence of a self-incriminating document and its possession by the person claiming the privilege will become known, so that the document may become vulnerable to seizure in other kinds of proceedings.

This discussion has centred on self-incriminating documents. It does not apply to other kinds of self-incriminating things, and this paper does not raise a question whether either a privilege or use immunity should apply to other self-incriminating things produced under compulsion. If a commission of inquiry can properly look for a "smoking gun" without turning the inquiry into a criminal proceeding, the smoking gun will rarely if ever be a physical object, and there do

not appear to have been any reported cases in which an inquiry required the production of body samples and the like.

(iii) Section 7 of the Charter

The discussion above has referred to section 13 of the Charter under which a witness who gives testimony in one proceeding is protected against its use to incriminate them in another proceeding. It has not referred to section 7, which protects individuals against being deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. In the *Thomson Newspapers* case,[78] the four members of the court who dealt with the point held that compulsion to testify is a deprivation of liberty under section 7. Two of the four held that the use immunity conferred by section 13 of the Charter saves the compulsion under section 17 of the *Combines Investigation Act* from conflicting with section 7 of the Charter, and the other two held that there is a conflict and that only the conferring of an immunity against the subsequent use of *derived* evidence would save it. There is thus support for the proposition that the *potential* for the use of testimony to incriminate a witness in later proceedings is a breach of Charter rights, though it is difficult to see how this can be, at least in the absence of proof that a public inquiry is being held in order to get information from a possible wrongdoer in order to build a case against them.

The existence of such potential Charter problems might be a reason for conferring a blanket privilege against self-incrimination in public inquiries. On the other hand, public policy should not start at mere Charter shadows if the policy itself is soundly based. There is a question to be resolved.

(c) Enforced production as seizure

Section 8 of the Charter confers upon everyone the "right to be secure against unreasonable search and seizure". A commission of inquiry which compels a person to produce documents and things that are in the person's possession does not effect a "seizure" in the usual sense of going to where the documents and things are and forcibly taking them. However, it can be argued that applying to the person in possession the force or threatened force of the state in order to coerce the person into giving up a document or thing is tantamount to a "seizure" of the document or thing.

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[78] *Supra*, note 68.

In the *Thomson Newspapers* case,[79] an administrative official had power to order production of documents in the course of an investigatory proceeding to determine whether offences under the *Combines Investigation Act* had taken 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 fifth[80] held to the contrary only because the power to order production in that case could not be enforced without an application to and a certificate by a Federal Court judge. Of the four who held that an order to produce constitutes a seizure, two[81] held that an order to produce under the statute in question in the action would not be an unreasonable seizure and that the statute did not contravene section 8, and two[82] held that the "seizures" provided for by the statute were unreasonable seizures. Those that held that a prospective seizure would not be unreasonable viewed the particular statute as regulatory rather than criminal with the consequences that it was not necessary for the administrative official to have reasonable grounds for believing that an offence had taken place and that there was a lower expectation of privacy in connection with business documents.

An attempt to extract a binding reason for decision from the *Thomson* decision and to apply it to provincial inquiries is not easy. A provincial public inquiry is not a criminal proceeding in the true sense, if only because, 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, as at least some of the reasoning applicable to the latter seems to contemplate a continuing regulatory regime of which those subject to it are aware in advance, while a public inquiry 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 involved are usually business documents, for which there is a lower expectation of privacy than there is for at least some kinds of personal documents;

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79 *Supra*, note 68.

80 Mr. Justice Sopinka.

81 Mr. Justice La Forest and Madam Justice L'Heureux-Dube.

82 Chief Justice Lamer and Madam Justice Wilson.

but a public inquiry, while it often involves business documents, may also involve personal documents.[83]

As noted above, section 3 of the Alberta act grants a commission power to order production of documents that the commission "considers to be required for the full investigation of the matters into which he or they are appointed to inquire". The section militates against arbitrariness by requiring the commission to form an opinion that the documents are "required" and should thus help to satisfy the Charter requirement. On the other hand, the section does not require the commission's opinion to be reasonable or based on probable grounds, nor does it provide for the intervention of an independent arbiter to determine whether notional seizure is reasonable.

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 so, sections 3 and 4 of the Alberta act may be valid insofar as they related to compelled production, but there is some doubt about this, part of which might be removed by providing for court intervention before the power is enforced. As previously noted, however, a public inquiry is usually a one-off event, and this is inconsistent with any notion that it is "regulatory" and with some of the reasoning about "regulatory" proceedings that are part of a regime to which a business knows that it is subject. 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 considers that the production of a document is necessary for its inquiry will not be enough to satisfy the Charter.

(6) Issues About the Power to Compel Testimony and Production

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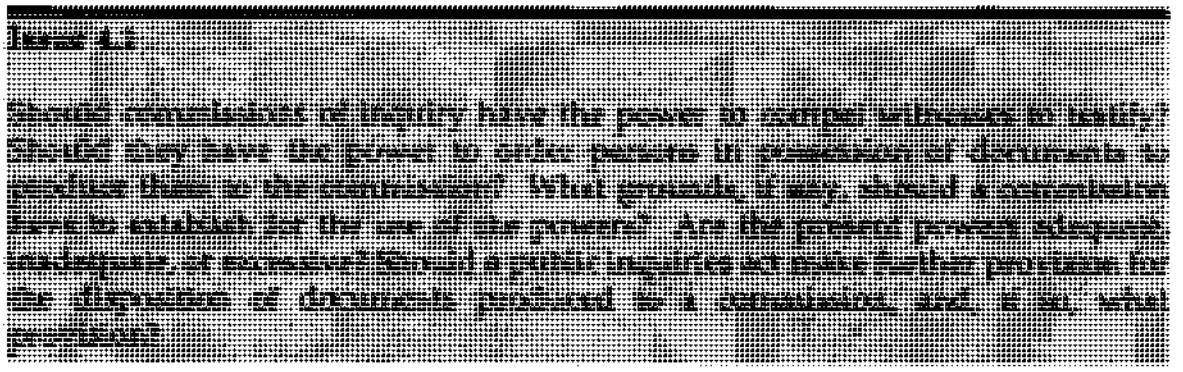
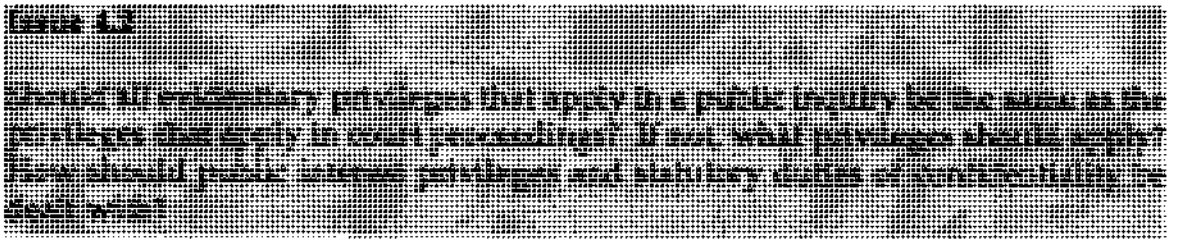
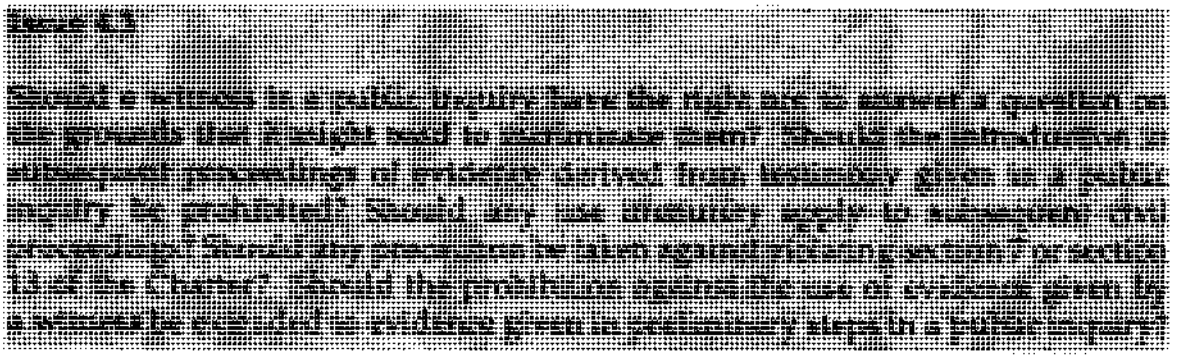
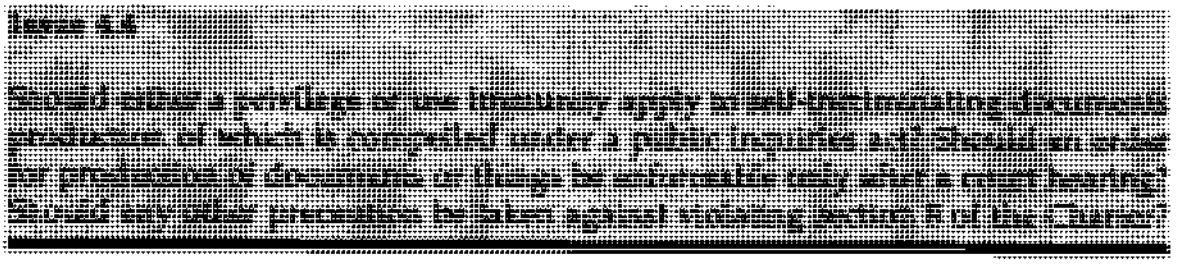
[83] Note that Stevenson & Cote (*Civil Procedure Guide, 1989*, Juriliber, 1989, at 468) cite Thomson and other cases for the proposition that forced production of documents in a civil case or administrative inquiry is a seizure under the Charter. They say that "whether the production (seizure) is reasonable depends on what, from whom, why, by whom and the circumstances".









C. Search and Seizure

We now turn to "seizures" in the traditional sense that involves the taking of possession of documents and things by an official under compulsory powers.

Section 6 of the Alberta act gives a commission of inquiry a limited power to enter Government buildings, forcibly if necessary, and take possession of documents found there. The section does not apply unless the Lieutenant Governor in Council declares that it does apply. A commissioner who decides that there should be an inspection and who is a judge may make an order for the inspection. A commissioner who is not a judge may apply to the Queen's Bench, on reasonable and probable grounds, for an order permitting inspection. The right to take possession of documents is an incident of the right to inspect. If a person entitled to the document so requests, the document may be photocopied and returned. The photocopy may then be admitted in evidence.

The Manitoba act[84] gives the commissioners access to any public building at any time of day or night. The British Columbia and Canada acts[85] give the commissioners appointed under a ministerial inquiry the power to enter public buildings and examine public records; this power is not given to commissioners appointed under the public inquiry parts of either of these two acts.

The Ontario act[86] is unique in Canada because it is not restricted to public buildings. The commission can appoint an investigator and then apply for an *ex parte* order to allow the investigator to enter and search "any building, receptacle or place, including a dwelling house" for any documents and things relevant to the inquiry.

The Alberta provision is rather strange in that it confers the power to seize documents as an incident of a power to inspect a building. However, since it is restricted to Government buildings and therefore, in the usual case, to Government documents, questions of invasion of individual rights are not so likely to arise.

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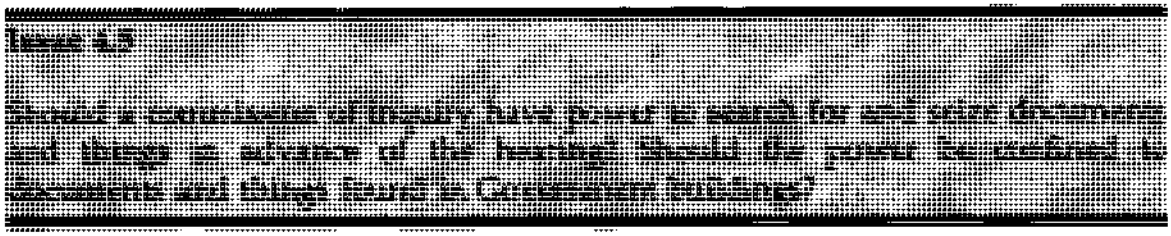
84 S. 89.

85 British Columbia act, s. 3; Canada act, s. 7.

86 S. 17.

The LRCC draft act would give a judge of a superior court of criminal jurisdiction power to issue a search warrant if there are reasonable grounds to believe that there is in the place specified anything that may be of assistance to the investigation. However, the literature does not disclose the existence of a strong demand for increased powers of search and seizure for documents for public inquiries. Possibly this is because the compulsory production power is considered adequate. If increased powers were to be considered, the impact of the Canadian Charter of Rights and Freedoms would have to be considered as well: as a minimum, it seems that some form of judicial intervention should be provided for.



D. Enforcement and the Contempt Power

It is one thing to say that a commission of inquiry has the power to compel testimony and production. It is another thing to say how that power is to be enforced, and the discussion of this question merges into a discussion of the contempt power.

The Alberta act provides 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.
>
> **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.

Section **4**, literally construed, says that whatever a court of record can do to compel testimony and production in civil cases a commission of inquiry can

do in a public inquiry. It seems likely that it would be interpreted as conferring on a commission of inquiry the power to attach for contempt for refusal to testify or produce, and the power to give the requisite orders to peace officers and correctional institutions. If this interpretation is correct, the section is strong medicine, given that a commission of inquiry may not be a judicial body at all.

Section 5 goes on to confer a general committal power if at least one member of a commission of inquiry is a Queen's Bench judge. The power is probably conferred on the judge, as the words "so appointed" probably refer back to the word "appointed" earlier in the section. The contempt must be a contempt "of the commissioner or a contempt of commissioners", and it is not clear whether that means a contempt of the judge or all the commissioners. Probably the most likely reading is that the judge-commissioner has the power of committal for contempt of the commissioners as a body. It is not likely either that the Legislature meant that the whole commission could exercise the power of committal if a judge was a member of the commission (who might even be in dissent) or that it meant that the judge could commit for contempt of themself but not for contempt of the commissioners as a whole.

The Canada act and the provincial acts commonly give commissions of inquiry the power to commit a person who refuses to testify or to produce documents, either in terms or by conferring the same powers as a court in that respect. Section 8 of the Ontario act is somewhat different, as it provides for a stated case to the Divisional Court which can impose a penalty as if the contempt were a contempt of court. Section 7 of the New Brunswick act and section 12 of the Quebec act appear to give a commission the full contempt power.

There is a serious question as to whether, as a matter of general policy, commissions of inquiry should be able themselves to exercise powers in the nature of contempt powers. These are generally reserved to judges of courts of general trial jurisdiction acting under judicial procedures. Commissions of inquiry are not judges of courts of general trial jurisdiction unless coincidentally a judge is the commission, and they do not operate with all the procedural protections of courts. There is another serious question as to whether such powers violate the Charter rights of individuals.

One alternative choice would be to provide that behaviour that would constitute contempt of court constitutes contempt of a commission of inquiry, but to leave the determination as to whether contempt has occurred, and the penalty

to be imposed, to a court, as, in effect, the Ontario act does. Another would be to make it a summary conviction offence to flout commission orders in any of specified number of ways. This is what the Law Reform Commission of Canada suggested. The latter suggestion may be open to the criticism that waiting for a charge to be laid and a trial held may unduly hamper the work of a public inquiry, and that there is no guarantee that a conviction will cause documents to be produced or testimony given.

The 1966 U.K. Salmon Commission[87] thought that contempt matters involving tribunals of inquiry should continue to go to the High Court. It had difficulty with the question, because in the United Kingdom, the chairmen of tribunals of inquiry are always persons holding high judicial office. The arguments that the Commission cited for leaving the power with the High Court were: it is inappropriate for an inquisitorial tribunal to have the power to commit; the High Court application process gives opportunity for reflection both by the tribunal and by the offender; the offender has the advantage of being dealt with by a court approaching the matter with a fresh mind; the procedure had been followed once and found satisfactory; if the tribunal had the power of attachment, it would be necessary to provide for an appeal to the High Court, which would be an undesirable precedent; and the sentence of imprisonment might exceed the time during which the tribunal would be in office, and it is clearly preferable that the authority which commits should be in existence and approachable by the offender at any time during which he is serving his sentence.

Public inquiries, at least those that involve the investigation of specific controversial facts, cannot be conducted efficiently if testimony and production cannot effectively be compelled or if persons involved in the inquiry engage in disruptive conduct. It can be argued that merely making it an offence to refuse to testify or produce or to disrupt hearings is not adequate: if a key witness refuses to testify, for example, a commission might have to suspend its operations while a criminal prosecution was carried on, and even then the one-shot imposition of a penalty might not produce the desired result. The power to commit until contempt is purged is a more efficient remedy. The question here is whether the efficient conduct of public inquiries is an objective which justifies the summary imposition of the onerous penalties that can be imposed for contempt.

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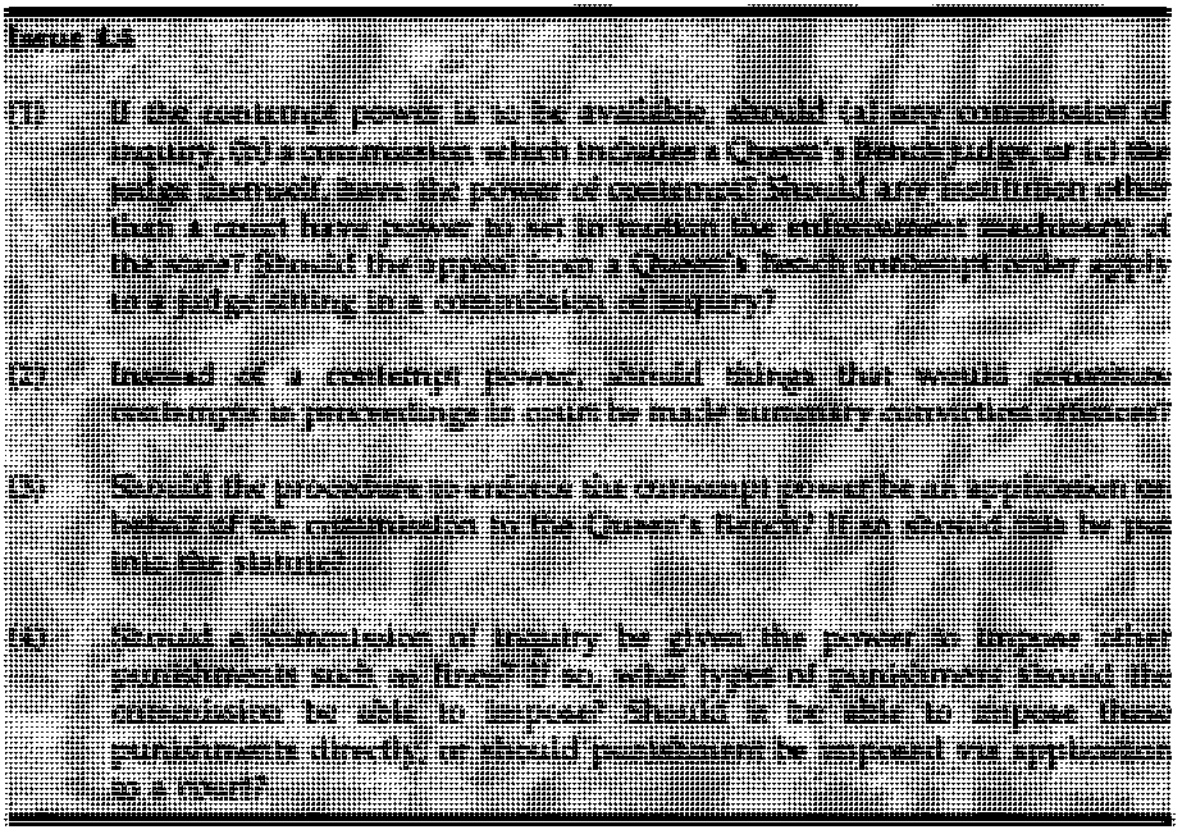
87 *Supra*, note 39.

The ultimate efficiency is to give a commission power to commit. It is possible to hold instead the view that committal should be available, but that the committal power should be exercised only by the court of general trial jurisdiction. This would reduce efficiency somewhat, but it would ensure that persons involved have a court hearing before severe penalties are imposed.



E. Delegation of Power

Section 2(2) of the Alberta act allows a commission of inquiry to delegate—or, rather, to subdelegate, as the commission is itself a delegate—the conduct of part of the inquiry to experts or other qualified persons. So do the Manitoba, Newfoundland, Saskatchewan and Canada acts. Section 2(3) gives the subdelegate the powers, privileges and immunities of the commission. The other acts content themselves with conferring the powers.

Section 10 of the LRCC draft act would permit an investigatory commission to authorize a subdelegate, first having been sworn by a justice of the peace, to take evidence and report to the commission. The LRCC comment says, correctly,

that the section does not give the subdelegate "the *full* powers of an investigatory commission—for example, the issuing of summons and subpoenas". It really seems that it does not give the subdelegate *any* powers other than the power to listen and report.

In theory, the power to subdelegate should be useful, but it does not appear to be exercised, so that its usefulness may be more theoretical than practical. It can also be argued that the extraordinary powers given to a carefully selected delegate (a commission of inquiry) should not be subdelegated to persons not chosen by the appointing authority, particularly in the absence of evidence that the lack of the power to subdelegate has caused difficulty.

F. Extra-provincial Facts and Evidence

In his report on the Royal American Shows investigation,[88] Mr. Justice Laycraft, at page A-18, said that he had no jurisdiction to inquire into events which took place outside Alberta, "except insofar as they had a direct relationship to the affairs of R.A.S. in Alberta or to the investigation of those affairs". He did inquire into (and admit evidence about) allegations that the RCMP had monitored some activities of the Edmonton City Police Force in interviewing witnesses in Winnipeg, "because this related to an Alberta investigation of an Alberta charge". He declined to inquire into certain newspaper stories about related matters because they were "a second and third step removed from my geographical jurisdiction".

It is doubtful that the question of jurisdiction to inquire into extra-provincial facts raises any reform question. Alberta inquiries will have an Alberta nexus, and it seems that there is sufficient room for Alberta inquiries to cover extraprovincial facts, on the one hand, and no great danger that Alberta inquiries

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[88] Laycraft, J.H., *Royal American Shows Inc. and Its Activities in Alberta, Report of a Public Inquiry*, June 1978.

will, on the other hand, go off into extensive investigations of extraprovincial facts.

Mr. Justice Laycraft also pointed out that his inquiry had no jurisdiction to compel persons outside Alberta to attend in Alberta as witnesses.

Since the date of his report, the *Interprovincial Subpoena Act*[89] has been enacted by Alberta and (it being a Uniform Act) by the two territories and by all of the provinces except Quebec and Nova Scotia. If the lack of jurisdiction to compel people outside Alberta to attend to give evidence is an evil, the enactment of the ISA by those other provinces and territories may have ameliorated the evil. The effect of the ISA and its counterparts in other provinces therefore requires some explanation.

The interprovincial subpoena acts require the superior court of a province, on the fulfilment of certain conditions, to receive and adopt as its own order a subpoena from a court outside the province. In some circumstances, a board or commission that is outside the province is treated in the same way as a court that is outside the province.

Assume, for example, that an Alberta commission of inquiry wants to subpoena a witness from elsewhere in Canada ("Province X"), and that Province X has an interprovincial subpoena act. Three things are necessary to get the witness to Alberta:

(1) a "party to a proceeding" must cause a subpoena to be issued for service in another province and must attend upon a judge of the Queen's Bench;

(2) the Queen's Bench judge must certify that the attendance of the witness in Alberta is necessary "for the due adjudication of the proceeding", and "in relation to the nature and importance of the proceedings, is reasonable and essential to the due administration of justice in Alberta";

(3) the Lieutenant Governor in Council of Province X must designate the Alberta commission as a "court outside X" for the purpose.

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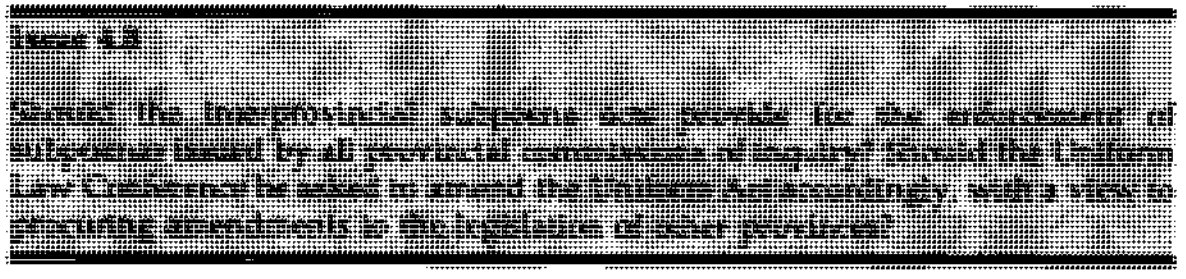
[89] R.S.A. 1980, c. I-8.1.

It will be seen that the procedure is cumbersome. Further, it will be seen that the language of the acts, although they purport to cover commissions, is of dubious applicability, as it is by no means obvious that a public inquiry is a "proceeding" to which some person is a "party", or that the proceeding can result in a "due adjudication" which is reasonable and essential to the "due administration of justice". The value of the interprovincial subpoena acts for the conduct of public inquiries, has yet to be established.

The enforcement of an Alberta subpoena in another province depends upon legislation in the other province that makes its enforcement machinery available for enforcement. Improvement of that legislation can be achieved only by persuading the provinces or territories to amend their legislation, which, if it can be done at all, can probably be done only through the Uniform Law Conference.

Finally, it should be noted that the interprovincial subpoena acts do not apply internationally.



CHAPTER 5 — CONDUCT OF THE INQUIRY

A. Commission Counsel

There is nothing in the nature of a public inquiry that says that a commission of inquiry must retain a lawyer to assist it. An investigatory commission is very likely to do so. Counsel is likely to be needed to obtain, organize and present evidence about the untidy sets of facts that must be investigated. Even in the case of an advisory commission, it is likely that counsel will be found useful. The Alberta, Manitoba, Newfoundland, Northwest Territories, Prince Edward Island and Saskatchewan legislation make specific provision for commission counsel, and the LRCC Report does so also.

The legislation customarily authorizes a commission to engage the services of counsel without saying anything about the status, duties or functions of commission counsel. The following passage describes these (though, while speaking in general terms, it is likely to be appropriate only in predominantly investigatory proceedings):[90]

> Although the jurisprudence is sparse with respect to the legal status of commission counsel, there is general agreement that he is the commissioner's counsel. His conduct must be governed at all times with this in mind. Conversely, the commissioner or commissioners must bear in mind that commission counsel's actions are attributed to the commission. A number of conclusions with respect to the scope and limits of commission counsel's mandate can be drawn from this simple proposition. First, commission counsel is subject to the direction of the commissioner. After considerations of the rights of other parties and individuals appearing before the commission, the commissioner can authorize his counsel to carry out any duties that are within the terms of reference of the commission. For instance, although the commissioner could conduct the examination of witnesses himself, there are cogent reasons for not so doing. A learned Australian author sums it up as follows:
>
> > Ultimately a Commission or Board has control of an inquiry. It has the duty to conduct the inquiry and counsel is briefed merely to assist in the discharge of that function. Nevertheless, there are cogent reasons for allowing a counsel assisting a degree of latitude or independence in the performance of his function . . . but unless the eliciting and

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[90] Per John Sopinka, Q.C., *The Role of Commission Counsel*, in Pross, Christie & Yogis, *supra*, note 16 at 75-85.

> presentation of evidence is left to counsel assisting Commissions and Boards might be seen to be partisan.
>
> It is difficult for a person to assess evidence objectively if he has to himself elicit facts.[91]
>
> To the extent that the rights of persons affected are increased, limitations are imposed on the conduct of commission counsel.

The duties of commission counsel have been equated with those of a prosecutor in a criminal case. In the Inquiry into Royal American Shows and its Activities in Alberta, Mr. Justice J.H. Laycraft, as he then was, said:

> [T]he duties of Commission Counsel . . ., in fact, are virtually identical [with those of a prosecutor].

It is evident, however, from the following that the prosecutorial duties to which Mr. Justice Laycraft was referring were those requiring that all evidence, pro and con, be addressed:

> The role of a Crown Prosecutor in England and in Canada is not to struggle at all events for conviction. His duty is as an officer of the court to ensure that all evidence, both favourable and unfavourable to the accused, is put before the court. This has been repeatedly stated in courts here and abroad. In the Supreme Court of Canada in *Boucher v. The Queen*, [1955] SCR 16, Rand, J. said at page 23:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

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91 Hallett, *supra*, note 26 at 216-17.

> In my view, this definition of the role of the Crown Prosecutor is also an apt description of the duty of Commission Counsel in an Inquiry such as this one.

This statement cannot be extended to apply to the role of commission counsel generally, as did the Parker Report.[92] A prosecutor is not the agent of the judge. His acts are not attributable to the judge. He does not confer with the judge to determine what evidence to call nor does he participate in the preparation of the report. These and other factors demand more impartiality from commission counsel than is required of a prosecutor.

Mr. Justice Sopinka went on to describe the functions of commission counsel as

(a) identifying and interviewing witnesses, with safeguards for fairness;

(b) advising about procedure and drafting basis rules of procedure;

(c) advising (publicly as well as privately) about such things as applications for standing, media applications to record the proceedings; and applications to clarify the terms of reference;

(d) making an opening statement outlining, in a general way, the matters into which the commission will inquire, largely for the information of the parties affected and the public;

(e) examining witnesses (under the most generally accepted view, all witnesses other than those against whom some misconduct is likely to be alleged and who want to be examined by their own counsel);

(f) cross-examining (commission counsel not being restricted by the ordinary rules with respect to impeachment) to test and challenge witnesses' evidence, depending on whether all points of view are represented;

(g) presenting closing argument (this being somewhat controversial, but being desirable, in Mr. Justice Sopinka's view, to ensure that the

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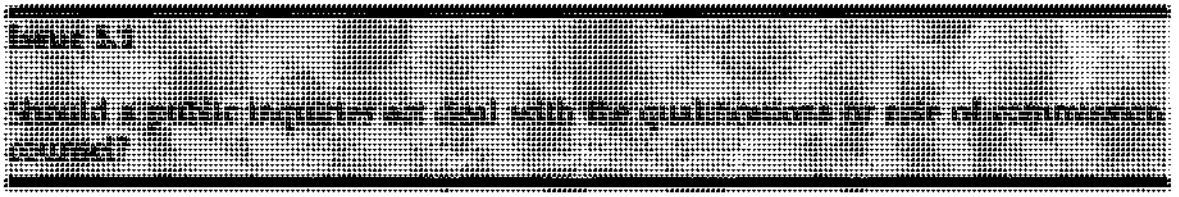
92 *The Royal Commission to Investigate Allegations Relating to Coroner's Inquests* (Ontario, 1968) Transcript at 336.

advice that commission counsel is giving in private is made known in public, and, in some cases to give the necessary notice of any allegations which the report might make against individuals); and

(h) assisting in writing the commission's report (though here there will be difficulties if commission counsel has taken an adversarial position in the proceedings).

There is no doubt that the role of commission counsel is of great importance in investigatory inquiries. The question is whether a new act should deal with any aspects of commission counsel's role. It is difficult to see what it could usefully do. It could command counsel to act impartially and fairly, but it is difficult to see what that would accomplish. It seems better to treat the functioning of commission counsel as part of the functioning of the commission. If a commission of inquiry is under a duty and, because of commission counsel's conduct, the duty is breached, the remedies would be those that are available for breaches of duty by the commission. Is there a better way?

One probably irrelevant point should be noted. In England, it apparently has been the practice for the Treasury solicitor to brief counsel for commissions of inquiry, and in Victoria it has apparently been the practice of the Crown solicitor to do so. One Australian commentator,[93] while recognizing the efficiency of such a system, points out the danger of conflicts of interest when solicitors employed by the executive are involved in advising commissions investigating the executive. The point seems so obvious as not to need mentioning in a Canadian context.



[93] Hallett, *supra*, note 26 at 211-14.

B. Evidentiary Matters

The New Brunswick act[94] states that the normal rules of evidence do not apply to a commission; a commission may hear and accept any relevant evidence. The Ontario act[95] says that a commission may admit unsworn evidence. The LRCC draft act[96] says that all relevant evidence is admissible unless its probative value is substantially outweighed by the prejudice it causes, or its undesirable 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 Alberta act says something about exclusions, that is, privileges, which will be discussed later. It does not say anything about admissibility. Except for provisions which clearly apply only to a contest between individuals, the *Alberta Evidence Act* applies to inquiries. It deals with some privileges but says little about what is admissible.

David Scott, Q.C.[97] has said:

> It is generally accepted that in ordinary circumstances in the work of public inquiries the conventional rules of evidence are not strictly adhered to. This point has been made repeatedly in many cases. Nonetheless, depending upon the particular finding and its importance, and notwithstanding that compliance with the strict rules of evidence is not required, cogent and reliable evidence may be required.

He went on to say that most statutory schemes recognize that, as a minimum, the application of conventional evidentiary privileges represent protections which remain in force, and he referred to section 8 of the Alberta act, which preserves privileges. Anthony and Lucas[98] also said that, "whether or not any particular inquiries Act so provides, inquiries are not bound by the legal rules of evidence

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94 S. 8.

95 S. 10.

96 S. 10.

97 Scott, David W., "The Rights and Obligations of Those Subject to Inquiry and of Witnesses" in Pross etc., *supra*, note 16 at 145.

98 Anthony, R.J., and Lucas, A.R., *A Handbook on the Conduct of Public Inquiries in Canada*, Butterworths, 1985 at 165.

used in the courts" and that hearsay may be received and considered, though they went on to say at page 166 that the exclusion of evidence that is reasonably relevant and should have been admitted goes to fairness, and that the acceptance of evidence that is so tenuous that no reasonable person would rely on it also may produce unfairness.

It should be noted that vice-chairman of the Law Reform Commission of Canada, in a dissent recorded in the Commission's Working Paper,[99] thought that the rules of evidence are useful and that the best rule might be that commissions should follow them except where there is good reason to depart from them. An Australian commentator has commented[100] that in some inquiries the acceptance of hearsay must be with caution lest it cause a grave injustice.

There is no reason to restrict the evidence upon which an advisory commission makes recommendations based on its expert opinion or upon facts of a general nature. There can, however, be a serious question about the evidence that should be admissible in an inquiry into the conduct of individuals.

One of the great problems of investigatory inquiries is the damage done to the reputations of individuals by allegations made in the course of an inquiry. If such an inquiry heard only evidence that conformed to the rules of evidence, a good deal of hearsay and innuendo would be excluded and the damage to reputations would be minimized. On the other hand, confining an inquiry in this way may well prevent an inquiry from unearthing the truth and performing the function for which it is established. An intermediate provision, though one that is closer to the permissive end, would be to make all relevant evidence admissible unless its probative value is substantially outweighed by the prejudice it causes (or by its adverse effect on the inquiry process), as proposed in the LRCC draft act. The question is where the proper balance lies.

There is also a question whether a commission of inquiry should base actual findings about the conduct of individuals only on legally admissible evidence or on evidence that meets some standard of cogency.

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99 Mr. Justice John Bouck, LRCC Working Paper, *supra*, note 22 at 91.

100 Hallett, *supra*, note 26 at 29.

[redacted]

C. Hearings

With one minor exception under section 8, which will be discussed later, the Alberta act is silent about hearings. The Ontario[101] and Northwest Territories[102] acts provide that all hearings are public[103] unless the commission feels that a matter involves public security or of such an intimate personal or financial nature that the interest in public disclosure is less than the interest in keeping the matter private. Section 5 of the LRCC draft act, which applies to its advisory category of public inquiries as well as to its investigative category, provides for hearings open to the public, unless the commission is satisfied "that 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 open hearings".

There is a threshold question: must a commission of inquiry hold "hearings"? A purely advisory commission might be able to proceed without anything that would be called a hearing, and much of the work of some advisory commissions is research that does not involve calling every author of every piece of literature, or even an expert on every subject considered by a commission, to give formal evidence to the commission.

The answer to the question appears to be that the machinery of a public inquiries statute should not be used unless there is a public interest in the public nature of the inquiry, and that the act should therefore require a commission of inquiry to hold hearings.

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101 S. 4.

102 S. 7.

103 This section will deal with whether or not *the public* should be excluded from commission hearings. For a discussion of the issues involved in excluding a person against whom allegations are being made from the portion of the hearing in which those allegations are made, see Chapter 6—Protecting the Rights of Individuals.

That leaves open the question whether a commission of inquiry should be able to receive information other than through the hearing process. The MacDonald Commission on the economic union published 70 volumes of research, some of which it presumably paid some attention to, and it may be doubted that the research was formally presented at hearings. The duty of fairness may well require an investigatory commission inquiring into specific conduct to receive evidence only through hearings, but it may be quite inappropriate to require an advisory commission to do so.

The final question is whether a public inquires act should require a commission of inquiry to hold its hearings in public. The Alberta act, as has been noted, says almost nothing on the subject. The exception is in section 8, under which any information that would be subject to a public interest privilege or a statutory duty of secrecy must be received in private and cannot be disclosed or published without the Attorney General's permission.

The 1966 U.K. Salmon Commission said this[104] (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 thorough 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.

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104 *Supra*, note 39 at 38.

The Salmon Commission also thought (at page 40) that a tribunal should have power to exclude the public in more cases than are allowed by section 2 of the U.K. 1921 Act, which gives the tribunal the power to exclude if it is of the opinion that "it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given". The commission said that these words had been construed so as to cover only security risks, and that a tribunal should have "a wider discretion, certainly as wide as the discretion of a Judge sitting in the High Court of Justice", which enables the public to be excluded "in circumstances in which a public hearing would defeat the ends of justice".

Given the peculiarly public nature of public inquiries, there seems to be a strong argument for requiring them to function in public through hearings. On the other hand, it is probably inevitable that exceptional circumstances will occur in which the damage to public or private interests will be so great as to outweigh the benefit to the public from a public hearing. Those considerations would suggest that careful consideration be given to the factors which a commission of inquiry could consider when deciding to hold a hearing (or part of a hearing) in private.

There is a further question as to what a commission of inquiry can do with evidence received *in camera*. On the one hand, the recitation in a published report of evidence received in private may well do as much damage as receiving the evidence in an open hearing would have done. On the other hand, there is no point in a commission hearing evidence in private if it cannot use it in the preparation of its report, which is the ultimate result of its work. One thing that a commission could do with evidence received privately is to make a private report about it, but this is likely to be unsatisfactory and will derogate from the public nature of the inquiry.

There is one kind of case in which receipt of evidence in private, or at least a ban on publication, might be appropriate.

David W. Scott, Q.C.[105] has mentioned a particular difficulty with immediate public reporting of hearings. The context includes a reference to the televising of public inquiries, but the difficulty, though it may be exacerbated by televising, would exist under any reporting of inquiries. He said:

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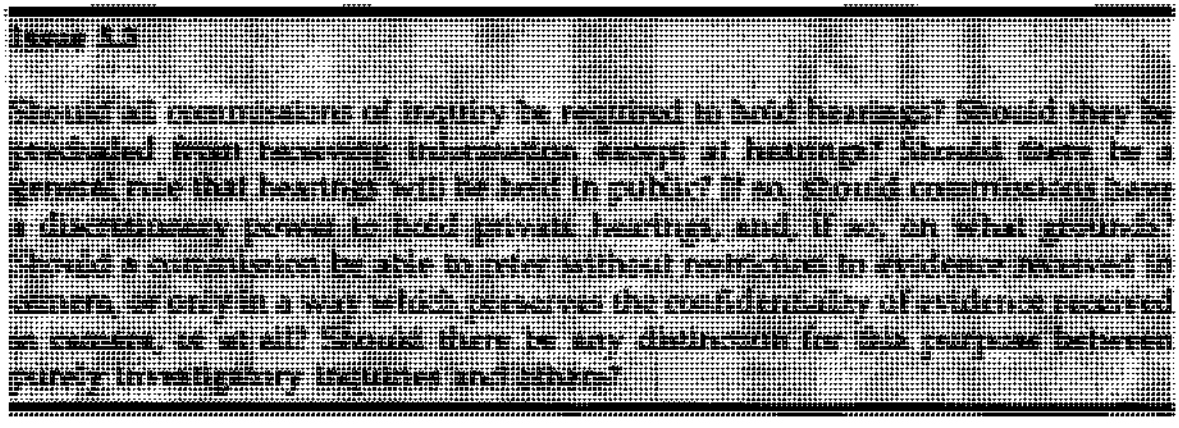
105 *Supra*, note 97 at 145-46.

> One of the difficulties is that if you adopt the protocol that a person whose conduct is being inquired into should be entitled to leave his evidence until he or she has heard all the evidence that is tendered by the commission, then it means that it may be months before a person can have his or her opportunity to respond on television to the evidence given earlier. And of course television and the print media play up with headlines what is going on and the poor "victim" has to wait months for the opportunity to respond. This buttresses the development of the idea of holding *in camera* hearings where very sensitive information is given which could damage a person or be prejudicial to a person, and leaving its release to the public until closer to the moment that that person will be entitled himself to give evidence.

Mr. Scott said that in the Sinclair Stevens inquiry, in accordance with "the extraordinary fairness of commission counsel" (himself), requests for this sort of dealing with evidence were on every occasion accommodated. It should be noted that this is a temporary denial of publicity, but that it envisages the eventual publication of evidence heard privately at an appropriate stage of the inquiry.



D. Media Reporting

If a commission hears evidence *in camera*, the media will not be present to report it. There could, however, be a question as to whether it is a necessary consequence of the fact that a hearing has been held *in camera* that, if information about what happened is leaked, the media cannot report it. There is also a question as to whether the media have the right to report what happens at a public hearing and whether a commission of inquiry has or should have the power to prohibit media reporting of something that happened at a public hearing. Given the nature of investigatory inquiries, it is quite possible that something will come up at a public hearing which the commission did not expect.

The principal proposal of the Law Reform Commission of Canada on the subject,[106] which applies to all inquiries, provides that "commission hearings may be reported without restriction". Section 12(2) of its draft act, however, would confer on a commission power to "forbid or restrict the reporting of any matter if it believes that 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 hearings reported without restriction".

The LRCC did not say anything about a right to record or televise. Presumably, at least the latter, since it can be disruptive, must be under the control of the commission.

The 1966 U.K. Salmon Commission said this:[107]

> It has been suggested to us that the Press should be prohibited from reporting the proceedings day by day and that the evidence should be made public only after the publication of the Tribunal's report. This would no doubt eliminate the pain sometimes caused to innocent persons by the glare of publicity. On the other hand we are satisfied by the evidence that on balance it is in the interest of innocent persons against whom allegations have been made or rumours circulated to have the opportunity of giving their evidence and destroying the evidence against them in the full light of day.

Further, the Commission thought that much the same reasons that they had given for holding the hearings in public applied to reporting of hearings, and noted that if the evidence is published in bulk after the report, there is only a small percentage of the reading public which reads it. It had considered the suggestion that the Press tends to highlight sensational aspects, but apparently did not think that this was enough reason not to allow reporting, and noted the importance of it being made clear at all times that only one side is then being published.

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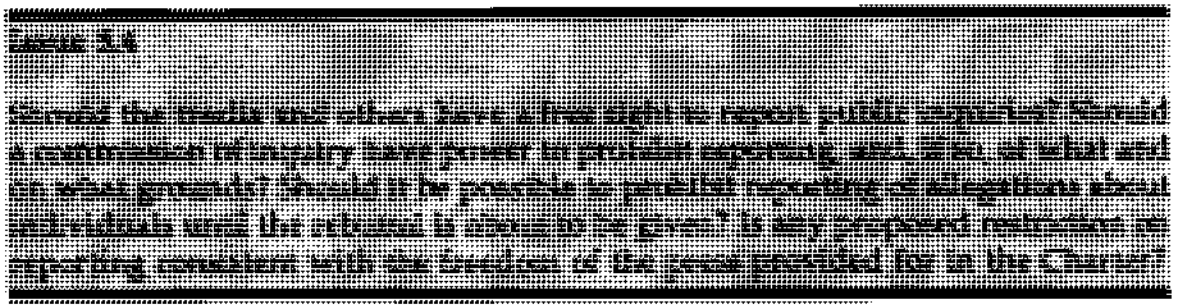
106 LRCC draft act, s. 12(1).

107 *Supra*, note 39 at 38.



E. Establishing Rules of Procedure

The Alberta act is silent about the procedure to be followed by public inquiries. The Ontario[108] and Northwest Territories[109] acts provide that, subject to certain limitations, a commission may set its own rules of procedure. The Yukon Territory[110] act says that the Commissioner in Executive Council may make regulations respecting the procedures governing an inquiry.

Little is said anywhere about the procedure of a public inquiry, except through such provisions as the right to counsel, public hearings, and the requirement that a person against whom an allegation is to be made must have notice and an opportunity to rebut it.

Section 3 of the LRCC's draft act would require a commission to establish and publish its rules of practice and procedure. The section does not say anything about what the rules should be. It is intended to produce efficiency and guidance for the public in dealing with the commission. It would also promote fairness, as fairness is advanced by telling people the rules under which they are required to operate. The LRCC draft act does not say whether or how the requirement can be enforced, but such a requirement might give rise to a mandamus, and failure to observe it might give grounds for judicial review.

In the case of investigatory commissions, it seems that there is a fairly well-known procedure involving: (a) an *in camera* review of prospective oral and documentary evidence, one purpose of which is to cut out evidence that will

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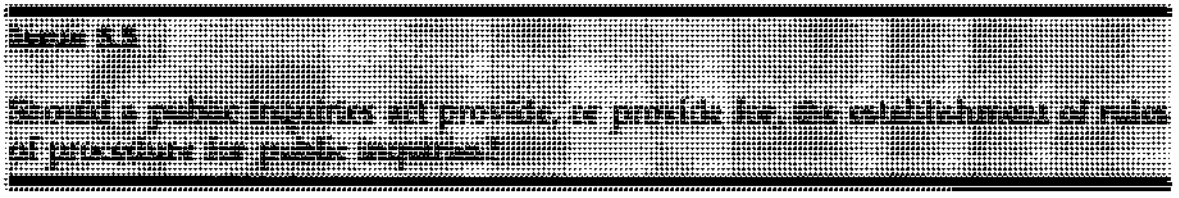
108 S. 3.

109 S. 5(1).

110 S. 7(c).

damage individuals or the public interest; (b) a hearing in an open forum, at which commission counsel organizes the presentation of evidence, examines all witnesses (except, sometimes, a party affected, who may be examined by their own lawyer), and presents summations of evidence and argument, and (c) the report.[111] The 1966 U.K. Salmon Commission thought that a preliminary meeting should be held, at which the terms of reference are read and interpreted and the extent of the intended lines of inquiry given, as well as explanations of the duties of counsel and interest persons and order of speeches, and indications of the allegations to be investigated.

There does not seem to be any point in providing statutory or prescribed rules of procedure, as the kinds of inquiries are so diverse that it would be difficult to provide sensible rules for them all. The 1966 U.K. Salmon Commission specifically said this,[112] and it said also that rules would necessarily be detailed and rigid, so that anyone who wished to obstruct the proceedings of a tribunal would be able to take advantage of any technical breach of the rules and could bring alleged breaches up for judicial review, thereby delaying or frustrating the tribunal. The Commission thought that the general principles that it laid down in its report were sufficient.



F. The Commission's Report

A commission of inquiry conducts an inquiry, usually in public. Under section 1 of the Alberta act a commission is to make an inquiry "and to report on it". It does not say specifically whom the report is to be made to or what is to be done with it. A commission normally delivers its report to the Lieutenant Governor in Council, and it is usually left to the Government to decide whether or not to make it public. Section 14 of the British Columbia act provides that a

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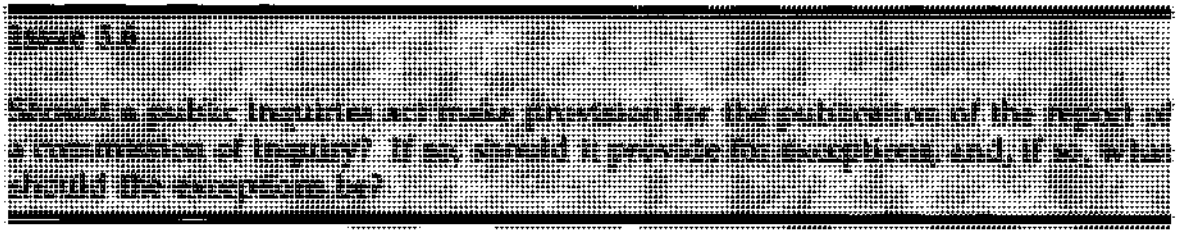
111 See remarks of Mr. Justice Estey, *supra*, note 29 at 212-15. See also, at length, Anthony and Lucas, *supra*, note 98.

112 *Supra*, note 39 at 28.

report made to the Lieutenant Governor must be laid before the Legislative Assembly within 15 days or within 15 days after the opening of the next session.

Mr. Justice Estey[113] has said that "the one thing the commissioner has to have is the right to print his own report, to time the release of his own report and to declare when it is released. The only time you can get this right is when you are being appointed, and they are anxious to get you appointed and get you going. Your bargaining power is great then; it is nil later". The implication is that if a commission does not bargain for the right to publish it has no such right.

Others have said in one way or another that reports should be published.[114] Section 13 of the Law Reform Commission of Canada's draft act provides that a commission "shall submit its report to the Governor in Council and shall publish it within thirty days of its submission unless the Governor in Council otherwise directs". This does not provide a budget, but it does provide for making the report public unless the Governor in Council is willing to accept the political cost of making a formal direction that it be kept private.



113 *Supra*, note 29 at 214-15.

114 See, e.g., Public and Administrative Law Reform Committee (NZ), Commissions of Inquiry, Wellington 1982 at 32: publish unless terms of reference in special circumstances say otherwise; Le Dain, *supra*, note 49 at 80: publish, once government has decided upon a *public* inquiry; Hallett, *supra*, note 26 at 301-08: inquiries should be used only when of such public importance that it is imperative that a report be published.

CHAPTER 6 — PROTECTION OF RIGHTS OF INDIVIDUALS

A. Introduction

This chapter discusses the protection of the rights of individuals in the course of a public inquiry. It deals with competing policy considerations. One is that the state or the public has an interest in having an effective investigation. The other is that both the public and individuals have an interest in ensuring that individuals affected by a public inquiry receive fair treatment.

A commission of inquiry is not a court. Court processes are not designed to result in policy decisions and would not usually make a useful contribution to policy decisions. Criminal court processes are designed to deal with specific charges of wrongdoing brought by public officials after thorough investigation of specific allegations; the investigatory inquiry process is usually called upon to deal with much more amorphous situations in which clouds of conflicting allegations and suspicions must be worked through. An inquiry can be useful when it is not known that wrongdoing has actually occurred and when there is no criminal case to be made against anyone on the known facts. It can unravel long and tangled courses of events. It can use a procedure that is more inquisitorial than is court procedure, and it can get at truth that the adversarial system cannot reach. To require public inquiries to follow court-like procedures would reduce their usefulness.

On the other hand, the inquiry process often has serious consequences for individuals caught up in it, whether as witnesses or as persons under investigation. It is true that a commission of inquiry makes no final or binding determinations and therefore does not affect legal rights in the area inquired into, but it is equally true that an adverse finding by a highly regarded commission may devastate a person's reputation or career. A commission's report may form the basis for serious criminal charges or of civil liability. The publicity surrounding hearings and report may make it difficult for an individual accused of a crime to be given a fair trial. The possibility, and in many cases the actuality, of such effects are strong reasons for protecting individual rights and interests.

Circumstances vary widely. To have required the MacDonald Royal Commission on the Economic Union, for example, to have acted only on facts proved by admissible evidence in proceedings guided by the rules of natural justice would have been harmful and ludicrous. On the other hand, for the

McDonald Commission into certain activities of the RCMP to have proceeded without regard to the rights of individuals to be heard would have been highly oppressive.

We turn now to a review of devices which are or may be used for the protection of individuals affected by public inquiries.

B. Fairness

(1) The Doctrine of Fairness

In *Cardinal and Oswald* v. *Director of Kent Institution*[115] Justice Le Dain, speaking for the Supreme Court of Canada, said this:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

Fair procedure has a number of elements. It includes the right to hear the case against one and the right to respond to that case. It includes the right to counsel. It includes the right to an unbiased arbiter.

Its content is variable and depends on the circumstances of each case. At one end of the range, a generalized duty of fairness applies to decisions which are purely administrative. These tend to be decisions regarding privileges (an example would be the granting of a driver's licence) rather than decisions which involve an individual's legal rights. At the other end, the rules of "natural justice" developed by the courts for court proceedings apply to decisions which resemble those made by courts.[116]

The rules of natural justice are based on the same principles as the duty of fairness. In their application to the courts, the rules of natural justice came to require certain specific procedures, though even these requirements can vary with

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115 [1985] 2 S.C.R. 643 at 653.

116 *Re Nicholson and the Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602.

the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject of the inquiry.[117] For tribunals which are not courts, the fairness principle is more flexible. A general duty of fairness involves "something less than the procedural protection of the traditional natural justice",[118] or "compliance with only some of the principles of natural justice".[119] But, whether it is a question of general fairness or of natural justice, the test is that described Chief Justice Dickson in *Martineau*.[120]

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?

In addition, any modern discussion of fair procedure must also include consideration of the rights guaranteed by the Canadian Charter of Rights and Freedoms, particularly sections 7 through 14 ("Legal Rights").

(2) Application of a Duty of Fairness to Public Inquiries

The requirements of fair procedure can apply to investigatory bodies. In *Nicholson*,[121] the Supreme Court of Canada adopted the rule enunciated by Lord Denning M.R. in *Selvarajan* v. *Race Relations Board*:[122]

> . . . that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and the report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

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117 Per Tucker, L.J. in *Russell* v. *Duke of Norfolk*, [1979] 1 All E.R. 109 at 113.

118 Chief Justice Laskin in *Nicholson, supra*, note 116 at 324.

119 Dickson C.J. in *Martineau, supra*, note 116 at 630.

120 *Supra*, note 116 at 631.

121 *Supra*, note 116.

122 [1976] 1 All E.R. 12.

Since commissions of inquiry are non-legislative bodies working under statutory authority, it is likely that they would be held to fall within the criteria in *Martineau*[123] and *Cardinal and Oswald;*[124] they have a duty of fairness wherever their decisions affect the rights, interests or privileges of an individual. An investigatory inquiry into a person's conduct, or an inquiry which makes use of coercive powers, clearly affects individual rights and is subject to the requirement of a high level of procedural fairness.

What about a predominantly advisory inquiry? If a government accepts and acts upon the policy recommendations of such an inquiry, it may make policy, regulatory or legislative changes that will have a direct bearing on the economic interests and possibly even the person liberty of many individuals.

In 1979, Gordon F. Henderson, Q.C. said this in the course of a discussion of the right to be heard and the right to confront:[125]

> The abuse of technique of investigation that arises from private investigation of the commissioner or by the so-called "research reports" of experts or deputed persons and even counsel raises more acutely the right to be heard and to confront. There is no test of challenge respecting evidence, veracity and credibility that can be mounted without challenging, at the same time, the competence or integrity of the commissioner or expert staff member of the commission. If the commission was established simply to determine facts for the purposes of developing policy of the government, such, as, for instance, the B & B Commission or the Canadian Unity Commission, there would not be much concern on the right to be heard or right to confront. But even in certain cases where policy, in the broad sense, is to be determined, the consequential adoption of a specific policy may affect persons or groups of persons so as to militate against accepting private investigation or experts' or counsel's reports without any opportunity to challenge them. For instance, the report of a commission respecting certain tax policy issues has an immediate and direct impact on certain taxpayers. Reliance on an expert's report, without an opportunity to challenge it may not be, in the true sense, fair. A report, for instance by certain bodies such as the Anti-Dumping Tribunal and the Clothing and Textile Board may for the basis of a restrictive policy on import. The adoption by the

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123 *Supra*, note 116.

124 *Supra*, note 115.

125 *Supra*, note 2 at 522.

government of such policy clearly affects the property rights or business of a number of people.

A contrary view would be that, except where individual conduct, freedom to act, reputation or personal liberty is concerned, it is neither practicable or desirable to require a commission of inquiry to adhere to a standard of fairness prescribed for tribunals that affect them. The report of a commission of inquiry dealing with taxes may affect many, or even all, taxpayers and a report leading to a change in anti-dumping regulations may affect a whole industry in Canada and its counterpart in the United States: it may be impractical to try to allow every one a fair right to be heard. And it may not be desirable, if it is practical, to say that a judicially acceptable process must be gone through before an adviser to government can give its advice: no such requirement is made of other advisers in the public or in the private sector unless they are exercising powers which directly impinge upon individuals.

There do not appear to be any decisions that have applied the requirements of fairness to an inquiry under a public inquiries act. However, the Supreme Court of Canada applied the doctrine to an investigation under the *Combines Investigation Act* in *Irvine* v. *Restrictive Trade Practices Commission*[126] although the investigation resulted only in a report and recommendations, and the Quebec Court of Appeal held that the rules of natural justice applied in a case in which a commission had the powers of a commission of inquiry under the Quebec act.[127]

In the Quebec case, a commission of inquiry was appointed under the *Act respecting Labour Relations in the Construction Industry (Quebec)*, which conferred on the commission the powers of a commission of inquiry. The court said that because the commission had the power to compel witnesses and order production of documents, it exercised quasi-judicial powers and must respect the rules of natural justice. It could not hold *in camera* hearings because the appellant, whose conduct was being investigated, had a right to be present and represented by counsel at all hearings and to know the evidence presented against it in order to respond; transcripts of evidence were not enough.

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126 [1987] 1 S.C.R. 181.

127 *Fraternite inter-provinciale des ouvriers en electricite* v. *Office de la construction du Quebec* (1983), 148 D.L.R. (3d) 626.

It appears that commissions of inquiry that are established to investigate the conduct of individuals must follow fair procedures and that commissions of inquiry that exercise coercive powers must do the same.

C. Specific Protections

(1) The Right to Know the Case Against One

(a) Receiving evidence in the absence of person involved

Some of the provincial public inquiry acts (although not Alberta's) provide that a commission may hold part of its hearings *in camera* if it believes this to be necessary. According to *Fraternite inter-provinciale des ouvriers en electricite* v. *Office de la construction du Quebec*,[128] a commission cannot hear witnesses in the absence of a person whose conduct is being investigated, because doing so abrogates the person's right to know the case against them. It should be noted that the decision might make it impossible to keep the identity of informants confidential, and that giving evidence *in camera* on sensitive matters may better encourage honesty and full disclosure by the witness, and is therefore a useful tool for a commission. Here, as elsewhere, there is a question of balancing the interests involved.

There is no rigid rule that all materials must be disclosed to a person whose interests are involved in an inquiry. For example, in *Re Abel and Penetanguishene Mental Health Centre*,[129] the court said that the chairman of the Advisory Review Board had a discretion as to whether to release the records of psychiatric patients to the patients' counsel. However, in most cases fairness would require that at least an adequate summary be provided to the person concerned, and it may well require complete disclosure.

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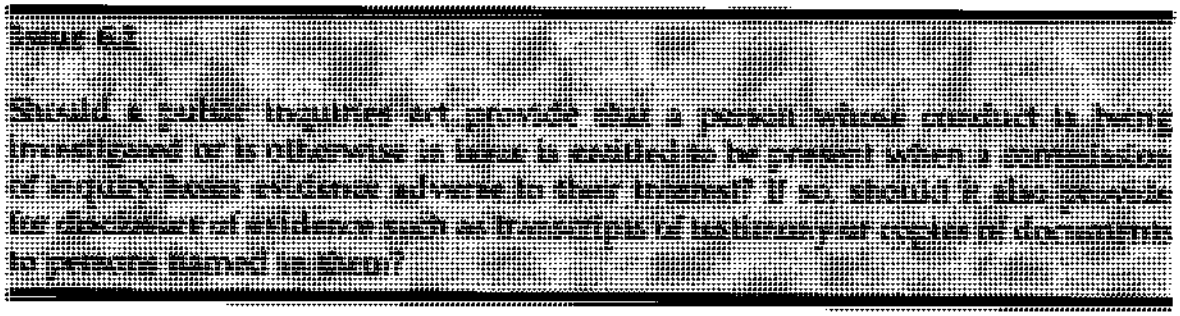
128 *Supra*, note 127.

129 (1979), 97 D.L.R. (3d) 904 (Ont. C.A.).

One would think that similar reasoning would apply to the receipt of documentary evidence. If it is going to affect the commission's view of the facts, it seems that fairness would require its disclosure to a person whose conduct may be the subject of adverse findings or comment. In *Re Napoli and Workers' Compensation Board*,[130] Chief Justice Nemetz said that the rules of natural justice apply to hearings before the Workers' Compensation Board. The claimant has the right to know the case against them, and therefore the Board must disclose the full contents of its file relating to the claimant and not merely provide summaries. There is, however, an indication that had the summaries not been woefully inadequate, the decision might have been different. The Chief Justice said (at page 185), "it is instructive to read the summary when one assesses whether it constitutes a proper means of disclosing to Napoli the case made against him. I need only quote a few items from this summary to indicate its inadequacies." If a court decides that a particular inquiry is quasi-judicial in nature, it is likely to require full disclosure of documentary evidence. A less stringent requirement of general fairness may be satisfied by the production of adequate summaries rather than copies of the documents.



(b) Notice of allegations

The 1966 U.K. Salmon Commission[131] thought that before any person involved is called as a witness they should be informed of any allegations which are made against them and of the substance of the evidence in support of the allegations. This could cause substantial administrative difficulties, and might

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130 (1981), 126 D.L.R. (3d) 179 (B.C.C.A.)

131 *Supra*, note 39.

invalidate an inquiry for no good reason.[132] An alternative is to leave this point to be dealt with as a matter of fairness: if fairness requires that the witness be informed, then the witness should be informed. If it does not, there is no duty to inform.

Section 12 of the Alberta act, prohibits a commission of inquiry from alleging misconduct by any person "unless 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 . . .". The federal, British Columbia, Ontario, Prince Edward Island and Northwest Territories acts have similar provisions (though the British Columbia provision applies only to ministerial inquiries), but the Alberta provision is the most precise in its requirements and requires the most extensive opportunity of rebuttal of the adverse case.

David W. Scott, Q.C.[133] characterized the Canada section and its provincial counterparts as "simple in their language but difficult to manage in practice", and said that "there is a universal plea for amendment to this clumsy statutory arrangement". He said that if reasonable notice is given during the inquiry, either by specifics in the terms of reference or by allegations during its course, and if the person responded and met the allegations, nothing further is needed. If notice is given before the report (presumably he meant after the closing of the hearings), the opportunity to be heard will be illusory because the commission will have identified the allegations and might be said to have effectively made up its mind; and if notice is given after hearing argument, the same may be said. Ideally, the commission should not give the notice. "It should probably be given privately by commission counsel anticipating all possible findings of misconduct which the commission might make. Further notice can be given if the draft report suggests additional findings of misconduct".

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132 In *Re Pergamon Press Ltd.* (1971), 1 Ch. 388, 400, Lord Denning thought that giving notice was going too far. The only rule is that an investigating body must be fair. Lord Denning also said that the tribunal otherwise is master of its own procedure.

133 *Supra*, note 97 at 143-45.

Mr. Justice Estey's remarks to the same conference[134] certainly indicate that the provision is hard to cope with, but he did not suggest that it could not or should not be coped with. He said:

> Where you have a large scale record and a long hearing, it is very difficult to single out what it is that might find its way into your report. Of course, you can wait until you draft the report. That strikes me as being very unfair. You crystallize your thinking before you hear what the object of your report thinks about that point. The compromise which I "stumbled upon" is to instruct commission counsel to prepare their summation on the issues in a neutral way, a genuinely neutral way, where the pros and the cons are both given equal time and set out in writing, and that document is presented to all the participating counsel and any other participant who wanted to have it direct instead of through a lawyer.

The difficulties in complying with the notice requirement are inherent in the nature of things. Principle requires that a person should have a chance to rebut charges before those charges are adopted as findings in a report that is likely to be published and that may well be the foundation for further criminal or civil proceedings. Only the commission can tell what the commission is likely to say. But it is only when the commission has formed some idea in its mind that it can forecast what it is likely to say, and by then, there is a danger that, having formed the idea, the commission has made up its mind when, *ex hypothesi*, it cannot have heard from the person involved.

The catch 22 is avoided by having commission counsel outline everything that might be said which would reflect upon a person affected. This is not perfect, because commission counsel is the commission's counsel, and an idea about what the commission might do that has been formed in commission counsel's mind may well be an idea that has also been formed in the commission's mind. But, given the conflict between the right to know the case against one and the fact that it is not known what the allegation is likely to be until the commission has finished its inquiry, it seems to be the best that can be done, and it also seems to us that it is good enough. However, comment is solicited as to whether there is a better way.

Mr. Justice Estey went on to discuss another practical point: if it is known that a commission has given a notice to a person under one of the notice sections,

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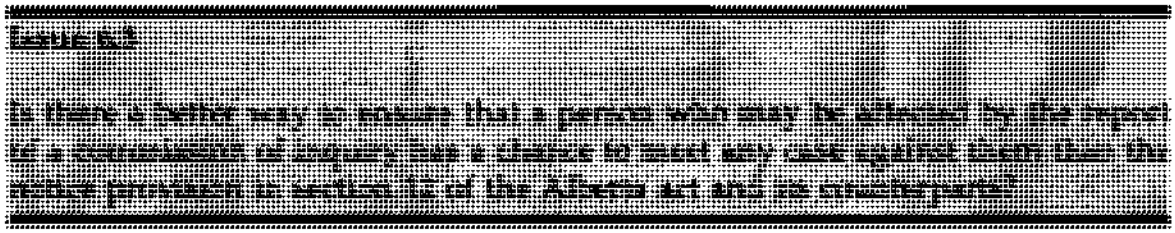
134 *Supra*, note 29 at 212-13.

that is news, because it indicates that the commission has in mind making an adverse finding. He said:

> The purpose [of having commission counsel make a summation] was that when summation was delivered, plus the summary of evidence prepared also in a neutral fashion by counsel, it was possible for people who might fear an adverse report, or comment adverse to their interest in the report, to come forward and say, "is that the notice?" or "I waive notice." Now the reason they waive notice is that once you give out notice that there is going to be something adverse to Mr. A. or Mrs. B. that is all the media really broadcasts. It is all over the place.

If the mere fact of the notice may do such great damage that people are anxious to waive it, it does seem that some way should be found to give involved persons notice of the case against them without the opprobrium of the formal notice, if it is practicable to do so.



(2) The Right to Respond: Testifying, Calling Witnesses and Cross-examining Other Witnesses

Fairness requires that a person whose conduct is attacked be given a chance to respond to the attack. The minimum requirement is that the person be allowed to tell their story by way of oral testimony. A more ample requirement would be that the person be allowed to call evidence and to cross-examine witnesses.

Section 11 of the Alberta act gives any *witness* who believes that his interests may be adversely affected an absolute right to give evidence on the matter. It gives a similar right to any other person who satisfies the commission that evidence given may adversely affect their interests. It also gives the commission a discretion to allow an adversely affected person to call and examine or cross-examine witnesses.

The Ontario and Northwest Territories acts require a commission to allow a person to give evidence and to call and examine or cross-examine witnesses if the person satisfies the commission that they have a substantial and direct interest in the subject-matter of the inquiry. This provision is narrower that the Alberta provision in that a witness does not have a right to testify on a subject on the basis of the witness's subjective belief that an adverse effect may follow, but it is broader in that, once a person has satisfied the commission that the person has a substantial and direct interest, the person has a right to testify, to call witnesses and to cross-examine and is not dependent upon an exercise of discretion. The other provincial acts and the Canada act are silent on the point.

The LRCC's proposals would give to any person against whom misconduct has been alleged the right to call witnesses, no matter whether the inquiry is investigatory or advisory. It would give the right to be heard to anyone who satisfies an advisory commission that they have a real interest in any matter relating to its mandate and to anyone who complains to an investigatory commission that testimony may adversely affect their interests.[135]

It seems desirable that a person whose interests are significantly affected should have the right to give testimony. One question that arises is whether it is practicable to allow, say, everyone whose interests will be affected by a change in the structure of the economic union, to appear as of right. Another question is whether it is the person or the commission who should be allowed to decide whether the person's interests are affected to a significant enough level to justify testifying. It is more protective of individual rights to allow the individual to decide. The contrary argument is that the commission, so that it can carry on its inquiry properly, should have the power to determine who is to be able to give evidence, subject to a requirement of fairness that will ensure that it hears those who will really be affected.

Generally speaking, it is clear that a person whose conduct is under investigation should have the right to participate more fully in the proceedings, that is, the person should be able to require that witnesses be called. The arguments in favour of allowing a person to participate fully on the mere grounds of their own subjective belief that their interests are affected are less cogent, but they can be made. The opposing argument is that a commission must be able to screen out persons who do not have a legitimate interest in participating fully.

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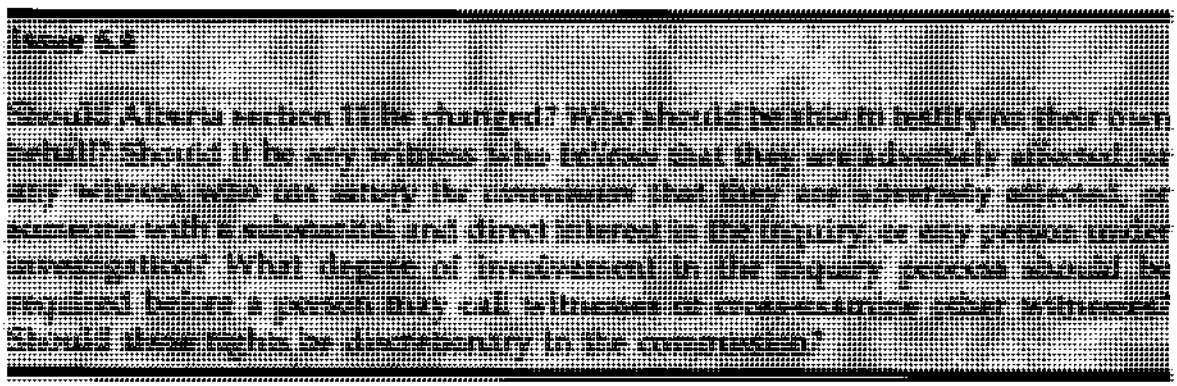
135 LRCC draft Act, ss 4(2); 11(1); and 15.

The right to cross-examine should normally go with the right to participate. However, there may be different ways of obtaining the truth in an inquisitorial proceeding. The important thing is to provide an adequate and effective method of controverting the evidence being presented against one.

The Alberta Appellate Decision's reasons for judgment in *Re County of Strathcona No. 20* v. *McLab Enterprises*[136] are instructive. At a hearing before the Provincial Planning Board, the chairman ruled that all questions for cross-examination must be channelled through him. He stopped enforcing this ruling part way through the hearing. From then on both sides cross-examined fully.

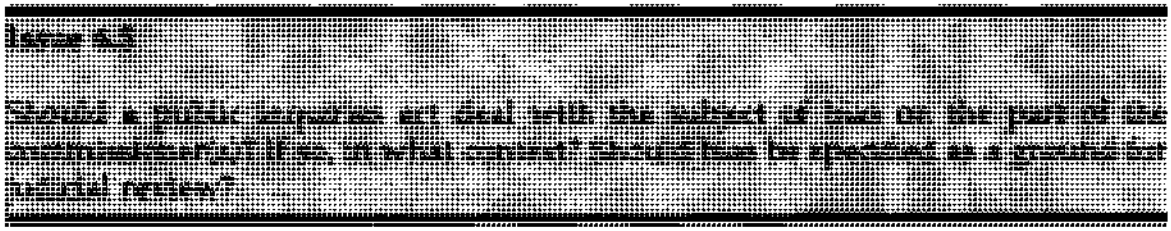
The Appellate Division said that there had been no substantial denial of natural justice. First, the one witness who had not been fully cross-examined by the county could have been recalled. More important, cross-examination is not the only way to fulfil the requirements of natural justice. The person must be afforded an equally effective method of answering the case against him—must be given a "fair opportunity to correct or controvert any relevant statement brought forward to this prejudice". The court then roundly condemned the chairman's original ruling. They said, "Although cross-examination is but one of the ways of making full answer and defence, in certain cases it is the best, sometimes the only, weapon in the armory of counsel. To make such a ruling without regard to the type of evidence that may thereafter be adduced is to invite the charge that natural justice has been denied".



136 (1971), 20 D.L.R. (3d) 200 (Alta. App. Div.).

(3) An Unbiased Arbiter

In 1978, Cattanach J. said that common law standards of bias do not apply to a public inquiry because a fact-finding advisory body is different from a court.[137] Without addressing the merits of the case before him, he refused to impose a duty to act fairly, saying that any remedy for unfairness in this case should be political, not judicial. Shortly afterward, the Supreme Court of Canada issued its judgment in *Nicholson*.[138] Given the change in approach that occurred in that and subsequent cases, it is more than likely that a court today would hold that an investigatory commission must be unbiased in relation to persons whose conduct is under investigation.



(4) Right to Counsel

Section 10 of the Alberta act provides that any person appearing before a commission of inquiry may be represented by counsel. That appears to be an entitlement. The Yukon act also confers a right to be represented by counsel (or "agent"). The LRCC draft act would entitle any person who appears before a commission to be represented by counsel.

The British Columbia act (for ministerial inquiries only) and the Canada and Prince Edward Island acts give a discretion to a commission to allow any person whose conduct is being investigated to be represented by counsel. They go on to require a commission to allow any person against whom a charge is made in the course of the investigation to be represented by counsel. They do not say whether or not the requirement applies only if the charge is being made by the commission. The other provincial statutes are silent on the point.

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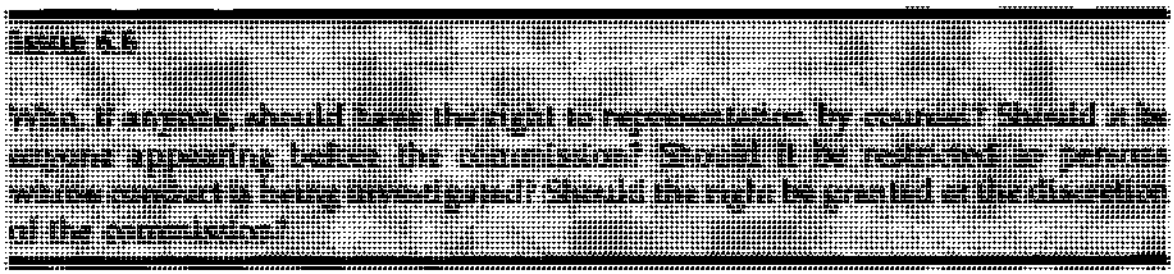
137 *Re Copeland and McDonald* (1978), 42 C.C.C. (2d) 334 (F.C.T.D.).

138 *Supra*, note 116.

It is clear that any person who is compelled to testify before a commission of inquiry should be entitled to be advised by counsel about the testimony, and that counsel should be entitled to be present and to be heard while the person is testifying. A person who is subjected to the coercive power of the state should have access to legal advice to ensure that their rights are respected.

It seems clear, also, that a person whose conduct is being investigated by a commission of inquiry should be entitled to be participate fully in the proceedings. The person should be entitled to be represented by counsel, at least during any portion of the proceedings that is likely to affect the person's interests, and counsel should be entitled to be heard.

A person may become the subject of investigation during the course of the inquiry, even though they were not formally named in the order in council. Fairness may require that the person be allowed to be represented. The facts of the case, and the degree of likelihood that the person's interests will be significantly affected will dictate what is fair. On the other hand, if too many persons are allowed to participate in the proceedings of an inquiry in much the same manner as if they were parties to a lawsuit, the cost and delay involved in the proceedings may well escalate to an extent much greater than is justified by the risk of injury to those involved.



(5) Cost of Participation and Representation

If there is a right to counsel, an important question is: who should pay for counsel? Usually, a public inquiry is established for public purposes. Should the public not pay the whole cost, including the cost of legal advice and representation for those caught up in the inquiry? The public may well feel that paying the costs of someone who may turn out to be a wrongdoer is unjustified. However, strong arguments can be made for an affirmative answer. The first is that cost should not be imposed on private individuals for the public benefit that is obtained from a public inquiry. The second is that the right to counsel is

fundamental to the protection of the rights of individuals caught up in an inquiry, but that it is an illusory right for an individual who cannot pay counsel. This is particularly likely in the case of persons whose conduct is investigated in lengthy inquiries.

There are dangers in the public funding of counsel. One is that costs will be run up which, considered against the protection required, are unjustified. Another is that the hearings will get out of hand because there are too many participants.

The following remarks by Mr. Justice Estey[139] describe the problems:

> Lets' take a practical, absolute, exact illustration. We have two banks that went into receivership and the management of the bank, of course, were in the line of fire for actions by debtors, creditors, boards of directors, shareholders, auditors, inspectors of banks and the federal insurance corporation. So they had to have legal advisors. We, therefore, had to sit down with them one at a time and work out how many witnesses we wanted to hear, which parties we were interested in and who their lawyers were. We had to bring them in and decide how much we would pay them. Now, that is a little risky because the arbiter should not be telling the defendant, the accused, how much of a lawyer he can buy. So we used the department of justice and they worked as a kind of a taxing master or taxing officers as we have over in Osgoode Hall. We set the scale on how much and how long and we had funny little rules. They could not bring their law student if they think we were going to pay him. They could bring them if they wanted. And they could not have an assistant unless we thought the issue was important enough at that time. We paid out some money, but I think that tomorrow or the next day, that is going to become such a great factor that we might make the institution of the commission of inquiry into the dinosaur of our legal institutions. They will just become prohibitively expensive, too invasive and, therefore, too expensive.
>
> Well, that is enough of that. I do not want to leave the impression, however, that we could operate the inquiry without lawyers. The amount of blood on the walls would just be hopelessly irremovable and damage to the public, at large and in particular, irreparable and life-long. The law profession in its highest role finds itself involved in this constant, increasing, escalating battle between the state and the citizen. It manifests itself in the inquiry as clearly as it does

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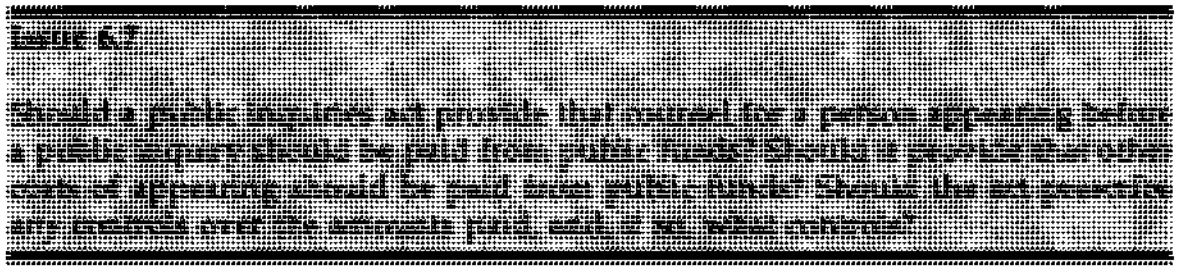
139 *Supra*, note 29 at 213.

> anywhere. The state is represented by that inquiry and the citizen is caught up in the laws of it. Those citizens have to have equal protection.

The cost of counsel may not be the only cost that must be incurred if a person caught up in a public inquiry is to be able to protect their interests. They may need the advice and testimony of experts. They may have to buy transcripts of evidence or incur other out of pocket expenses. Payment of all these expenses may be necessary to enable the person to protect their rights effectively.



(6) Right to Examination by Own Counsel

A question to which some importance has at least occasionally been attached is whether a witness who gives evidence in a public inquiry, at least if their interests are likely to be affected by the inquiry, is entitled to have their evidence brought out through examination by their own lawyer rather than by commission counsel.

An affirmative argument in principle can be made. It is assumed here that a person whose interests are likely to be affected has a right to be heard, or a right to give evidence, or something of that kind.[140] That should mean that the person is entitled to give the evidence that that person wants to give and not the evidence that someone else, such as commission counsel, thinks that they should give. But if commission counsel asks the questions, commission counsel controls the scope of the evidence. Although commission counsel will probably cover what the affected person wants covered, a practical likelihood of that kind is not the same as allowing the person, themself or through their own lawyer, to control the evidence to be given (subject to the commission's power to control irrelevancies). There may also be a proper psychological advantage to giving evidence under

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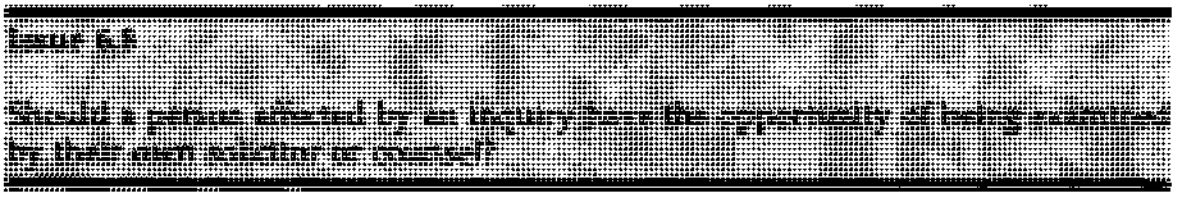
[140] See, e.g., s. 11 of the Alberta act.

friendly questioning, even though the witness will later be exposed to unfriendly fire from others.

The 1966 U.K. Salmon Commission thought that a person being investigated "should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry". The Ontario Court of Appeal took much the same view in *Re Public Inquiries Act and Shulman*.[141] The Court held that Dr. Shulman was a "person affected" because the inquiry was based on his allegations about official conduct and he would be discredited if those allegations were shown to be unfounded. It held that he should therefore be accorded the privilege of being examined by his own counsel rather than commission counsel. The decision was based on section 6 of the Ontario statute as it then stood, which allowed the court to review the exercise of a commission's discretion; the Alberta act does not contain a similar provision. The decision does, however, express an appellate court's view of how a public inquiry should be conducted.

It should be noted that Chief Justice Laycraft, in the *Royal American Shows* report,[142] 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 the evidence in every case. He did, however, invite a witness's counsel to adduce any further direct evidence, and this may be a partial or even complete answer to the witness's right to give the testimony he wants to give. Mr. Justice Estey[143] has said that the exception to the examination of all witnesses by commission counsel "is where the witness asks to be examined by his own counsel and no apparent harm or delay would be caused by that. Then, you grant that request".



141 (1967), 63 D.L.R. (2d) 578 (Ont. C.A.).

142 *Supra*, note 88 at A-6 and A-7.

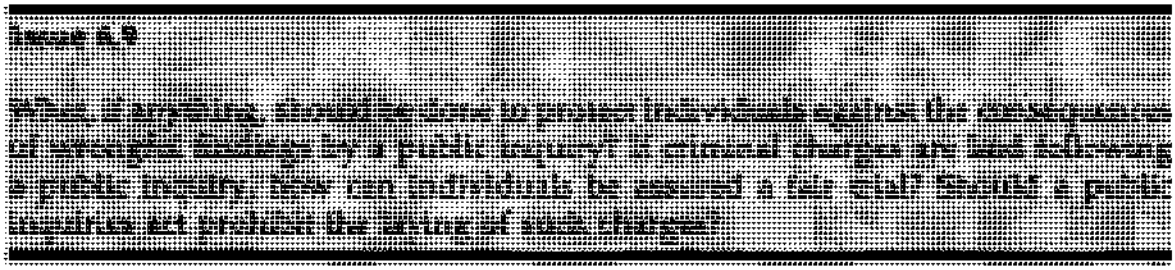
143 *Supra*, note 29 at 212.

(7) Double Jeopardy and Fair Trial

The publicity given to the evidence in a public inquiry and the credibility of a commission's findings may make it difficult or impossible for a person named by a commission as a wrongdoer to be given a fair trial on later criminal charges. If no criminal charge is laid, the same things may brand the person as a wrongdoer with no chance of clearing their name. As public inquiries are not held to the same standards of proof or the same rules of evidence and procedure as courts, the possibility exists that a person may be wrongly convicted, whether in law or in public opinion, of wrongdoing.

Exposure to a public inquiry followed by a criminal charge can be argued to be a form of double jeopardy. However, a public inquiry is not criminal in nature and does not have true penal consequences. Therefore, under *R.* v. *Wigglesworth*,[144] a person charged with a criminal offence after being investigated in a public inquiry cannot claim the protection of section 11(h) of the Charter against double jeopardy.

Arguments can be advanced that there is nothing that a public inquiries act can do about the problem. There is no way in which the potential of public inquiries to affect the fairness of later criminal trials, or to subject an individual to what is likely to be felt as two punitive proceedings, can be eliminated, except by not having investigatory public inquiries or by not allowing a prosecution after an investigatory public inquiry.[145] The public benefit cannot be obtained without imposing some private burden. The most that public inquiry legislation can do is to provide for fair procedures and for their control by judicial review.



144 [1988] 1 W.W.R. 193 (S.C.C.).

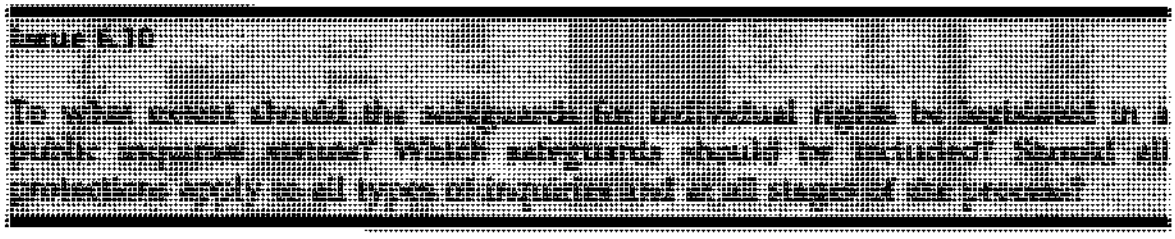
145 See the views of Professor Ratushny, *supra*, note 25.

D. Legislation of Protections

The question here is whether and when legislation is the appropriate device to provide the protections which the previous discussion identifies as necessary or desirable. On the one hand, there are strong elements of public policy involved, and it seems undesirable to leave the development and implementation of that policy entirely to the courts, however happy the development of the doctrine of fairness has been. On the other hand, given the speed with which judicial development is taking place, it may be undesirable to confine that development by the relatively inflexible hand of legislation.

As noted above, the acts already confer some protections. Section 10 of the Alberta act deals with the right to counsel; section 11 deals with the right to testify and to call witnesses; and section 12 provides that before the commission's report is made, notice of allegations of misconduct must be given to any person named in the report and the person must have a chance to respond. In addition, section 6(2) of the *Alberta Evidence Act* confers a privilege against the use of the testimony of a person in one proceeding to incriminate that person in another proceeding, and section 13 of the Charter also confers that protection. The Charter may confer other protections, depending on how the courts ultimately view sections 7 and 8. The situation in other provinces and in the territories is similar.

There seems to be no reason to discontinue the protections already legislated. The principal question seems to be whether others should be legislated, in particular, the right to be treated fairly, or whether they are best left to the courts.



CHAPTER 7 — JUDICIAL REVIEW

A. Introduction

The term "judicial review" now includes any process by which a court reviews the decision of another body in order to see whether the decision should be set aside, declared invalid, or changed. It includes the use of orders in the nature of the prerogative writs of certiorari to set aside a decision, prohibition to stop a body from continuing its processes, and mandamus to order a body to do its duty. It also includes hearing a statutory appeal from another body, or considering a decision of another body under a statutory procedure such as a stated case. It sometimes includes the use of a declaration of invalidity.

A commission of inquiry does not make decisions about the subject matter of the inquiry which are binding upon anyone. It merely forms opinions as to facts and (usually) makes recommendations. It therefore does not fit into the traditional categories of inferior tribunals which are subject to certiorari or prohibition, and it does not have powers which would traditionally subject it to mandamus. The traditional view has been that public inquiries are not subject to judicial review. The acts are usually silent on the subject.[146]

Few would argue that the proposals of an advisory public inquiry should be subject to judicial review. Even if, for example, implementing a recommendation of an advisory commission for a free trade agreement with the United States will affect the economic interests of those previously protected by tariffs, there is no reason to have the commission's recommendation reviewed by the courts. This would be true even if the inquiry had been established for another purpose and the commission had not be asked for its opinion about free trade. The questions addressed by the commission are questions of public policy; the Government has asked for advice; and it is for the Government and not the courts to decide what should be done about the advice that the commission gives.

However, as has been noted frequently above, a public inquiry into the conduct of individuals, even though the recommendations of the commission of inquiry are not binding, can do specific damage to reputations and careers and prejudice criminal trials. It can be argued that the law should protect an

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[146] See, however, the Manitoba and Ontario stated case procedures which are discussed below.

individual so that such specific individual consequences will be imposed only after due process by a tribunal acting within its jurisdiction. It can be argued further that the only way for the law to implement such protection is to allow the traditional supervisor of administrative tribunals, the courts, to review what is done by a commission of inquiry and, where desirable, to correct it. The contrary arguments are that court supervision leads to cost and delay and resulting inefficiencies, and that it is commissions of inquiry and not the courts which the law has entrusted with carrying out public inquiries.

This chapter will describe the present legal situation and will discuss the issues.

B. When Judicial Review Applies

(1) General Limitation

Judicial review of a public inquiry is not available unless specific individual rights, privileges or interests are affected by the inquiry. The inquiry may affect rights, privileges and interests by investigating the conduct of an individual, by making a report about the conduct of an individual, or by applying coercive powers to an individual.

(2) The Public Inquiries Acts

The Manitoba and Ontario acts provide for judicial review by way of stated case.[147] In Manitoba the stated case goes to the Court of Appeal. In Ontario it goes to the Divisional Court.

At one time, both the Manitoba and Ontario provisions allowed the courts to review any decision or act of a commission of inquiry and substitute their own decision. The Ontario provision was later revised, and the Ontario Divisional Court is now limited to reviewing the decisions and acts of commissions for jurisdictional error only.[148]

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147 S. 95 of the Manitoba act and s. 6 of the Ontario act.

148 The difference between s. 5 of *The Public Inquiries Act*, R.S.O. 1970, c. 379 and s. 6 of R.S.O. 1980, c. 422 is made clear by *Re Bartolotti and Ministry of Housing* (1977), 15 O.R. (2d) 617 (C.A.).

None of the other public inquiries acts says anything about judicial review.

(3) Traditional View of the Courts

The traditional view of the courts was that commissions of inquiry are not subject to judicial review because public inquiries are not judicial proceedings and commissions do not make final decisions. The 1890 Supreme Court of Canada decision in *Re Godson and The City of Toronto*[149] appears to be the authoritative Canadian root of this view. Even in that case, however, a dissent pointed out that even though a commission cannot impose punishment or a sanction, its report can and sometimes does have serious consequences for individuals; the commission should therefore, in the dissenting view, be subject to review by the courts.

Despite the traditional view, courts have applied judicial review in exceptional cases. These will now be listed.

(4) Constitutionality of Inquiry

A province cannot establish a public inquiry into matters falling under the legislative jurisdiction of Parliament. If it does so, the commission of inquiry would be acting beyond its substantive jurisdiction, or jurisdiction in the "boundary" sense, in conducting the inquiry, and the courts will grant judicial review and strike down the inquiry.

In *Starr* v. *Houlden*,[150] the Supreme Court of Canada held that a province cannot create an inquiry that in substance serves as a substitute police investigation and preliminary inquiry with compellable accused in respect of a specific criminal offence.[151] The Supreme Court has recognized, however, that a province can create an inquiry, one aspect of which involves a field of federal jurisdiction, if the provincial aspect is predominant. A provincial investigation into organized crime is constitutionally proper, and so is a provincial investigation into the circumstances in which a prisoner sustained injuries, who inflicted them,

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149 (1891), 18 S.C.R. 36.

150 (1990), 68 D.L.R. (4th) 641 (S.C.C.).

151 See *Castle* v. *Brownridge*, [1990] 6 W.W.R. 354 (Sask. Q.B.) for a somewhat broader application of the constitutional bar.

and whether there were any irregularities in respect of a hearing under the provincial *Police Act*.[152]

The Alberta act recognizes the constitutional limitation on the powers of the province by authorizing inquiries only into matters within the jurisdiction of the Legislature.

The activities of a public inquiry may, as indicated elsewhere in this paper, infringe a Charter right. It is doubtful that the mere establishment of an inquiry would do so.

(5) Authority for Establishment of Inquiry

The Lieutenant Governor in Council can establish an inquiry under the Alberta act only if the act authorizes them to do so (though the act does not preclude the establishment of another kind of inquiry). The breadth of the power conferred by section 1 of the act is so great that it is unlikely that an public inquiry will be established that is not invalid on constitutional grounds but it beyond the powers conferred by the act, but the possibility exists. A commission of inquiry appointed under an invalid commission would be acting outside its jurisdiction, and a court would grant judicial review and strike down the inquiry.

(6) Terms of Reference

The power of the Lieutenant Governor in Council under the Alberta act is to appoint commissioners by commission to inquire into and report on a "matter" which satisfies certain conditions. That clearly implies that the "matter" must be defined by the Lieutenant Governor in Council and that the commission of inquiry has no power under the act to inquire into anything else or to do anything else. If the commission of inquiry goes beyond the terms of reference in the commission, it is therefore acting without jurisdiction, and the courts will grant judicial review with the appropriate remedy.

It seems also that the commission of appointment may impose conditions on how the commissioners to which they must conform and which confine their jurisdiction. An example of this is the terms of reference for the inquiry into the deaths of a number of children on the cardiac ward at the Toronto Hospital for

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[152] See *Keable, supra,* note 32 and *O'Hara, supra,* note 33.

Sick Children (the Nelles inquiry).[153] The commissioner was instructed to determine how the children met their deaths, but was forbidden to attach civil or criminal responsibility to any named person.

Through judicial review, the courts will confine a commission of inquiry to its terms of reference and prevent it from failing to conform to a limiting condition.

It should be noted that Gordon F. Henderson, Q.C., in his article in the Special Lectures of the Law Society of Upper Canada[154] was much concerned that terms of reference should be drawn with precision and clarity so that a commission of inquiry would be confined to a specific inquiry and not be allowed to become a roving inquisitor.

(7) Statutory Procedural Requirements

The public inquiries acts lay down some procedural requirements. An example is the requirement of section 12 of the Alberta act that a report must not allege misconduct unless the person involved has had notice of the allegation and an opportunity to rebut it. In *Landreville* v. *R.*,[155] the court gave a declaration that a finding of a commission of inquiry was invalid because the requisite notice and opportunity had not been given, so that the finding contravened the federal counterpart of section 12. A wrongful denial of standing would be another example. A failure to conform to such requirements would be corrected by a court under judicial review, since the failure would be a denial of a statutory right.

(8) Exceeding Powers

A commission of inquiry cannot exercise coercive powers unless they are conferred by the act, and it can exercise those powers only where the act says it can exercise them. Requiring a witness to breach an evidentiary privilege[156] or

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153 *Re Nelles and Grange* (1984), 9 D.L.R. (4th) 79.

154 *Supra*, note 2 at 502, 530.

155 (1973), F.C. 1223, 41 D.L.R. (3d) 573 (T.D.).

156 See, e.g., *Nova Scotia (Attorney General)* v. *Royal Commission (Marshall Inquiry)* (1989), 54 D.L.R. (4th) 153 (S.C.C.).

to give evidence which is not relevant are examples of attempts to exercise unauthorized coercive powers. A committal for contempt where there is no contempt power or on improper grounds would be another example. A commission of inquiry must stay within the framework of the powers granted to it by the statute and by the Lieutenant Governor in Council's commission that creates it, and a court will grant judicial review if the commission goes outside that framework.

(9) Lack of Procedural Fairness

Chapter 6 discussed at some length the question whether a commission of inquiry is under a duty of fairness to persons whose conduct is being investigated or against whom the commission's coercive powers are invoked. The general conclusion was that a commission of inquiry is under such a duty.

The doctrine of fairness, and the duty of fairness imposed on administrative bodies, are creatures of judicial review. If the duty exists, judicial review exists. It is not necessary to do more at this point than to reiterate that it appears that a commission of inquiry is under a duty of fairness to persons whose individual rights are affected, and that the courts will review the decisions and acts of public inquiries to see that the duty has been carried out. This is a recent development.

C. When and How Judicial Review Should Apply

(1) When, if Ever, a Commission of Inquiry Should be Subject to Judicial Review

The starting point of this discussion is that a public inquiry is established to give advice to the Government. The commission of inquiry is appointed to carry out the inquiry and provide the advice. There is no obvious reason why a court should be able to assess the correctness of the advice or to substitute other advice. Even if the advice is based upon versions of the facts that are not correct, that is not a matter for the courts. These are matters entirely for the commission of inquiry and the Government.

This is true even if action taken by the Government on the advice will have adverse effects on the economic or other interests of an individual or a group. The courts have nothing to do with government policy or with how government policy is arrived at. If the advice that a commission of inquiry gives to the

Government, or a decision that the Government makes after receiving the advice, is badly conceived, that is something for the political process, not the judicial process, to deal with.

Judicial review is for the protection of individuals against wrongful administrative processes. There is no reason to make it available unless specific interests of individuals are involved. The line between the effect on an individual's interests of an inquiry process that produces bad advice, on the one hand, and the effect on an individual of an inquiry process that itself impacts upon an individual's interests, on the other hand, may not always be easy to discern, but it is only the latter that discussions of judicial review have to do with.

It may be thought to follow from this that as a general matter a commission of inquiry which is primarily "advisory" should not be subject to judicial review. Note should, however, be taken of the view that fairness is required, even though a commission only gives policy advice, if the adoption of the recommended policy would have an effect on an individual's interests through changes in taxation, changes in import policy, etc. It should also be noted that, despite any general rule against judicial review of advisory commissions of inquiry, such a commission might render itself subject to judicial review by exercising coercive powers, if it has them, or by making specific findings of fact which relate specifically to individuals, but that situation may not arise frequently in practice.

If judicial review is for the protection of individuals against wrongful administrative processes, it seems that judicial review should be available for the decisions and acts of public inquiries that investigate the conduct of individuals or exercise coercive powers against individuals. The investigation of conduct usually involves possible implications of carelessness or wrongdoing, evidence and findings of which may damage the reputations or careers of individuals. When a public inquiry is or may be directed against individuals, it becomes an exercise of the power of the state against individuals, and that is the kind of situation in which judicial review is appropriate. However, there is still nothing to suggest that the courts should review the substance of the findings of the inquiry, which is still a matter between the commission and the Government. The potential for injury to private interests by commission error has to be accepted in order to obtain the public benefit of findings and advice by persons chosen to provide them after a properly conducted inquiry.

A consideration that should be borne in mind is that the imposition upon a commission of inquiry of court-like procedures may inhibit the carrying out of its mandate.

The importance of judicial review has been articulated by the Law Reform Commission of Canada.[157] The LRCC said that review by the courts functions to prevent the actions of the government from becoming arbitrary or illegal. Without judicial review, it would be the government which decided what actions came within the limits of the law, and what procedures are fair. The LRCC recommended that judicial review extend to all federal administrative bodies, including commissions of inquiry.

The other side of the coin is that supervision by the courts protects the rights of individuals involved in the inquiry, either as witnesses or persons investigated. A public inquiry can profoundly affect those rights, and, while the public may be entitled to have controversial matters ventilated by a public inquiry, that is no reason to ignore the rights of those immediately involved.

The argument against judicial review is that an administrative body such as a commission of inquiry should not be subject to interference from the courts. Most public inquiries are highly political in nature, and the courts should not interfere in political matters. Interference by the courts may hamper a public inquiry or even make it futile. A commission is not a court, and requiring it to follow court-like procedures may well impede its work. Constant recourse to the courts can seriously delay the inquiry process. Since public inquiries deal with matters that the government has decided are of great public importance, the commission should carry out its work as expeditiously and thoroughly as possible.

The policy question here is therefore how much judicial control of the actions of the commission is desirable. A balance must be struck between protecting the rights of individuals and facilitating the inquiry.

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157 LRCC Report 14, *supra*, note 23 at 5.

[redacted]

(2) Grounds

(a) General summary

This line of thought in the preceding discussion suggests that judicial review should be available to, and only to, persons whose interests are directly affected in the ways mentioned, on grounds such as the following:

(1) the commission has exceeded or is exceeding its substantive jurisdiction, whether because the establishment of the inquiry is beyond the powers of the Legislature or beyond the powers of the Lieutenant Governor in Council, or because the commission has acted or is acting outside the inquiry described in the commission appointing it or in contravention of conditions imposed on it;

(2) the commission has proceeded or is proceeding in contravention of 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.

This summary does not include judicial review for an error on the merits of the inquiry.

It will be useful to consider the possible grounds item by item.

(b) Specific grounds

(i) Review on the merits

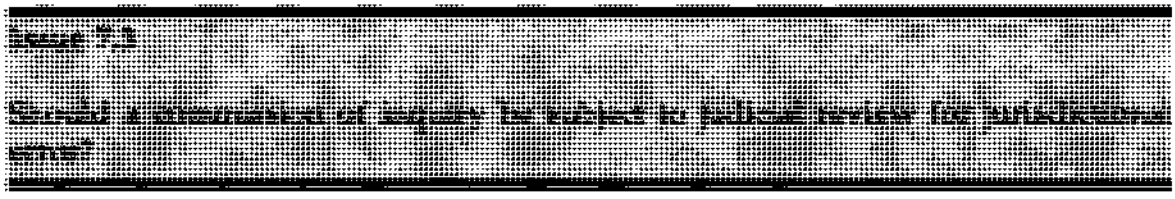
As discussed above, the Manitoba act appears to provide a full right of appeal on any "decision, order, direction, or any other act" of the commission, by way of stated case. The Ontario act used to contain the same provision, but this was repealed and replaced by judicial review for jurisdictional error only, although the court can still substitute its view for that of the commission.

The greater the scope of interference by the courts, the greater the possibility that the process of judicial review will be abused by persons wishing to impede the work of a commission of inquiry. In practice, however, this does not seem to be happening. There has been little activity in Manitoba since 1975, there have only been about ten reported stated cases in Ontario in the same time period, and about half of these have been initiated by the commission.

The decisions do not suggest that the Manitoba or Ontario courts would review the findings of a commission on the substance of the inquiry. There does not seem to be any reason to suggest that a court should be able to substitute its views on the merits for those of a commission of inquiry.

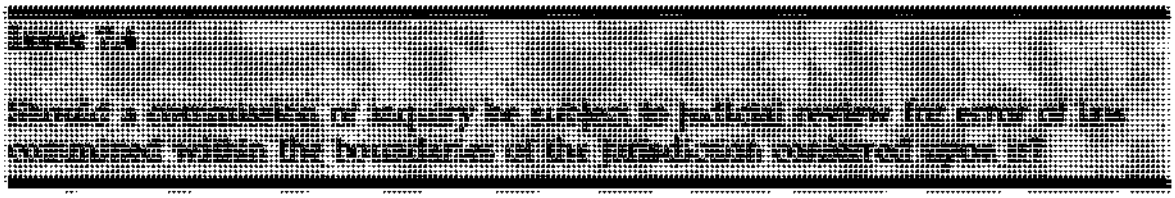
(ii) Review for jurisdictional error

Any administrative body is subject to review for jurisdictional error. There seems to be no reason why, at the instance of a person against whom allegations are made in a public inquiry, judicial review should not be available.



(iii) Review for errors of law

An error in law made by an administrative tribunal and apparent on the face of the record may be judicially reviewed and the tribunal's action quashed. Given that a commission's report is advisory only, it is not clear that judicial review for error in law should apply to a commission, unless, of course, the error takes the commission outside the boundaries of the jurisdiction conferred upon it by the appointing authority.



(iv) Review for procedural fairness

In Chapter 6, we have discussed at some length whether a duty of fairness should be imposed upon a commission of inquiry, and, if so, what its nature should be. The question raised here is, if there is to be such a duty, should a commission be subject to judicial review for failure to perform it, that is, for a breach of the duty of fairness? Given that there is no way of enforcing such a duty other than by judicial supervision, it would seem that a duty of fairness is illusory unless a breach does give rise to judicial review.

(3) Standing

There have been two types of cases dealing with standing. The first deals with standing to question the actions of a commission and will be dealt with here. The second deals with standing to call or cross-examine witnesses and is discussed elsewhere in this issues paper.

The stated case provisions of the Ontario and Manitoba PIA's allow the authority of a commission to do any act to be called into question by a "person affected".[158] This is pretty broad, especially when compared with the "substantial and direct interest" necessary in the same Act to allow a person to testify and to call and cross-examine witnesses.

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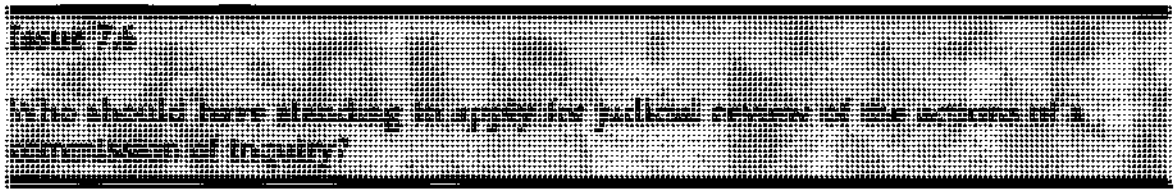
158 Note that this right is not automatic. Either the commissioner must agree to state a case or, if the commission refuses, the person affected must apply to the Divisional Court for an order directing the commission to state the case.

Since the other public inquiries acts (provincial and federal) do not provide for judicial review, they do not make provision for who has standing to initiate it. At common law, the requirements for standing varied with the remedy sought, particularly with respect to the prerogative versus the non-prerogative remedies. The Alberta Rules of Court now provide that a single application may be brought for any of *certiorari, mandamus,* prohibition, declaratory relief or injunction; presumably the standing requirements for these are now all the same, which is to say a person must be "affected" or "aggrieved". At the federal level, the remedies for judicial review are controlled by the *Federal Court Act*. An application to "review and set aside" any decision made on a judicial or quasi-judicial basis may be brought by "any party directly affected by the decision or order" (section 28(2)). The Act is silent on the subject of standing to challenge any other types of decisions made by a federal board or tribunal.

Standing to challenge the authority of the commission could be restricted to those whose conduct is being investigated. On the other hand, standing could be extended to cover those who have a "substantial and direct interest" in the subject matter of the inquiry, or even further to cover "anyone affected" by the inquiry. Standing could be granted as of right under some circumstances, and be discretionary in the court under other circumstances. The statute could grant the right to standing for persons directly affected or persons with a substantial interest, but reserve a discretion in the commission as to whether to grant standing to public interest groups or persons not directly affected.



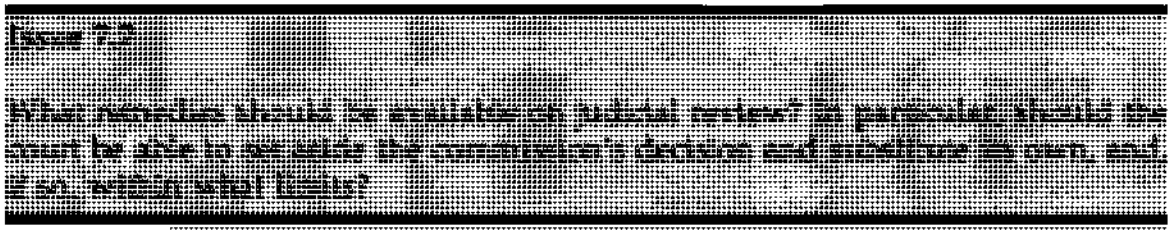
(4) Remedies

The traditional remedies granted for abuse of administrative authority are the prerogative writs (prohibition, *mandamus, certiorari*) and the equitable remedies of declaration or injunction. While the form of the remedies and the procedure followed to obtain them have changed in recent years, the substance of the remedies remains much the same. If injury can be shown, the aggrieved party may also sue in damages.

Mandamus is not usually applied to commissions of inquiry because a commission does not owe a duty to any person. A commission's duty is to investigate and report, and that duty is owed to the government. However, it is possible that *mandamus* might be granted to require a commission to perform a statutory duty such as a duty to admit all relevant or legally admissible evidence.

Certiorari traditionally was only available to quash a decision made under some statutory authority. Since commissions of inquiry do not make final decisions as such, *certiorari* was not available. However, since the *Martineau* case, *certiorari* has become a general mechanism for supervision of any government action, with the possible exception of a legislative decision. Prohibition is probably available under the same circumstances as *certiorari*, except that it is granted before the action complained of is completed.

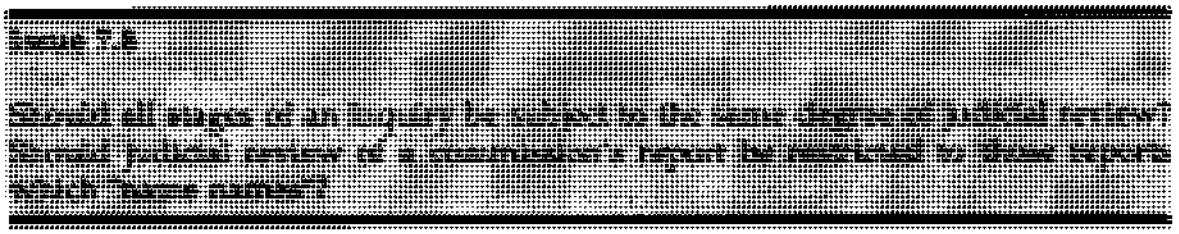
The Federal Court of Appeal can "review and set aside" any decision of a federal judicial or quasi-judicial administrative body. The Alberta Rules of Court provide that, if the application is filed within six months of the action complained of, the court can set aside the decision. The stated case provision of the Ontario act permits the court to substitute its own view for that of the commission in the areas subject to judicial review. The proposed amendments to the *Federal Court Act* (Bill C-38), which have been given royal assent but not yet proclaimed in force, would permit the reviewing court to declare, quash, set aside, reconsider, prohibit or restrain.



(5) Application of Judicial Review to Various Stages of the Process

There are generally two parts to the inquiry process: the investigation and the report. The investigation phase is much more judicial in nature than the reporting phase; hearings are held, witnesses are called (or compelled), etc. It is therefore arguable that more stringent court supervision should be exercised over the investigative phase, since this is the stage at which individual rights are most likely to be seriously affected.

On the other hand, a report which censures the conduct of a named individual may have serious consequences for that individual. If the person is not subsequently charged with an offence, they may never be able to clear their name. If the person is charged with an offence, they may find it difficult to obtain a fair trial.



(6) The Stated Case

As has been noted, the Ontario and Manitoba acts provide for judicial review by way of stated case. Since the Manitoba provision is essentially a full right of appeal on the merits, which was discussed in the section on that subject, this discussion is confined to the Ontario provision.

Any person affected by a public inquiry can request the commission to state a case to the Divisional Court. The subject matter of the case can be either the validity of the commission itself, or the authority of the commission to do "any act or thing". If the commissioner refuses to state a case, the person affected can apply to the Divisional Court for an order directing him or her to do so.

This Ontario provision has been used in about ten reported cases in the last fifteen years. All the reported court challenges of a commission's actions have been by way of stated case. The stated case has been originated by the commission in about 50% of the cases. In only one case was it necessary for the individual to apply to the court for a direction to state a case.

The stated case procedure is useful in several ways. The issues are limited to those stated in the question. The questions must be specific; the court will not answer a question which is too general. This focuses and defines the issues. The stated case procedure also provides a mechanism by which a commission can receive instruction from the court; in some ways it is equivalent to a constitutional reference or a trustee asking for help in interpreting the terms of a trust. In *Re*

Nelles and Grange,[159] the commissioner stated a case to the court asking if the terms of reference permitted him to "name names" in his report.

The main concern with a stated case provision is that it may be abused by persons wishing to impede the work of the commission. This worry may stem from arbitration law's unhappy experience with the special case procedure, which was abolished in England by the *Arbitration Act* of 1979 because it had been abused so badly as to bring disrepute on the whole arbitration process,[160] and was reformed in Alberta by the *Arbitration Act* of 1991. This does not seem to be happening in Ontario, where there have been only ten reported cases in the last 15 years in which the procedure has been involved. The provision is even broader in Manitoba, and yet there appear to have been only two reported cases in the last fifteen years. In addition, many of the same types of questions have been litigated in jurisdictions which do not have a stated case provision, so the stated case does not merely provide an additional way to harass a commission of inquiry. On the whole it seems to be a useful and effective mechanism.

Potential abuse of the stated case procedure might be prevented either by giving the commission a discretion as to whether to grant the request (subject perhaps to review by the courts), or by providing guidelines for the commission to follow when exercising this discretion. In arbitration law, for example, for a stated case there had to be:

1. a genuine question of law, not a question of fact dressed up as a question of law,

2. a question open to serious argument,

3. a question of importance to the resolution of the dispute, and

4. a question raised bona fide and without ulterior motive such as to cause delay.[161]

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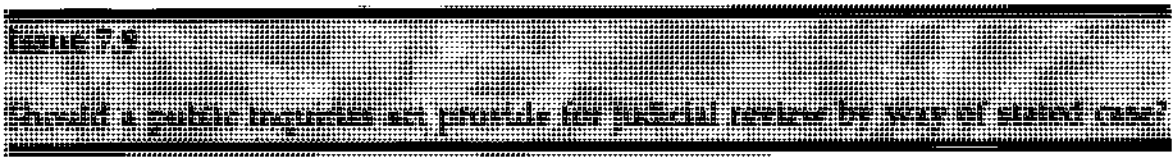
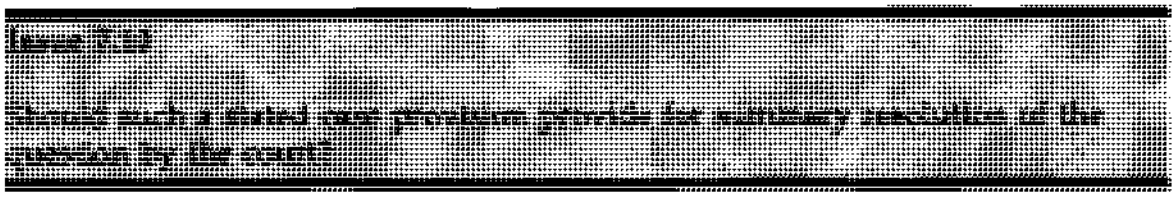
159 *Supra*, note 153.

160 See Mustill, Sir Michael J. and Boyd, Stewart C., *Commercial Arbitration*, Butterworths 1982, at 527.

161 Mustill and Boyd, *supra*, note 160 at 694.



The Ontario act says in section 6(3) that "Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised". This allows the court to substitute its own view for that of the commission. The advantages and disadvantages of allowing a court to do this were discussed in the section on remedies, above.



(7) Legislative Provision for Judicial Review

Judicial review is a judicial invention. There is a question whether its further development with respect to public inquiries should be left to the courts or whether a public inquiries act should deal with it in whole or in part. Judicial development is flexible, but, being based on legal doctrine, may or may not be an adequate vehicle for the development of public policy. Legislation can be tailored to public policy but may impede the flexible development of judicial review in this area.

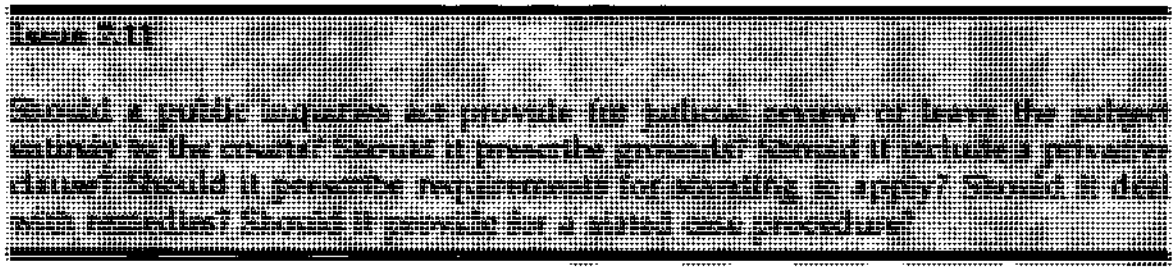
A public inquiries act could prescribe the grounds for judicial review. If it appears that judicial review is now available on the grounds identified as desirable by the preceding discussion, there is less reason for a public inquiries act to prescribe the grounds. If it appears that judicial review is not available when it should be or is available when it should not be, a legislative solution may be required.

If judicial review is being carried out where it should not be, there is a question whether a public inquiries act should have a privative clause making judicial review unavailable in those areas. For example, if it is thought that the actions of a commission of inquiry should not be set aside for error in law within the boundaries of the jurisdiction conferred on the commission, and if it is thought that there is a danger that the courts will grant judicial review for such

error, a public inquiries act could provide that judicial review does not apply in such a case. Given the judicial interpretation of privative clauses, the likely result is that the courts would refrain from interfering in the face of such a clause unless a commission's decision is patently unreasonable.

A public inquiries act could prescribe the requirements of standing. If it appears that the courts are likely to grant standing either too broadly or too narrowly, the act could set out the criteria.

A public inquiries act could deal with remedies. If the present remedies are insufficient, excessive or inflexible, the act could rectify the deficiencies. Similarly, if a stated case procedure is considered desirable, the act could provide for it.



CHAPTER 8 — PROCEDURAL MATTERS

A. Qualifications of Commissioners

The Alberta act says nothing about the qualifications of commissioners. There does not seem to be any point in saying anything, but some argument could be made for saying that investigatory inquiries should have someone with a legal qualification, or for making a general statement that commissioners with qualifications appropriate to the purpose of the inquiry should be appointed. However, it does not seem that such provisions would achieve any worthwhile purpose.

The specific question of the use of judges for public inquiries could be considered. Views vary as to the appropriateness of this:

(1) the 1966 U.K. Salmon commission thought that the U.K. Act should be amended so that the chairman of a commission of an investigatory inquiry into a matter of high public importance should be *required* to be a holder of high judicial office as a guarantee of impartiality, efficiency, the judicial use of powers, and the achievement of public confidence and acceptance.

(2) Justice Le Dain thought[162] that the appointment of judges to commissions of inquiry is dangerous because of the political aspect of such inquiries; judges have limited experience with passing judgment on political conduct and no particular qualifications for it; and the proper forum is parliament and the electorate.

(3) Willis thought[163] that the risk of shaking public confidence in the impartiality of the judiciary is not a reason for not using judges, and he did not think that lack of experience or qualification stands in the way of using them. Judges may be needed to prevent McCarthyism. There is an uneasy see-saw between two irreconcilable desires, one to keep the judges' hands off policy and judges out of politics, and the other to give the citizen the only decisionmaker that they regard as truly independent and truly impartial.

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162 *Supra*, note 49 at 79-97.

163 Willis, John, Comment on Le Dain *In Law and Social Change, supra*, note 49 at 98-101.

(4) The LRCC[164] would leave the question to the Cabinet to decide in the precise circumstances of each case. There is something to be said for appointing judges to commissions of inquiry: they are well acquainted with the process of establishing facts through testimony, while protecting witnesses; and the public regards them as objective. On the other hand, there is danger that public respect may be eroded by frequent or inappropriate appointments of judges to commissions.

(5) The higher judiciary of the Australian state of Victoria has refused to accept appointments to commissions of inquiry on the grounds that such appointments are not consistent with judicial office. Hallett[165] noted criticisms that judges lack the necessary skills to carry out social investigations. Investigatory inquiries ("inquisitorial" is the word he used) need the fairness and impartiality normally associated with the judiciary. "The real issue to be determined is whether the community can afford, or need to have members of the judiciary used by the executive for the latter purpose".[166] His answer is that others, particularly senior barristers and retired judges, can be found to conduct such inquiries.

B. Commissioner's Oath

The British Columbia and Manitoba acts require that a commissioner swear an oath before commencing the inquiry. Alberta does not currently require an oath.

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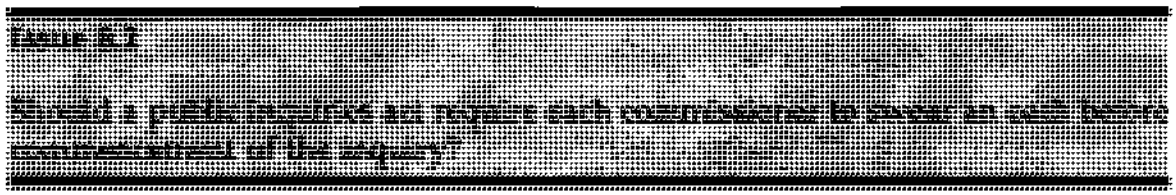
164 LRCC Report 13, *supra*, note 22 at 32-33.

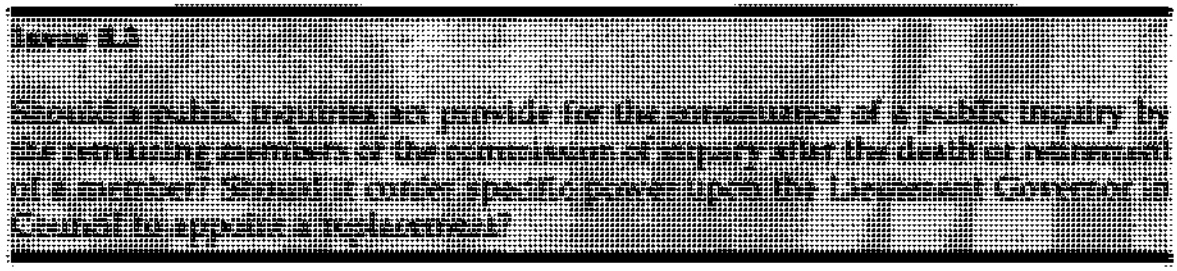
165 *Supra*, note 26 at 66.

166 *Ibid.* at 73.



C. Death or Retirement of a Commissioner

The British Columbia and Manitoba acts provide that if a commissioner dies the remaining commissioners will continue the inquiry, and that if the deceased or retiring commissioner was a sole commissioner, a new commissioner may be appointed. The latter provision is probably unnecessary, as the power to appoint probably includes the power to substitute, and since the Lieutenant Governor in Council would in any event be able to establish a new inquiry with the same terms of reference. However, it may be desirable to provide that, in the event of death or retirement of one of a number of commissioners, that the remaining commissioners can continue with the inquiry (whether or not the deceased or retired commissioner is replaced). This would ensure that the inquiry process was not interrupted due to unforeseen changes in commission personnel.



D. Personnel and Expenses

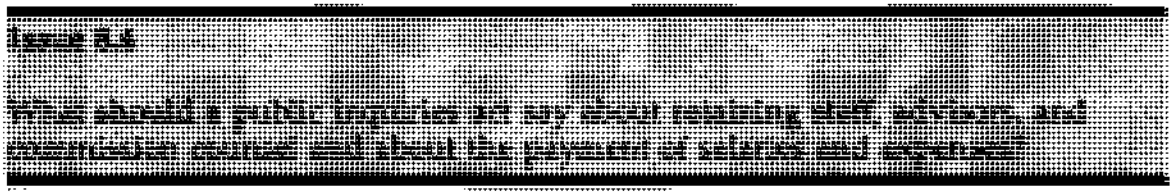
Seven provinces, including Alberta, plus the Northwest Territories deal specifically with personnel and expenses of a commission of enquiry. All permit the hiring of support staff and assistants. In some cases, although not in Alberta, the permission of the Lieutenant Governor in Council must be obtained.

Of the seven provinces, only British Columbia and Quebec do not provide for hiring experts and technical advisors.

Alberta, Manitoba, Newfoundland, P.E.I., Saskatchewan and the Northwest Territories specifically allow the commission to engage counsel. The LRCC proposal would also specify this right.

The British Columbia and New Brunswick acts state that, unless there is a special appropriation by the Legislature, the commission's expenses will be paid from the consolidated revenue fund. The Quebec act says that salaries for commission personnel shall be fixed by the government.

Commission expenses are included in the regulation-making power of the Lieutenant Governor in Council in three provinces and both territories.



E. Meetings

(1) Notice

The British Columbia and Manitoba acts provide that notice of the appointment of the commission and of its first meeting shall be given to the public. The Quebec act requires public notice of the time and place of the first meeting. This may be an important policy point, as the public nature of inquiries is one of their essential characteristics, and it may be that it should not be left to be dealt with by publication of orders in council in official gazettes.

(2) Time and Location

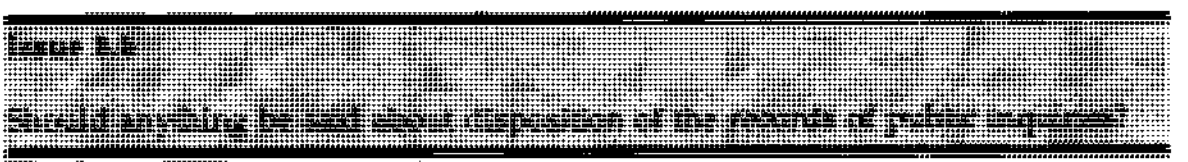
The Quebec act says that the commission shall hold meetings within a reasonable time after its appointment. These meetings are to be held where the necessary information is to be obtained. The New Brunswick act says that meetings may be held anywhere within the province.

(3) Adjournments

The New Brunswick act permits the commission to adjourn its meetings "from time to time". The Quebec act forbids adjournment for more than a week without authorization from the Minister of Justice.

F. Disposition of Records

The statutes say nothing about what is to be done with a commission's records. Probably they will go to the archives.



CHAPTER 9 — IMMUNITY AND PRIVILEGE: LIABILITY TO CIVIL ACTION

A. Introduction

A major area of concern is the liability of participants in the inquiry process to civil suit, particularly to tort actions such as actions for defamation and malicious prosecution. The reason for granting immunity from suit is to enable functionaries to pursue their functions efficiently and fearlessly, without fear of exposure to the financial and other consequences of litigation and the possibility of being found to have acted wrongfully. In general, the interests which must be balanced are those of the state and the public in an effective and efficient process and those of persons affected by wrongful conduct in having legal recourse for it.

B. The Various Public Inquiries Acts

The only immunity dealt with in the various public inquiries acts is that of commissioners. This will be discussed further in the section dealing with that subject.

C. Do Judicial Immunities Apply to Commissions of Inquiry?

At common law, persons exercising judicial functions in a court were "exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity".[167] In addition, absolute immunity from actions for libel or slander arising from words spoken in court was granted to parties, witnesses, and counsel.

It is not clear whether these immunities apply to public inquiries. In *O'Connor* v. *Waldron*,[168] a Canadian appeal, 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*,[169] the House of Lords said that whether or not

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167 Halsbury's Laws of England, (4th ed.) at para. 212.

168 [1935] A.C. 76 (P.C.).

169 [1979] 1 All E.R. 489 (H.L.).

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*,[170] the majority in the Supreme Court of Canada held that the statutory immunity displaced the common law stated in *Trapp* v. *Mackie*: the inference is that in the absence of a statutory provision dealing with an immunity, the law as stated in *Trapp* v. *Mackie* applies in Canada.

D. General Questions

There are several considerations that apply to all the personnel involved in a public inquiry and to the whole inquiry process. The first is who should have the benefit of an immunity from suit. The second is whether, where an immunity is granted, it should be absolute or qualified. The third question is whether the immunity should apply to all commissions in all circumstances.

(1) Absolute Versus Qualified Immunity

An immunity may be absolute, i.e., it may cover anything said or done or not done no matter what the motive of the actor, or it may be qualified in some way. The most common limitation is that immunity is lost where a person acts from malice or in bad faith.

If immunity is extended to any of the commissioners, counsel, or witnesses, it can be either absolute or qualified. The argument in favour of absolute privilege is that it enables a person to carry out their duties fearlessly, without the inhibiting effect of potential litigation or liability. However, if functionaries have absolute immunity, then a genuinely injured citizen has no remedy. How the public perceives the commission is also important, since commissions are generally set up to investigate matters that are of great public interest. A commission with absolute immunity may be seen by the public as independent and therefore able to better carry out its duties, or the commission may be perceived by that same public as being "above the law".

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170 [1985] 2 S.C.R. 716.

(2) Part Of or All Of the Inquiry Process

An immunity, if granted to certain participants, could cover all of the inquiry process or only part of it. For example, the commissioners could be immune from all civil suit for things done or not done during the hearings, but could be liable for defamation for things said in their report. Similarly, different types of immunity could be granted at different stages of the proceedings. For example, the commissioners could have absolute privilege for everything said during the hearings but only qualified privilege for things said in the report, or vice versa.

(3) All Or Only Some Kinds of Commissions of Inquiry

If a distinction between advisory and investigatory commissions (similar to that proposed by the LRCC) is adopted, then immunities could apply only to certain types of commissions or only to commissions when exercising certain types of powers. For example, the members of an advisory commission might be granted no immunity or only a qualified immunity for things said or done, whereas the members of an investigatory commission might be granted absolute immunity. Similarly, absolute immunity could be granted only when a commission is exercising coercive powers such as compelling testimony.

E. Members of Commissions

Members of commissions of inquiry (at least if a commission is investigatory) are analogous to judges. They hear evidence, evaluate it, and make a report based on it. They are not directly equivalent to judges, however, since they may participate directly in the inquiry process. The members may use an inquisitorial process and ask questions of the witness themselves, and they may decide what evidence to ask for. However, this function may also be handled for them by commission counsel. Since it is the members' duty to make the "final" decision, i.e. to prepare recommendations and make the report which is the end result of the inquiry process, their role accords most closely with that of judges.

At common law, judges of superior courts have an absolute immunity against civil suit for anything said or done in their judicial capacity and within

their jurisdiction.[171] Since superior courts determine their own jurisdiction, superior court judges in essence have an absolute immunity for anything said or done during judicial proceedings, even if they act maliciously or in bad faith or under an honest mistake as to jurisdiction. They will be liable in damages only if they exceed their jurisdiction in bad faith.

At common law, judges of other courts are protected from liability as long as they remain within their jurisdiction. Any mistake as to jurisdiction, even an honest one, causes them to lose protection and a judge of another court who acts maliciously loses their jurisdiction and thereby becomes liable in damages.[172]

Seven of the 13 public inquiries acts[173] say nothing about the immunities of commissioners. Section 4 of the Alberta act and section 5 of the Nova Scotia act grant commissioners "the same privileges and immunities as" a judge of the provincial superior court of general trial jurisdiction, but do so in the context of attendance of witnesses. The entire section 4 is as follows:

> 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 the privileges and immunities are to be all of the privileges and immunities of judges, it would be better to do as some of the other province's acts have done, and place the statement about privileges and immunities in a separate section. Although the statement itself is quite clear, the fact that it is tacked on to the end

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171 *Morier* v. *Rivard, supra,* note 170. Justice Chouinard reviewed the English law and said, at 739, "The parties cited several other cases and a number of writers from Britain and the Commonwealth, other Canadian provinces and Quebec, which establish that superior court judges are protected against civil suit and which treat the immunity as absolute".

172 It seems likely that arbitrators are also to have an immunity to actions in negligence, and also to other actions, at least while acting without fraud or bad faith. See, e.g., *Sport Maska Inc.* v. *Zittrer et al.*, [1988] 1 S.C.R. 564; *Montgomery* v. *Ashmore,* unreported, CA007383, *Vancouver Registry* (14 January 1988) (B.C.C.A.).

173 Canada, Newfoundland, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and Yukon.

of a provision about compelling attendance of witnesses, could lead to the interpretation that it applies only to the commission's dealings with witnesses.

Section 16 of the Quebec act, which is similar to the counterpart sections in the British Columbia and Manitoba acts, makes it clear that the immunity extends throughout the work of the commission. It expressly grants the immunities of a superior court judge in term for "all acts done or not done in the execution of their duty". It was the latter phrase which the Supreme Court of Canada in *Morier* v. *Rivard*[174] said extended the commissioners' immunity to cover their report. Since this phrase is absent from Alberta section 4, and since that section grants immunity in the context of attendance of witnesses, it is possible that the courts would limit the commissioners' immunity to the "judicial" part of the inquiry, i.e. the hearings. For whatever part of the proceedings are covered by section 4, the commissioners would have absolute immunity for anything said or done within jurisdiction. On the other hand, the Quebec words "in the execution of their duty" might be interpreted to mean that if a commission goes outside its jurisdiction the immunities do not apply.

The British Columbia, Quebec and Manitoba acts also define commissioners' immunity in terms of the immunity of a judge of the superior court. The New Brunswick *Inquiries Act* takes a different approach. Section 12 says that no action shall be brought against a commissioner unless "it appears that the act was done by the commissioner without reasonable cause, and with actual malice, and wholly without jurisdiction". The much narrower LRCC recommendation is that commissioners and commission counsel should be immune from action for defamation in the course of their duties.

A range of possibilities for a new public inquiries act can be identified:

(1) Commissioners could have absolute immunity from liability for things said and done in all parts of the inquiry process. This would be similar to the immunity granted by section 16 of the Quebec act (see above). If this option is chosen, the question whether the immunity should apply if a commission goes outside its jurisdiction should be dealt with.

(2) Commissioners could have absolute immunity for the "judicial" part of the process, which is to say the hearings, and either qualified or no immunity

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174 *Supra*, note 170.

for statements made in the report. That might have the good result of making a commission more careful about its actions and the statements in its report if it is "naming names" or censuring the actions of others. However, it might have the bad result of deterring a commission from saying what it should say in its report, which is the final product of the inquiry.

(3) Commissioners could have qualified immunity at all stages of the proceedings. For example, they could be protected from liability unless they act with malice or in bad faith, or the more extensive protection given by the New Brunswick act could be considered.

(4) Commissioners could be "immune from any action for defamation in the performance of their duties." This is the LRCC recommendation. It leaves open the possibility of a suit for other torts such as malicious prosecution, wrongful imprisonment or, at a stretch, injurious falsehood.[175]

(5) Commissioners could be specifically denied any immunity at all.

(6) The final possibility is that the statute could remain silent on the subject, leaving the common law to govern.

The considerations to be balanced here are, on the one hand, that a genuinely injured individual should have a remedy, and, on the other hand, that the work of a commission of inquiry should not be hindered by nuisance suits or put under pressure to design its report to avoid liability rather than to give a forthright account of the facts.

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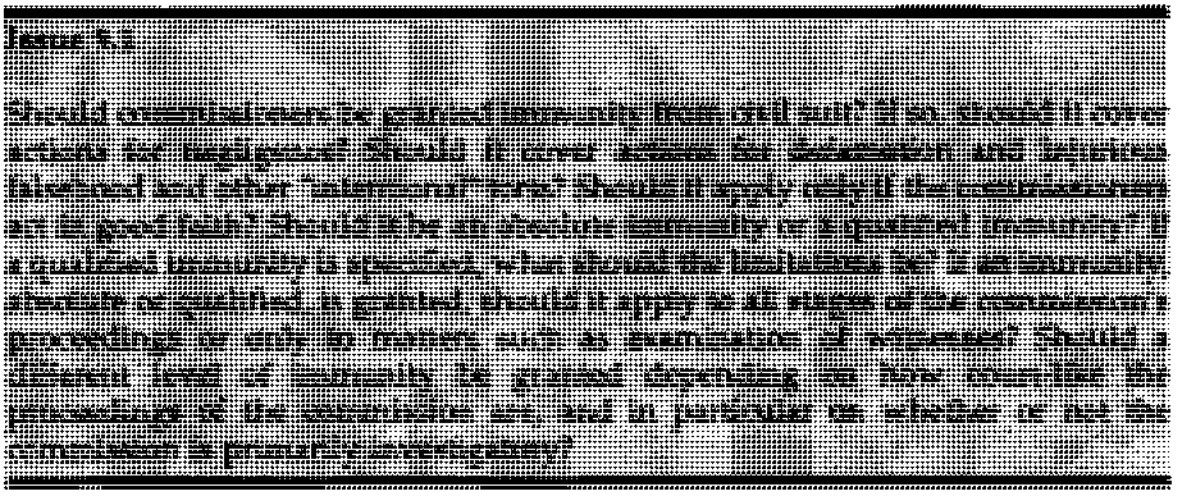
[175] Injurious falsehood is essentially a counterpart of defamation relating to economic interests. It occurs when a person makes "false statements, whether oral or in writing, concerning the plaintiff or his property, calculated to induce others not to deal with him" (Fleming, *The Law of Torts*). The statements are actionable only if they are made with malice, and there must be actual damage, as in loss of a sale because a merchant's goods were disparaged by a competitor. Slander of title is one kind of injurious falsehood. However, the tort now extends to include "any damaging falsehood which interferes with prospective advantage, even of a non-commercial nature" (Fleming). Thus either a witness before an inquiry or a commission's report could be guilty of injurious falsehood by, for example, falsely impugning a person's business methods in a manner which results in diminishing the value of the business.



F. Witnesses

Witnesses in court have absolute immunity 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".[176]

The application of this concept to witnesses before a tribunal was discussed by the House of Lords in *Trapp* v. *Mackie*.[177] Lord Diplock affirmed that absolute privilege extends to witnesses before a tribunal if the tribunal acts in a manner similar to the way a court acts or if it has attributes similar to those of a court. There are four factors to consider. First, is the tribunal "recognised by law"? "Merely domestic" tribunals will not attract privilege. 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? Privilege will not extend to tribunals whose decisions are administrative in nature, even if they use judicial procedures.[178] Thirdly, does the tribunal use court-like procedures? Finally, what are the legal consequences of the tribunal's decision? Is the decision final, or merely advisory?

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176 *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?

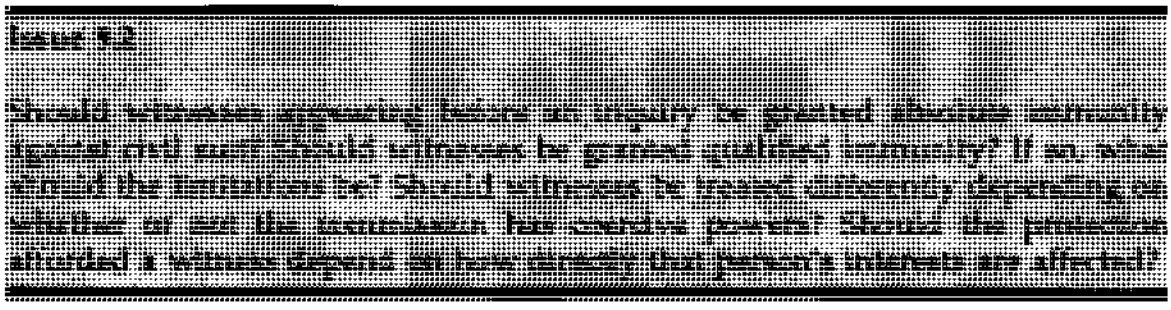
177 *Supra*, note 169.

178 *O'Connor* v. *Waldron*, *supra*, note 168.

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 offensive to a basic sense of fairness to compel someone to testify before a public inquiry and then to allow him or her to be sued for defamation. The same policy considerations apply here as in court—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 applies with greater force to an investigatory commission than to a merely advisory commission, since testimony is usually voluntarily given to advisory commissions by persons who want to be heard. However, even witnesses before advisory commissions may make statements which are defamatory, however honest their belief in the truth of these statements.

A new public inquiries act could grant absolute immunity to all witnesses before a public inquiry. It could grant qualified immunity (e.g. an immunity that is lost if the witness testifies from malice or otherwise in bad faith). It could grant absolute immunity to witnesses who appear before a commission which possesses coercive powers, and no immunity, or only a qualified immunity, to witnesses who appear before a commission which does not have coercive powers. A distinction could be made between a person whose conduct is under investigation and other persons: greater immunity could be granted to the person whose conduct is under investigation.



G. Counsel

Counsel can play different roles in the inquiry process. They can be commission counsel, 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 therefore most closely analogous to that of a prosecutor. Counsel representing persons whose conduct is in issue, on the other hand, play a role most similar to 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.

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 the same. However, in *Nelles* v. *Ontario*,[179] 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 what they say. The LRCC proposal 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.

Once again a balance must be struck between permitting and encouraging functionaries involved in public inquiries to perform their duties fearlessly and thoroughly, on the one hand, and ensuring that the rights of individuals involved in the process are respected, on the other. A public inquiry is useless if it is so hampered that it cannot determine the truth, and a person whose conduct is in

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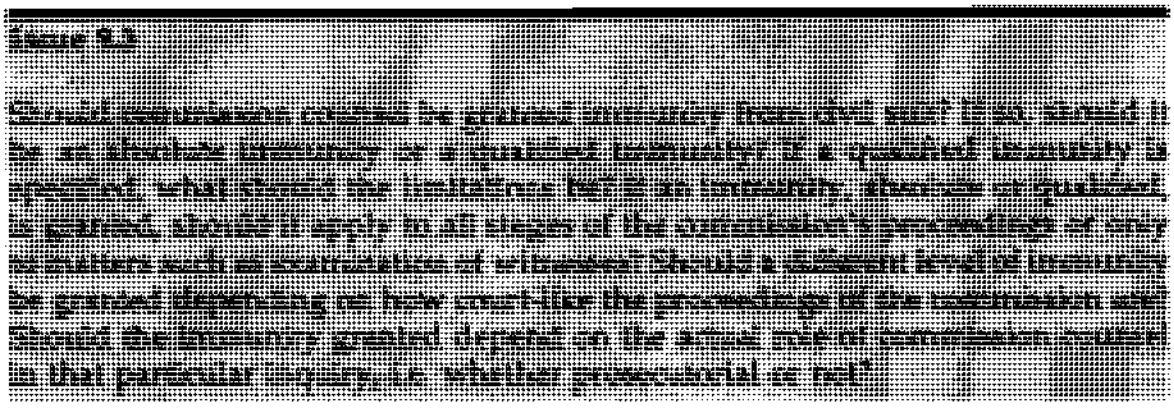
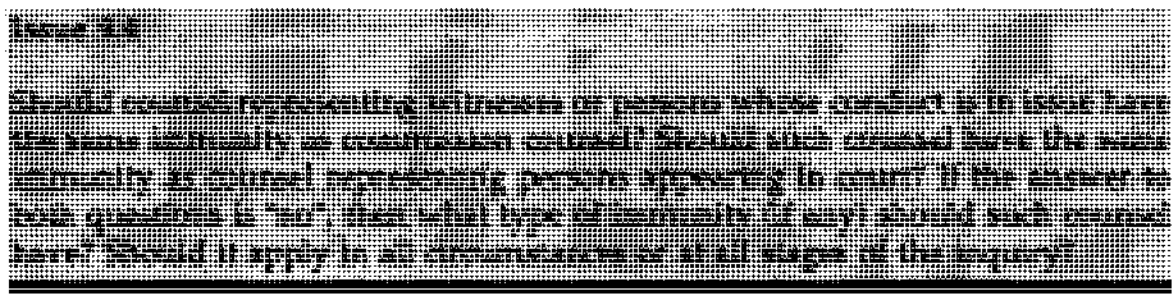
[179] (1989), 98 N.R. 321.

issue will be prejudiced if fear of civil liability inhibits the performance of their counsel's duty. On the other hand, our sense of fairness is offended when a remedy is denied to an innocent person for things wrongfully said in the course of a public inquiry.

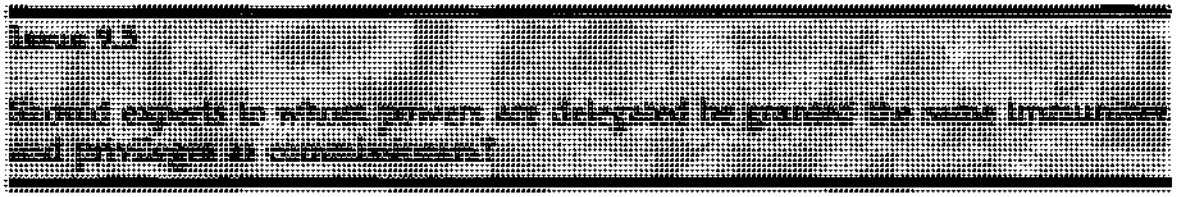




H. Experts

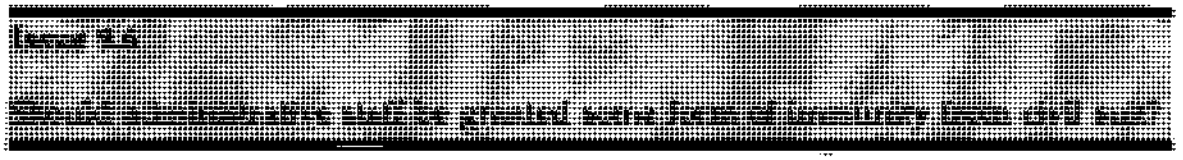
Section 2 of the Alberta act allows a commission to engage experts and permits the commission to authorise them to inquire into any matter within the scope of the inquiry. The section grants them the same powers, privileges and immunities as the commissioners.

If experts are going to be granted the same powers as commissioners, it makes sense to also grant them the same privileges and immunities. The more important question, therefore, is whether experts should be granted the same powers or not; this is dealt with in another section of this paper. However, if experts or other delegates are to perform some of the functions of commissioners, consideration should be given to the question whether or not they should be granted the same type of immunity.



I. Staff

Section 2 allows the commission to engage staff (clerks, reporters and assistants) but does not permit the commission to delegate parts of the inquiry to these people. However, it is possible that staff who are directly involved in the inquiry process may be exposed to some liability.



CHAPTER 10 — OTHER STATUTES CONFERRING THE SAME POWERS AS A PUBLIC INQUIRIES ACT

There are many Alberta statutes which confer on various functionaries the powers of a commissioner under the *Public Inquiries Act*. Those disclosed by a computer search of those statutes that can be searched by computer[180] are listed in Appendix C. A revision of the Act would affect the powers granted by those statutes.

The LRCC considered the corresponding federal problem. Its draft Act would repeal the existing *Inquiries Act* (Canada) and replace it by a statute with a different name and would thus seem to render meaningless all the references to the *Inquiries Act* in other statutes. What it said in the text of Report 13 (page 9) is that consequential changes will be required in the other statutes; that "in due course", those who administer the other statutes should review the statutes; that the LRCC was in principle opposed to the granting of powers in one statute by reference to another if the effect is to give inappropriate authority or to prevent easy and full knowledge of what powers are granted; that powers should be tailored to meet need; and that cross-referencing is unlikely to achieve this result. Its 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 the proposition that, whenever coercive powers are granted, the legislative mind should address itself to the scope and purpose of the activity for which they are needed and should find the appropriate balance between the particular needs of the particular activity and the public and private interests in the protection of privacy and private interests. A mere incorporation of the powers granted by a public inquiries act is likely to be effected without much thought and may well confer powers on functionaries that are not needed and are therefore contrary to the public interest.

On the other hand, something can be said for the proposition that repeating much of a revised public inquiries statute in dozens of other statutes would not be efficient, to say nothing of the governmental time that would be taken up by inquiries into the workings of each of the statutes that presently incorporates the powers under the present acts (though we are hopeful that our consultation in

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

our administrative procedures project may yield some information on this question).

There is accordingly a serious question as to whether or not the statutes that confer upon functionaries the powers of a commissioner under the *Public Inquiries Act* should be reviewed with a view to seeing whether coercive powers are necessary and whether the powers conferred by the *Public Inquiries Act* are the appropriate powers.

Another question is whether the protections that accompany the coercive powers conferred by the *Public Inquiries Act* should accompany those powers when they are incorporated by reference in another act. At the moment we think that it is clear that the protections should accompany the powers, but that is a question upon which comment could be made. If the protections should accompany the powers, there would be a question of mechanics: should all the other acts be amended to incorporate the protections as well as the powers, or should the new act provide that a reference in another statute incorporating the powers also incorporates the protections? It might well be that a court would say that incorporating the powers necessarily incorporates the checks upon the powers, but it seems undesirable to leave the question to be answered by statutory interpretation.

A further question that could be raised is whether the immunities conferred upon commissions of inquiry should be conferred upon the functionaries appointed under the other acts.

Issue 10.1

How should statutes which confer upon functionaries the powers and immunities of a commissioner under the *Public Inquiries Act* be dealt with?

APPENDIX A

PUBLIC INQUIRIES ACT

CHAPTER P-29

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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

Selected list of Alberta inquiries

Reproduced from *Provincial Royal Commissions, Commissions of Inquiry, 1867-1982,*

compiled by Lise Maillet

and published by

National Library of Canada

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)

CommissionerCommissaire: 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 C

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