

SOME LEGAL ASPECTS OF THE REPORT OF THE ROYAL COMMISSION ON ESPIONAGE

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The powers exercisable under the Inquiries Act (R.S.C., 1927, c. 99) by a Royal Commission are emphasized in the report of the Commissioners appointed under Order in Council P.C. 411 of February 5th, 1946, who, in a complete section (Section XI) of their report devoted to Law and Procedure, reviewed certain of the statutory powers which were available to them and which they felt themselves bound to exercise.

The inclusion of such a section is in itself unusual and one is left with the distinct impression that it is, in effect, the apologia of the Commissioners for adopting extraordinary procedures which they felt needed justification. Although their opinions are not expressed in their capacity as judges of the Supreme Court of Canada, those opinions and the manner in which the reports on each witness are developed may well form a precedent for Royal Commissions appointed in the future to inquire into allegations of misconduct which may warrant disciplinary action or prosecution proceedings.

Leaving aside any reference to or comment on the gravity of the matters into which the Commissioners were directed to inquire, and which are fully developed in the report, it is worth considering whether it is essential, in the public interest, that any Royal Commission should be free to adopt the standards and methods the Commissioners used and then found it necessary to justify publicly.

It is well to remember that the powers of an administrative or quasi-judicial tribunal such as a Royal Commission are extremely broad and in some respects higher than those of a Court. In the language of Davis J.A. in *St. John v. Fraser*,¹ a tribunal when exercising administrative functions must act "judicially" in the sense that it must act fairly and impartially; to this extent alone is it required to act in a judicial manner. Beside this may be placed the words of Masten J.A. in *Re Ashby*:²

The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standards to follow, it is guided by its own ideas of policy and expediency. Hence, acting within its proper province and observing any procedural

¹ [1935] S.C.R. 441, at p. 452.

² [1934] O.R. 421, at p. 428.

formalities prescribed, it cannot err in substantive matters because there is no standard for it to follow and hence no standard to judge or connect it by. . . . A judicial tribunal looks for some law to guide it; an administrative tribunal, within its province, is a law unto itself.

The Commissioners appointed by P.C. 411 were directed by its terms "to inquire into and report upon which public officials and other persons in positions of trust or otherwise have communicated, directly or indirectly, secret and confidential information, the disclosure of which might be inimical to the safety and interests of Canada, to the agents of a Foreign Power and the facts relating to and the circumstances surrounding such communication". It is obvious that the Commissioners were appointed to inquire into and report upon possible misconduct by the persons in question and it is equally obvious that on the basis of their report the law officers of the Crown might conclude that offences against the Official Secrets Act had been committed. The Commissioners were not, however, directed to inquire and report whether or not offences had been or appeared to have been committed against the act or any other law, for the very good reason that a Royal Commission is not a criminal court and, as the Commissioners remark,³ has no power to enforce its findings. "If" they continue "it makes findings upon which the proper authorities conclude that certain persons should be punished, those authorities must resort to the courts or tribunals which alone possess the power to punish." Reduced to its simplest terms, the Commissioners report misconduct, the Attorney General decides if the misconduct warrants prosecution, the magistrate at the preliminary hearing and the grand jury when an indictment is preferred determine if a *prima facie* case has been made out and the trial court decides the guilt or innocence of the accused.

The report, however, makes it clear that the Commissioners felt it their duty not only to report misconduct, but, in effect, either to perform the function of the grand jury or magistrate or to provide briefs for counsel who would conduct the prosecutions for the Crown. In making their report on each witness they tested their conclusions not only with reference to the offence-creating sections of the Official Secrets Act, but also with reference to the sections of the act that create statutory presumptions in favour of the Crown. There is nothing in P.C. 411 which suggests that it was the function of the Commissioners to report whether or not offences had in their opinion been committed and it will be observed that the statutory presumptions apply only on a

³ At page 684 of "The Report of the Royal Commission Appointed under Order in Council P.C. 411 of February 5, 1946".

prosecution or in proceedings for an offence under the act and have no bearing on proceedings before a Royal Commission.

A report in such terms has the attributes of a preparatory examination under Continental jurisprudence. Without aggravating the criticism by suggesting that the Commissioners fell short of their "judicial" duty by presuming the witnesses guilty until they proved the contrary, they at least made it as easy as they could for a trial court to convict them. In one case, the Commissioners adopted the extraordinary course of including in their report what might be termed a brief on appeal in which they do not hesitate to take issue with the magistrate who had refused to commit one of the suspects on the ground that the evidence did not disclose a *prima facie* case against him.⁴

One is left with the unpleasant suspicion that the Commissioners considered they had a duty to ensure that it could be proved in a court that the persons, who in the opinion of the Commissioners had misconducted themselves, were guilty of offences. This suspicion is strongly supported by the attitude of the Commissioners towards the witnesses, with particular reference to the rights of the witnesses under section 5 of the Canada Evidence Act.

Section XI discloses that warrants for the detention of twelve suspects were issued by the Minister of Justice on the advice of the Commissioners; that the Commissioners take no responsibility for the manner in which the suspects were detained or for any interrogations of the suspects by the police; that there were good reasons for refusing to allow some of the suspects to be represented by counsel throughout their appearance before the Commissioners; that in more than one case where witnesses were represented by counsel from the outset of their appearances the witnesses gave their evidence without any appeal to the Canada Evidence Act; and that in any event no legal duty with respect to the matter of informing witnesses of their rights under section 5 of that act rested with the Commissioners. Section XI of the report omits any reference to the fact that certain witnesses who were not represented by and had had no access to counsel specifically asked the Commissioners to explain their rights as witnesses and that the Commissioners refrained from mentioning the protection which was available under section 5 of the Canada Evidence Act. At least one witness who had not claimed protection and had not been represented by counsel was subsequently convicted following

⁴ Case of David Shugar, pp. 281 to 318 of the Report.

the admission at his trial of evidence given by him before the Commissioners.⁵

The Commissioners summarize at some length⁶ the obligations of a witness under oath to answer questions which may tend to criminate him. There is no doubt that, under the Canadian statutes, he is bound to answer and that this has been the law for many years. But in connection with the privilege of the witness the Commissioners make this extraordinary statement:

The privilege given by the Statute, to a witness who wishes to claim it, is said by Phipson in his leading work on Evidence, 7th Edition, at page 206, to be 'based on the policy of encouraging persons to come forward with evidence. . . .' The author does not say that it is aimed against self-incrimination.

As an exposition of the law and as a quotation this statement is a travesty. The passage in the 7th edition of Phipson (reproduced in the current 8th edition at page 198) reads very differently:

No witness, whether party or stranger is, except in the cases hereinafter mentioned, compellable to answer any questions or to produce any document the tendency of which is to expose the witness (or the wife or husband of the witness) to any criminal charge, penalty or forfeiture. *Nemo tenetur prodere se ipsum.*

The privilege is based on the policy of encouraging persons to come forward with evidence in Courts of Justice by protecting them as far as possible from injury or needless annoyance in consequence of so doing. A sensible compromise has, however, been adopted in several modern statutes on compelling the disclosure but indemnifying the witness in various respects from its results.

Phipson is stating the common-law rule which, with certain statutory exceptions, still prevails in England, where in practice it is usual for the court to warn a witness that he is not bound to answer if the answer would incriminate him.⁷ The Canadian statute is different in two respects: first, the witness cannot refuse to answer and, secondly, the onus of claiming privilege is upon the witness. The Commissioners' quotations from the judgment of Riddell J. in *R. v. Barnes*⁸ deal only with the first branch and justify Canada's departure from the common-law maxim that no one is bound to incriminate himself.

⁵ See *R. v. Mazerall*, [1946] O.R. 511. The judgment at trial has since been affirmed by the Ontario Court of Appeal, which held unanimously that the evidence given by Mazerall before the Royal Commission was admissible.

⁶ At pp. 671 to 674 of the Report.

⁷ HALSBURY, Vol. XIII, p. 730.

⁸ (1921), 49 O.L.R. 374, at p. 390.

As to the second branch, there is equally no doubt that the privilege is that of the witness and must be claimed by him before he answers the question.⁹ Nevertheless, were the Commissioners in the circumstances acting "fairly and impartially" in deciding they had no duty to inform witnesses of their privilege?

The Commissioners had the widest powers to enable them to prescribe their procedure at hearings and for the taking of evidence, and they did not hesitate to adopt practices not in accordance with strict court procedure when they were satisfied expediency required them. For example, they admitted hearsay or secondary evidence. However, when it came to the application of section 5 of the Canada Evidence Act to witnesses who to the knowledge of the Commissioners had been detained as suspects and had been refused access to counsel, the Commissioners felt it necessary to take the strict and technical course of refraining from warning the witnesses of their limited rights.

If the Commissioners had confined their report to evidence of misconduct as distinct from evidence of criminal offences, their failure to stretch a point and let the witnesses know the extent of their privilege would have been less unjustifiable. In fact, the report on each suspect is an unmistakable invitation to prosecute for offences which the Commissioners specify by section and subsection and which they support in each case by marshalling statutory presumptions, the evidence of other witnesses and the self-incriminating evidence of each suspect. The suspicion grows that the Commissioners decided to do the work of the magistrate and grand jury, or at least of the Crown attorney, and in so doing used their powers under the Inquiries Act in a way that Parliament never intended.

From the point of view of the Crown the Commissioners did an admirable job, for by exerting their powers and standing on their legal rights they were able to predict with some certainty that the self-incriminating answers of each suspect would be available as evidence against him at his trial. These answers would not have been admissible had the witness claimed his privilege and might well have been inadmissible if made to a peace officer or other person in authority who had no right to require answers under oath.

It is to be hoped that Parliament will intervene to prevent this report from becoming a precedent and pattern for future

⁹ See *R. v. Harcourt* (1930), 37 O.W.N. 461 (C.A.), which contains a more apposite statement of the law than that contained in *Reg. v. Coote*, L.R. 4 P.C. 499, from which the Commissioners quote to the effect that ignorance of the law does not excuse; apparently it does not protect either.

Royal Commissions appointed to inquire into allegations of misconduct. However serious and well-founded the allegations may be, their criminality is a matter for the Courts and not for the Commission. Any suggestion that it is the function of a Royal Commission to assemble in their report the evidence which the Crown may tender in subsequent criminal proceedings, including evidence in the form of confessions or self-incriminating admissions, involves a rejection of the principle that it is for the magistrate (after a judicial hearing) and the grand jury to determine whether or not the accused should stand trial.

Parliament could intervene effectively by a simple amendment to the Inquiries Act, providing that at no stage in the proceedings of a Royal Commission shall a witness be denied access to his solicitor. The Commissioners make out a strong case for having refused to allow all witnesses to be represented by counsel throughout their appearances before the Commission, but they do not explain why, for example, a detained witness should not have been allowed to see his solicitor and be apprised of his limited legal rights. An equally appropriate remedy would be to amend the Evidence Act along the lines recommended by the Civil Liberties Committee of the Canadian Bar Association. This recommendation, adopted by the Association at its annual meeting, is in the following terms:

That in order to protect the right of any witness not to be compellable to give evidence which may be used elsewhere to incriminate him, S. 5 of the Canada Evidence Act be amended so as to provide that a witness may claim absolute privilege for any evidence given by him at any time unless it be shown that at the time he was compelled to give such evidence he was informed of his right to claim that privilege and elected not to do so, or waived the privilege at the time when it is sought to use the evidence in question in order to incriminate him.¹⁰

Neither amendment would hamper a Royal Commission in obtaining evidence on the matter committed to it, but either one would go some way towards preventing the commission from extracting confessions which can be admitted by a trial court without reference to the circumstances in which they were obtained and without the assurance that no involuntary pressure had been exerted on the accused.

It is also most necessary that Parliament should clarify sections 12 and 13 of the Inquiries Act in the light of the interpretation placed on these sections, and particularly on section 13, by the Commissioners. The two sections read as follows:

¹⁰ See the October 1946 issue of the Canadian Bar Review at pp. 705-706.

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

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

There is little judicial authority to assist in deciding what is meant in section 12 by a "charge" and whether it is different from a "charge of misconduct" as used in section 13. Some assistance is derived from the judgment of Gillanders J. A. in *Re Imperial Tobacco and McGregor*¹¹ where he infers that the word "charge" as used in section 12 is synonymous with an "allegation" against or about a person whose conduct is being investigated. It is, however, possible, but rather unlikely, that the word "charge" in section 12 means the laying of a criminal information in the course of the investigation. The expression "charge of misconduct" in section 13 is clearly not susceptible of the latter meaning and it is submitted that it can mean no more than an allegation *by the Commissioners* of misconduct. A fair and reasonable interpretation of section 13 is that, if the Commissioners decide or tentatively decide to make a report in which they will allege that in their opinion a person has misconducted himself, they are obliged to give him particulars of the allegations they propose to make and an opportunity of being heard in person or by counsel to answer the allegations.

In commenting generally on their interpretation of section 13 the Commissioners have this to say:¹²

Where the Commission proposes to report against any person against whom a charge has been made, such person must first 'have been allowed full opportunity to be heard in person or by counsel'. In our conduct of the inquiry committed to us we followed these statutory provisions.

Assuming that by "charge" the Commissioners mean "charge of misconduct" and assuming the persons in question were given reasonable notice of the charges of misconduct, this statement appears to be unexceptionable. An entirely different view is, however, expressed by the Commissioners in their report on David Shugar. Briefly, in their second interim report of March 14th, 1946, the Commissioners "reported against" Shugar, as a result of which he was charged with conspiring to commit offences

¹¹ [1939] O.R. 627, at p. 643 (C.A.).

¹² Section XI, p. 676.

under the Official Secrets Act. At the preliminary inquiry the magistrate found there was no *prima facie* case against Shugar and discharged him. The Commissioners then obtained further evidence, which included evidence from a Dr. Beamish. The Commissioners express their views on the effect of section 13 of the Inquiries Act as follows:¹³

Shugar was, through his Counsel, informed of the depositions of Dr. Beamish and invited to be heard with respect thereto, but elected not to do so. This, in our opinion, is an admission on Shugar's part of the facts deposed to by Dr. Beamish. Shugar's Counsel in his letter declining on behalf of his client, the opportunity to make any answer to the new evidence, took the following position: 'I am prepared to answer any charge of misconduct against my client which the Commissioners may see fit to report upon. I do not propose to produce evidence to answer evidence in the absence of such a charge being made.'

We think this position misconceives the provisions of the Inquiries Act. That position assumes that a Commission, under the statute, must reach a conclusion unfavourable to a witness before it, and thereafter hear evidence or argument on behalf of that witness directed to inducing the Commission to change its mind. We do not think the statute so irrational.

In short, the Commissioners felt that, as far as Shugar was concerned, they had complied with section 13 by informing him of Dr. Beamish's depositions and inviting his comments and that it would have been "irrational" for them to have formulated, even tentatively, the charge of misconduct they proposed to make in their report on the basis of all the evidence they had heard and to have informed Shugar of the nature of the charge. They thereby cast the responsibility of determining its nature on Shugar and his counsel, who could hardly be expected to read the minds of the Commissioners.

It is submitted that this is neither a legal nor equitable construction to have placed on section 13 and that, if it is a proper construction, the section should be amended. The Commissioners' interpretation is an invitation to future Royal Commissions to adopt inquisitorial methods which give a person called before the Commission no opportunity of knowing what conclusions the Commissioners have drawn from the evidence of previous witnesses and, *a fortiori*, no opportunity of knowing whether or not the Commissioners are even considering making a report which will allege a charge of misconduct.

¹³ At page 318 of the Report.