THE CANADIAN BAR REVIEW

VOL. XXV January No. 1

A CENTURY OF COMMISSIONS OF INQUIRY

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WHEREAS it frequently becomes necessary for the Executive Government to institute inquiries on certain matters connected with the good government of this Province; And whereas the power of procuring evidence under oath in such cases would greatly tend to the public advantage as well as to afford protection to Her Majesty's subjects from false and malicious testimony or representations;

That was the preamble to the first general inquiries statute enacted by British legislation. It is to be found in chapter 38 of the 1846 Statutes of the Province of Canada. There is no statistical record as to the number of commissions of inquiry which have been authorized in Canada, but the statute was enacted in England's golden age for royal commissions — 74 were constituted in the 1850's. English usage was to pass a special act whenever a power to send for persons was to be vested in a commission. A like practice was employed in the old Province of Canada, which explains the historic origin of the opening words in section 3: "In case such inquiry is not regulated by any special law".

Todd, writing in 1869, stated:

> A royal commission may be appointed by the Crown either at its own discretion, and by virtue of its prerogative, or in conformity with the directions of an Act of Parliament, or in compliance with the advice of one or both Houses of Parliament.[1]

Griffith C.J., for the High Court of Australia, in *Clough* v. *Leahy*,[2] would not concede that the prerogative is employed:

> the power of inquiry is not a prerogative right. The power of inquiry, of asking questions, is a power which every citizen possesses . . . He cannot compel an answer. . . that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it desirable in the public interest to get information on any topic.

[1] On Parliamentary Government in England, vol. ii, pp. 432–3.
[2] 2 C.L.R. 139, at pp. 156, 157.

But the Full Court of New Zealand shares Todd's view,[3] regarding a power to appoint royal commissions as being one claimed and preserved by the letters patent to Governors General:

> The Governor may constitute and appoint, in our name and on our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary officers and Ministers of the Dominion as may be lawfully constituted or appointed by Us.

but subject to the qualification that "the power so delegated must be exercised in accordance with law and with constitutional practice" (*Cock's* case at p. 422).

The average Englishman has worried little over their status since the Court of Star Chamber was legislated out of business, regarding royal commissions as a tool of government. Perhaps it is not inappropriate to assume that Sir Henry N. Bunbury's recent pamphlet — issued by the British Government's Information Services — mirrors British valuation. He says:

> Royal Commissions, it is often said, are mainly used to find a policy in matters where the Government has no policy of its own. Critics of the Government are apt to say that it is appointed with the hope that it will not find that policy too quickly. In other words, Royal Commissions are often represented as expedients for delaying a decision on troublesome questions which are not of immediate urgency. And certainly they usually conduct their deliberations with more thoroughness than speed. Nevertheless, this criticism is not wholly or invariably justified. The problems which Royal Commissions are created to examine are usually of a complex and difficult character, on which there are many differences of opinion or little knowledge of the basic facts.[4]

It is to be appreciated that there is, in law, a distinction between royal commissions constituted by the Crown on its own responsibility and commissions of inquiry which are set up under the authority of a statute. Essentially it is as stated by Viscount Haldane for the Judicial Committee:

> A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law.[5]

Inquiries Acts usually include a power to send for persons and papers and to examine under oath. But, the purpose of these

[3] *Cock* v. *A.G.* (1909), 28 N.Z.L.R., and *Timberlands Woodpulp Ltd.* v. *A.G.*, [1934] N.Z.L.R. 270.

[4] Formation of Public Policy in Britain, p. 18.

[5] *A. G. Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, at p. 257. In that instance a royal commission had demanded production of papers, etc. The Judicial Committee decided that the Royal Commission Act of the Commonwealth was *ultra vires*, because rights and remedies given by it, not having been ceded by the states, could not be exercised by the Commonwealth.

notes being solely to suggest leads to those who may be associated with the workings of an inquiry, the expression "royal commission" in the following paragraphs is often used in the colloquial, rather than in the precise, sense.

Parliamentary History of Canada's Inquiries Act

Part I of the Inquiries Act, R.S.C., c. 99, is practically the text of the 1846 statute. This latter piece of legislation originated with the Governor, was recommended by the Executive Council to the Assembly, and accepted by it with little debate. It was, in accordance with the practice of the day, enacted as a temporary act, and was periodically extended. Probably for that reason in the 1867–8 session it was made one of the statutes of the new Dominion of Canada as a matter of routine business. The only alteration was deletion of the words "the administration of justice" from the subjects to which the statute was referable — section 92 of the B.N.A. Act having assigned that function to the provinces.

Part II — dealing with departmental inquiries — was added by c. 12, Statutes of 1880. Sir John A. Macdonald, who had become Prime Minister again, told the House that the Bill was made necessary by reason of, (a) his predecessors having secured legislation permitting the Minister of Justice to delegate penitentiaries' inquiries to an inspector, and (b) a new officer, the Auditor General, having also been given the power to summon persons and to examine them under oath. The intent, he said, was to place the Ministers on an equal footing. To the argument that Part I already provided adequate machinery, the Prime Minister replied that when a formal royal commission was constituted under that Part, and the subject matter one purely departmental in character,

> it established a tribunal somewhat in the nature of a preliminary impeachment.

The object, he explained, was to provide a means whereby, for example, the probability of a smuggling ring existing might be investigated. He disowned any intent of usurping functions of the courts:

> If the evidence of crime or a felony be discovered, there is only one thing to do — to send the offender to trial . . . if the head of any department has to make an inquiry as to any irregularity and a distinct case of felony appears, it can be reported for trial by the ordinary tribunals, by a recommendation of the prosecution of the offender.[6]

[6] Debates, May 3, 1880, p. 1937.

Section 5 of the Canada Evidence Act did not then exist; consequently, the Opposition concentrated on the taking of evidence under oath in departmental investigations. The Honourable Edward Blake declared:

> The law may be a judicious one if it is confined to inquiries into the conduct of public officers in discharge of their duties, so long as they are not charged with criminal offences under the law of the land. It seems to me it would be an innovation of serious consequence, one which would hardly commend itself to Parliament or the country, if we were to permit inquiries in this manner into matters which are under the law of the land. Two observations have occurred to me: First, that the law ought to be expressly so framed as that the power should not extend to any such investigations; and second, that there should not at any rate, be power to force the examination of the party charged.

and later:

> a preliminary inquiry, the examination of witnesses before a private court — perhaps before persons not learned in the law, without counsel for the accused, might result in the conclusion of the question, and a decision by the department that the charge was proved, leading to the discharge of the officer, because supposed to be proved guilty of larceny, embezzlement or some other offence.

The Honourable James McDonald, Minister of Justice, replied, the material part of his remarks being related to the text of the clause which is now section 7 of the act:

> It gives authority to the commissioner to summon before him any person to give evidence. A witness is summoned to give evidence in relation to any matter which, at first, may not point him out, but which, in the result, may indicate him. The moment he goes before the commissioner and is asked to give his evidence, he has only to say: I will not give evidence, because I am afraid my evidence will convict myself. He has the permission every one has under the English law of refusing to give evidence which may convict himself. Therefore I think the objection of my hon. friend falls to the ground.

Mr. Blake persisted and on third reading moved that the bill be referred back to be amended "to preclude any commission appointed thereunder from inquiry into criminal matters". This was negatived without a vote being recorded.

Part III was added in 1912. Debate in both Houses was relatively long and held in an atmosphere of partisanship. The Opposition associated the legislation with a recently constituted royal commission which was dubbed by Sir Richard Cartwright as a "muck-raking committee", created:

> for the purpose of investigating, and either finding out or inventing scandals that come handy against the preceding administration.[7]

[7] Senate Debates, February 6, 1912, p. 142.

As introduced, the Bill consisted of a single clause, out of which the present section 11 evolved — Sir Robert Borden, who was noticeably open-minded, revised the text in the House. The bill permitted commissioners to delegate their power to summon witnesses and to examine them under oath. This was attacked on the ground that it created an irresponsible commission within a commission. Sir Robert met this objection by inserting "when authorized by Order in Council" in subsection 3, thus limiting the power to send for persons to those who were specifically authorized to do so by the Governor in Council. A longer discussion revolved around the provision permitting a royal commission to engage counsel. The Honourable William Pugsley, after declaring that,

> This Bill is a departure from the law in a very important essential by authorizing the commissioners to engage counsel

contended:

> Now a one-sided investigation — an investigation in which there is only one lawyer — is bound to give great dissatisfaction. It would be the easiest thing in the world for a lawyer — and he will do it perhaps unconsciously — to give a bias in favour of the particular side of the question in which he is interested. When we propose to give power to the commissioners to employ counsel it is only right that the official whose conduct is being inquired into should be given the right to be also represented by counsel. Only in that way will he get fair play.[8]

He moved an amendment:

> Any person whose conduct is being investigated under this Act shall have the right to be represented by counsel on such inquiry.

Sir Robert Borden immediately expressed a willingness to consider the amendment, but pointed out that:

> under at least one commission issued by the late Government the parties whose conduct was being investigated were permitted ostensibly to have counsel, but the counsel was not permitted to say a word or take any action.

and:

> I would not be disposed to oppose the suggestion if it would not lead to confusion. For example, suppose that a commission appointed to inquire into certain departments of the government, begins its work in a certain department, is every person in that department whose conduct is inquired into to have the right to employ counsel and the whole work of the commissioners to be thrown into confusion in that way? My own idea is that it would be better to leave the matter to the commission, with the assurance that fair play would be given in every case.[9]

[8] Debates, January 16, 1912, pp. 1284–5.
[9] Debates, pp. 1285–6.

On January 18th the Minister of Justice proposed, in lieu of the Pugsley amendment, that the text be:

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

Mr. Doherty's explanation was:

> This differs from the amendment proposed by my hon. friend to this extent. It gives the absolute right to anyone against whom any charge is made in the course of the investigation to be represented by counsel, and gives discretion to the commissioners to authorize any one whose conduct is being investigated to employ counsel.[10]

Thereupon Mr. Pugsley withdrew his amendment, and the text is now section 12 of the act. Complementary section 13 was added without discussion. It reads:

> 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.

This was unfortunate, because the word "misconduct" might have been improved upon. It is an apt expression so far as civil servants are concerned. Related to them it connotes offences, conduct which is negligent or reckless and acts of political partisanship — to a legislator it is wholly desirable that there be political partisanship, so long as the individual is not on the public payroll. Then it is a statutory offence.[11]

The parliamentary history points to the conclusion that it was not the intent, so far as the general public is concerned, to set up a quasi-judicial tribunal, nor to create a status of *lis inter partes*. In this regard the New Zealand act differs. In certain classes of inquiries New Zealand commissions of inquiry may assess costs. In the *Timberlands Woodpulp* case, Myers C.J. quoted with approval words of Williams J. in the *Cock* case:

> The commissioner is to hear the charge and to report his finding. Whatever the finding may be the person charged is in peril of costs, and if the commissioner finds the charge to be proved there can be no

[10] Debates, January 18, at p. 1415.

[11] Section 55 of the Civil Service Act, R.S.C., c. 22, states that no deputy head, officer, clerk or employee shall be debarred from voting at any Dominion or provincial election; but no civil servant "shall engage in partisan work in connection with any such election, or contribute, receive, or in any way deal with any money for any party funds". And: "Any person violating any of the provisions of this section shall be dismissed from the civil service".

> doubt that costs will be given against him. He may be adjudged to pay the whole cost of inquiry.

and:

> a judgment for costs is in fact, though not in name, a punishment.

One Canadian case has been noted where, without specific legislation to authorize, a government sought to deduct the cost of an inquiry from moneys payable under an agreement. The Government of Nova Scotia and a contractor agreed that he be paid a subsidy upon his constructing a railway line. It was a provision that, in the event of his failing to pay his workmen and suppliers, the Government might pay them directly out of the subsidy. It became necessary to investigate the state of his affairs and a commissioner was appointed under the Inquiries Act. The Province deducted the costs of the commissioner from the subsidy. This was challenged by other creditors. Speaking for the court, Ritchie J. decided:

> When the Governor acting under the Public Inquiries Act issues a commission, I think in the absence of a statute authorizing the expense to be charged to some one other than the Government, such expense must be borne by the Government.[12]

Administrative Practice

The Membership. The composition of a royal commission is a matter wholly within the discretion of the Crown. In the New Zealand *Timberlands* case an objection taken was that one commissioner — a member of the stock exchange — had a financial interest in the inquiry[13] and that another member, a professor, had a known bias by reason of his writings and addresses. Myers C.J., for the court, deciding that a royal commission exercises no judicial functions and is not a judicial tribunal in any legal sense, declared:

> That being so, no question of bias or interest on the part of a person appointed as a member of such a commission can arise . . . The qualifications of commissioners when the commission cannot be controlled by the Court, are a matter entirely for the consideration and judgment of the Governor General's responsible advisers . . .[14]

Todd's view was that members of the Government should not be appointed commissioners,

[12] *Irvine* v. *Hervey* (No. 2), 47 N.S.R. 310.

[13] The inquiry was with respect to the promotion, financial methods, control and operation of companies and corporations which seek to raise capital in New Zealand. The matter was before the court for a writ of prohibition.

[14] At p. 295.

> as it might afterwards become their duty to decide upon some executive action growing out of the same, as a question of state policy upon which a minister of the Crown ought not to have previously committed himself to an opinion.[15]

But he saw no objection to such an appointment when the subject matter "has no connection with politics". Civil servants may be appointed commissioners; but a "royal commission wholly composed of officials would be a monstrosity".[16]

Members of Parliament may be members, so long as no salary is associated with the appointment;[17] and it is not regarded in Canada as a violation of the "Independence of Parliament" sections in the Senate and House of Commons Act if a Member, who is a commissioner, accepts actual living and travel expenses when attending at places other than his home. If the House be in session, he is not regarded as in travel status when attending meetings of a commission sitting in Ottawa.

In 1873 Sir John A. Macdonald moved that the House constitute a Select Committee of five to inquire into allegations with respect to the incorporation of the Canadian Pacific Railway, saying that he was prepared, if the investigation were not completed by prorogation, to appoint the committee a royal commission in order that it might complete its work. One of the first requests of the committee was for power to examine witnesses under oath. A bill was quickly passed, but was declared *ultra vires* by the law officers in England on the ground that Canada's House of Commons could not make claim, under the B.N.A. Act, to any greater power than the British House of Commons — which had no such right — enjoyed. The B.N.A. Act was amended in 1875 as a result. Sir John on July 2nd acquainted the several members of the committee of the disallowance and proposed that they be constituted a royal commission, ending his letter with a postscript:

> P.S. The commission will contain a clause enjoining the commission to report to the Speaker of the H. of C.

A. A. Dorion and Edward Blake were the Opposition's members on the committee. On July 3rd both rejected the proposal. In his letter Mr. Dorion (later Sir Alphonse) drew attention to the fact that the conversion from a House Committee to that of a commission of inquiry would have the consequence of the Members not sitting in their capacity as Members of Parliament but as commissioners

[15] *Supra*, at p. 437.
[16] Bunbury, *supra*, at p. 17.
[17] Todd, *supra*, at p . 305.

> whose decisions and proceedings would be subject to the supervision and control of the Executive, under whom they would hold their appointment, and not of the House.[18]

Subsequently, an order in council issued naming three judges to continue the inquiry. A direction of the commission was:

> and we do require you to communicate to Us through Our Secretary of State of Canada, and also to the Honourable Speaker of the Senate and to the Honourable the Speaker of the House of Commons of Canada.

In 1934 a commission was issued naming the members of a special committee of the House to complete its inquiry on Price Spreads. The Committee had recommended such action. In that instance the order in council ended with the direction

> that the Commission report to the Minister of Trade and Commerce.

The Committee on Procedure of Royal Commissions[19] in its report remarked:

> It seems to us impossible to avoid the conclusion that appointments have sometimes been made to commissions of individuals whose proper place would rather have been in the witness box than on the tribunal. A commission selected on the principle of representing various interests starts with a serious handicap against the probability of harmony in its work, and perhaps even of practical results from its labours.
>
> We are also of the opinion that there has been a recent tendency to make the membership too large. The object in view is probably to ensure that various shades of opinion should be represented within the commission, a consideration to which we attach little weight. Moreover, the experience of recent commissions shows to anybody who examines their records that the expenses have tended largely to increase, which we attribute to some extent to the increased size of commissions.
>
> The true object of the appointment of a Royal Commission is to obtain a carefully considered judgment on the matters within their terms of reference; and this object is imperilled when the preliminary considerations mentioned above are disregarded, because its members are apt to divide almost from the date of their appointment into two or more opposing parties.

The Balfour Committee dealt also with the status of a chairman. By reason of the fact that he is named as such in the royal warrant, the Committee concluded:

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[18] Journals of the House of Commons (1873), vol. 7, p. 21.

[19] In 1909 the Home Secretary appointed Lord Balfour of Burleigh chairman of a committee consisting of the Earl of Radnor, T. G. Ashton, M.P., C. E. H. Hobhouse, M.P., and W. P. Byrne of the Home Office, to inquire into the procedures and practices of royal commissions. Their report was tabled in 1910 [Cd. 5235]. It will be referred to as the "Balfour Committee".

> that he is invested with a certain amount of authority to regulate and control the proceedings of the commission over which he presides.

But, the warrant,

> being addressed to the whole body of the commission, does not impose upon the chairman responsibilities or duties of a nature which would justify him at any time in attempting to disregard, still less to override, the deliberate opinion of his colleagues or of dictating to them what shall or shall not be done.

From no class is a chairman more frequently selected than that of the judiciary. As Berriedale Keith has said:

> In the Dominions as in England the employment of judges on Royal Commissions has been discussed with some liveliness. The argument against the practice is that a judge may thus be distracted from his true duties, and embarrassed if later he come to be concerned judicially with issues which have been before him as a Commissioner. Objections have also been raised to the use of judges to enquire into matters raised in Parliament; in the famous Pacific scandals of 1873 the proposal to refer the allegations against the Conservative leaders to three judges was denounced by Mr. Huntingdon as unconstitutional, and judges in difficult and delicate cases of this kind are exposed to the abuse which sometimes is lavished on their activities in the delicate matter of the hearing of electoral petitions, though experience has proved that they deal better with these matters than any other. In Victoria in 1934 (Act No. 4278) a Court of Disputed Returns was at last created on this ground.[20]

In 1912 when the Senate was considering amendments to the Inquiries Act it was suggested — but not pressed to a vote — that the bill be amended to stipulate that the chairman of all inquiries be a judge, except when the reference was "political". During the recent war judges were frequently called upon to perform various services for the Government. Consequently, when the Judges Act was being revised in 1946, the subject was discussed. For the argument against, it will suffice to quote John Hackett, M.P. (now Dominion Vice-President of the Canadian Bar Association):

> I pray the Government to desist from undermining the Bench by referring to members of the judiciary questions highly tinged with politics, questions which are beyond and outside the ambit of judicial functions and which are drawing into the dust and dirt of the political arena those whom we have liked to believe were above and beyond such controversies.[21]

But the man-in-the-street probably regards the observation of Angus McInnis, M.P. (who records in the Parliamentary Guide his occupation as that of motorman) as reflecting the general viewpoint:

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[20] The Dominions as Sovereign States, p. 367.
[21] Debates of the House of Commons, July 26, 1946.

> I think we are being a little unrealistic when we mentally raise judges to a level a little more than human. I believe judges try to be impartial and that in the main they succeed in being impartial. But to expect us to believe that a man, who was in the thick of the conflicts of life today and is made a judge tomorrow, is going to drop all his prejudices and biases and never think of them again, is asking too much of human nature. He will certainly have prejudices and biases no matter what he does. The point I was going to make, however, is that a judge has a certain position in our society not only with lawyers and those who have to do with the courts, but with the public; and when the public wants a royal commission, generally, I think, it feels more satisfied that an impartial report will be made if a judge is at the head of that commission. You can make your other appointments as you like, and those appointments will be supposed to represent different factions or sections or classes, as the case may be, but if you do not put a judge as chairman of such commission you may have very great difficulty in finding another person who will be satisfactory to all concerned.[22]

Apparently a commissioner has no legal claim for compensation for his services. *Tucker* v. *The King*[23] concerned the account of a lawyer who was appointed under Part II to investigate partisanship charges against a superintendent of canals. The commissioner sent in an account for $800. The Government offer of less being refused, the commissioner proceeded by petition of right. The Crown disclaimed any liability whatsoever. Burbridge J. observed that the commissioner had been under no obligation to accept the office and decided that:

> the appointment was made under a statute in which there is no provision for compensation for any service that might be rendered by the commissioner, and in accepting the appointment, he must, I think, be taken to have relied upon the honour and good faith of the Crown and of the Minister, and not upon any legal obligation on the part of the Crown to pay for his services. . . In fact it is clear that the service was not rendered in virtue of any contract, but by virtue of the appointment under the statute, and no provision being thereby or otherwise made for the payment of the commissioner for his services as such commissioner, no promise on the part of the Crown to pay therefor is to be implied from the appointment and from the rendering of such services.[24]

On the other hand, counsel who is appointed under section 11 is in a better position. Section 5 of the Saskatchewan Inquiries Act is a reproduction of the Dominion section. Martin J.A., speaking for the Saskatchewan Court of Appeal,[25] said:

> The commissioners were authorized by the Lieutenant-Governor-in-Council in the commission issued to them to engage counsel, and acting

[22] Debates, August 2, 1946.
[23] (1902), 7 Ex. C.R. 351.
[24] Sustained on appeal by the Supreme Court of Canada, 32 S.C.R. 722, which reports only a dissent by Girouard J.
[25] *Hogarth* v. *Regem*, [1934] 2 W.W R. 340, at p. 345.

upon such authority, they did engage counsel, among them the appellant. In so engaging counsel the commissioners acted on behalf of the Lieutenant-Governor-in-Council and while no agreement was made with counsel as to remuneration there was an implied agreement that counsel were employed upon the usual terms upon which such services are rendered, in other words, that they would be given a reasonable compensation for their services.

The Reference. Section 2 states that the reference may concern "any matter connected with the good government of Canada or the conduct of any part of the public business thereof". Cameron J.A. in *Kelly & Sons* v. *Mathers*[26] said of the words "good government of the Province" in the Manitoba Inquiries Act that it

> is intended to be a term of wide meaning. . . To my mind, it involves and connotes the ideas of public welfare, of public business and of public purpose.

The same judge in *North West Grain Dealers Association* v. *Hyndman*[27] said of the like phrase in the Dominion Act:

> The words. . . are broad, general and designedly used, and extend to all matters and considerations that come within the Federal jurisdiction. . . If there be any attempt on the part of the commissioners to extend their proper authority or to trespass on the strictly provincial field it can be met as the occasion arises. There is nothing to prevent the issue of a Dominion commission of inquiry or to prevent such commission from gathering information on almost any conceivable subject, such, for instance, as that of our provincial land titles system and its administration; but the power to compel the attendance of witnesses on such an inquiry would be another matter entirely.

In the same case Dennistoun J.A. commented:

> It is not suggested that such jurisdiction is unlimited so as to justify an inquisition into the private and personal affairs of all and sundry who may be summoned as witnesses, nor is it to be assumed in advance that the commissioners will overstep the bounds of their jurisdiction or seek unwarrantly to invade the civil rights of residents of the provinces. They should restrict the exercise of their compulsory powers to a search for information which may properly be made use of in a legislative or administrative capacity by the Government of Canada in respect of matters over which it has statutory jurisdiction.[28]

There have been instances where the question before the courts was whether an inquiry trenched on the jurisdiction of the courts. The *Kelly* case is an example. The plaintiffs were contractors for the construction of the Manitoba Parliament Building. The defendants were Mathers C.J., Macdonald J. and Sir Hugh John Macdonald — commissioners appointed under the

[26] (1915), 23 D.L.R. 225.
[27] (1921), 61 D.L.R. 548.
[28] *Ibid.*, at p. 573.

Manitoba Inquiries Act to investigate the contracts. The plaintiffs were seeking an injunction, primarily because they had notice of an intention to issue an order to commit them in the event of refusal to attend and give evidence. Furthermore, the Province had given notice of its intention to bring civil action to recover a large sum of money and to take criminal action against them should the facts elicited by the inquiry appear to justify such action. The Manitoba Court of Appeal decided against the Kellys, the headnote of the report reading:

> The powers conferred on an Investigating Commission to compel the attendance of witnesses and production of documents for the purpose of enabling the Government to proceed in civil and criminal prosecutions, is no abridgment of the immunity of giving incriminatory evidence recognized by the Dominion and Provincial Evidence Acts.

A few years later the problem presented itself in British Columbia. During the first Great War the Government of Canada, acting under the War Measures Act, issued prohibitory orders with respect to the liquor traffic. The Government of British Columbia, acting under its Inquiries Act, directed an inquiry into law-breaking as a result of such orders. A warrant was issued (but not served) to compel Gartshore's attendance as a witness. The application for a writ of prohibition was made to Hunter C.J. B.C., and was granted, mainly because he considered that if the Inquiries Act was intended to authorize a coercive inquiry into matters exclusively within Dominion jurisdiction, it was

> to that extent ultra vires, in view of the decision of the Privy Council in the case of *Atty. Gen. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, the ratio decidendi of which is, that a Legislature, with limited powers, cannot create a coercive tribunal to examine into matters over which it has no jurisdiction. I do not understand the principle established by that case to be one of absolutely rigid and unyielding character. For instance, a commission to inquire into the working and efficiency of the grand jury system, might, I think, be validly issued by the provincial government even although it was called on to examine into some aspects of the system which. . . are under Dominion control. But where. . . as here. . . the commission is directed to inquire into matters that are exclusively under the control of the Dominion Parliament, I think the principle applies with the result that the commission is void, so far as concerns the mandate to inquire into violations of Dominion prohibitions relating to intoxicating liquor.[29]

[29] *In re Gartshore*, [1919] 1 W.W.R. 372, at p. 376. A trenchant criticism by W. Jethro Brown of the *Colonial Sugar* case is to be found in the Law Quarterly Review (1914), vol. 30, commencing at p. 301. The same decision was distinguished by the Manitoba Court of Appeal in the *Kelly* case — it being founded on certain provisions of the constitution of Australia which are not comparable to the provisions of the B.N.A. Act.

The commission for the inquiry was also found unconstitutional by the Chief Justice because the Charles I statute, declaring void various powers exercised by the Court of Star Chamber, enacted that:

> no man be put to answer without presentment before justices as matter of record or by due process and original writ according to the old law of the land. . . [30]

The Province of British Columbia, thereupon, put questions to the Court of Appeal and succeeded. Chief Justice Macdonald regarded the inquiry as one pertaining to the "administration of justice", a subject assigned to the provinces by section 92 of the B.N.A. Act; therefore, the inquiry was one within the legislative competence of the Province. He then surveyed the situation:

> A provincial detective force might, I think, be organized under provincial laws for the very purpose for which the commissioner was appointed. Now, if I am right in thinking that investigations, extra-judicially, into the commission of crime for the purpose of discovering if and by whom committed are within the subject matters assigned to the Province under the words 'administration of justice', is there anything to prevent the Province from making the investigation effective by imposing on individuals an obligation to give evidence under penalty for refusal. I think not. Such a power is not inconsistent, but consistent with the jurisdiction of the Province to legislate concerning property and civil rights.
>
> No doubt to concede the power to the Province to make investigations into breaches of Dominion laws would appear at first blush to be an anomaly, and it might well be argued that the power conferred upon the Province in respect of the administration of justice ought to be interpreted as conferring merely the duty or obligation to put the machinery of the Courts in motion, and to take the requisite steps to prosecute persons accused of crime. That narrow construction would, I think,

[30] But Street A.C.J. said in *re Walker* (1924), 24 S.R. N.S.W. 604, at p. 612: "I think that on its true meaning 'put to answer' probably meant what we mean by 'putting on his trial' nowadays, but in any event the mere appointment of a commission of inquiry by the Crown does not of itself give the commissioner any coercive power or compel any person to answer any questions put to him if he chooses not to do so. Any coercive power that the commissioner is to have must be conferred upon him by Parliament, and if so conferred it is then prescribed by law." See also article of Sir Harrison Moore in (1913), 13 Columbia Law Review 500, where he traces the history of executive commissions of inquiry. His treatment of Coke's decision in the *Commissions of Enquiry* case (1608), 12 Co. Rep. 31, is adopted by Holdsworth's History of English Law, vol. v, p. 432. Dixon J., in *McGuinness* v. *A.G. (Victoria)* (1940), 63 C.L.R. 73, at p. 101, accepted Sir Harrison's general conclusion, which he said was that "no rule of law attached illegality in any definite sense to the mere issue by the Crown of a commission of inquiry or to the act of investigation in pursuance to such a commission and that at common law there was no limitation upon the executive power of inquiry even though the matters inquired of were of a private nature or some matter of offence or right capable of being brought to adjudication".

> preclude what has been generally recognized as one of the functions of government in the administration of justice, namely, the ferreting out of crime and identification of criminals. There is nothing novel in compelling a witness to give evidence which may tend to incriminate him. That is done in the civil Courts and is the practice in one of the oldest criminal Courts of the Realm, the Coroner's Inquest. With the justice or expediency of inquiries into crime by an extra-judicial provincial commission I have not to concern myself. The power to appoint such rests somewhere. It is either with the Dominion or the Province, or with each, and hence it is idle to urge as a reason against the validity of the order-in-council that it is inimical to the rights of the subject.[31]

The foregoing instances relate to provincial inquiries statutes; *North West Grain Dealers Association* v. *Hyndman*[32] took its origin in a commission of inquiry constituted under the Dominion act. A large number of companies engaged in the trade joined in applying for an injunction to restrain Mr. Justice Hyndman and his fellow-commissioners from (a) compelling: answers to questionnaires, the production of books and papers, and employees of the applicants to appear and give evidence on oath; (b) taking possession of their books and papers; (c) interfering with their property and civil rights; and (d) hearing complaints without giving due notice of them. The court followed the *Kelly* case and the finding of the British Columbia Court of Appeal in the *Inquiries Act* case. A headnote is:

> When a Commission has been validly appointed under the Inquiries Act, R.S.C. . . . mere apprehension that the Commission will attempt to deal with matters outside the proper scope of its authority is not sufficient to justify an injunction restraining the whole inquiry.

Turning to England, Holdsworth, when dealing with the 16th century, remarks:

> In the last half of this century the legality of these commissions was called to question by lawyers who saw that the extensive powers given to them were endangering the supremacy of the law and the liberty of the subject. In the following period the common lawyers limited their sphere of action still more rigidly, and, with the victory of the Parliament and the common law, these limitations have become part of our modern constitutional law.[33]

So it was that, when a "Select" number of the Privy Council (including Coke) were appointed in 1612 to investigate the conduct of the Countess of Shrewsbury and she refused to answer questions, it was resolved that the Select Council could not fine or imprison "for that ought to be assessed judicially". This has been followed ever since.

[31] *Re Public Inquiries Act* (1919), 48 D.L.R. 237, at pp. 239–40.
[32] (1921), 61 D.L.R. 548.
[33] History of English Law, vol. iv, p. 70.

A recent Australian case is also pertinent. A newspaper made the allegation that unspecified Members of Parliament had been bribed and demanded an investigation. Judge Gavan Duffy was appointed commissioner to make an inquiry. He summoned the editor, put him on oath and asked the source of his information. He refused to answer. Thereupon, the commissioner cited him to the Attorney General (as provided for by the act) and he was ultimately fined £15 by a police magistrate. He appealed to the High Court of Australia and failed.[34] Latham C.J., after stating two propositions which he regarded as undebatable,

> (1) the executive government cannot by the exercise of the prerogative create new courts; and (2) the executive government cannot by any exercise of the prerogative interfere with the due course of the administration of justice.

continued:

> The Royal Commissioner was appointed to inquire into a specified subject matter, namely, the suggested bribery of members of Parliament. He was not appointed to determine an issue between the Crown and a party, or between other parties. The commissioner was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation — an inquisition as distinct from the determination of an issue.[35]

The Hearings. The chairman — usually a man of standing in public affairs without a specialized interest in the subject — is accepted as the umpire in all matters of procedure. Hearings may be held in public or in private.[36] In the absence of instructions, procedure and practice are determined by the chairman and the commissioners.[37] Ordinarily, the taking of evidence on oath by a Part I commission is an exception from practice. When adopted, the legal existence of the commission may be proved by the production of the order in council directing the commission to issue: *Rex* v. *Mazerall.*[38] Witnesses may be selected, or offers of evidence may be made. In the latter event, Bunbury says the English rule is that

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[34] *McGuinness* v. *A.G. (Victoria)* (1940), 63 C.L.R. 73.

[35] *Ibid.*, at p. 86.

[36] Stout C.J. in *Jellicoe* v. *Haselden* (1902), 22 N.Z. L.R. 349, and Griffith C.J. in *Clough* v. *Leahy, supra,* at p. 159.

[37] An example of an exception is provided by the Order in Council constituting the 1946 "espionage" inquiry ordered by the Government of Canada. This Order directed that a record be made of all of the evidence and that all oral evidence be taken down in shorthand by a writer approved and sworn.

[38] [1946] O.R. 762, at p. 777 (Court of Appeal).

> these they may accept orally from witnesses or may content themselves with requesting, and promising to consider, a memorandum in writing.

In Canada, a practice — but not one invariably followed — is that submitted briefs are read into the record by a witness. The Balfour Committee reported that their inquiries disclosed that, when there was a disagreement within a commission with respect to the selection of witnesses:

> though minorities or individuals have not claimed a *right* to have such witnesses heard against the wish of the majority, yet a considerable latitude has apparently been allowed to minorities in this respect, and one member of a commission circularized says that on one commission where evidence had been excluded, the minority made the necessary inquiries individually in order to inform their own minds.

Hearsay and secondary evidence, not founded on first-hand knowledge, is not rigidly refused. The Balfour Committee remarked that

> many chairmen seem to hold the view that it would not be wise to restrict the evidence before Royal Commissions in accordance with the practice in Courts of Law.

It accordingly recommended that:

> At any meeting for hearing oral evidence the Chairman, as presiding officer, should have power to rule out any question when put which he considers inadmissible as being irrelevant or unnecessary. Any objection to the Chairman's ruling should be considered forthwith (the room being cleared during the discussion) and the decision of the majority of the Commission must prevail, subject to an appeal by the minority on any matter of principle (but not on mere personal questions) to the originating department, who should not only be empowered, but required, to give a definite decision on the matter so submitted.

Oral evidence is the general practice, but there is no prohibition against consideration being given to submissions in writing.[39] In England evidence is printed and sold; but in Canada it is an exception when it is printed. A commission of inquiry may take evidence in confidence, in which event it is not published. An example is offered by the Pulpwood Commission. It arranged with the Government of Quebec that an officer of the Province would give evidence which would be treated as confidential. Prior to the tabling of the Commission's report, a member of the House of Commons moved for the production of this particular evidence. The Minister of Trade and Commerce objected to the adoption of the motion until the Province gave its consent. The mover did not press his

[39] Howell C.J. at p. 239 in the *Kelly* case, *supra*.

motion further.[40] At Westminster more recently, a member inquired as to the publishing of confidential evidence received by the Royal Commission on Palestine; also whether it would be made available to the Mandate Commission. The answer of the Secretary of the Colonies was:

> His Majesty's Government have not, and will not see, the confidential evidence which was given solely to the Royal Commission in confidence, and which is always kept under seal. It will not be given to me and it cannot be given to the Permanent Mandates Commission.[41]

The Ontario Court of Appeal noted in *Re Imperial Tobacco Co.* v. *McGregor*[42] that the Commissioner had not made available to the companies certain evidence taken in the inquiry prior to notice of charges against them being given the companies. The court regarded this as a matter within the commissioner's discretion.

The chairman may put any question he wishes to a witness and the members then interrogate in turn. Persons (other than commissioners and their counsel) have no right to ask questions. This practice was well established in England a hundred years ago.[43] The procedure followed before the Evicted Tenants (Ireland) Commission in 1892 was to allow questions to be put through the commissioners themselves and in the Featherstone Riots Inquiry in 1893, Lord Justice Bowen, who presided, followed the same procedure. Edward Blake doubted, when Part II was added to the Canadian Inquiries Act in 1880, if the statute gave a right to counsel to participate; and Sir Robert Borden, in 1912, referred to an instance where counsel was only allowed to be present. But modern practice is as stated by Chief Justice Myers of New Zealand:

> for its own assistance it may, if it thinks fit, permit the attendance of counsel for persons who are not parties in any true sense and may allow such counsel to examine or cross-examine witnesses.[44]

St. John v. *Fraser*[45] related to an inquiry made under the British Columbia Securities Fraud Prevention Act, but the following observation by Davis J. of the Supreme Court of

[40] Debates of House of Commons, April 30, 1924.
[41] Debates, July 12, 1937, pp. 853–4.
[42] [1939] O.R. 627.
[43] "Government by Commissions" by Toulmain Smith, published in 1849, states at p. 168: "What evidence they please is taken and no more. All evidence is taken in secret; and so much published as, and when, they like; and with such an accompanying gloss as they please to give it. No liberty of cross-examination — that is, of extracting dissimilitudes — is admitted."
[44] *Timberlands Woodpulp Ltd.* v. *A.G., supra*, at p. 295.
[45] [1935] S.C.R. 441.

Canada does not seem to be inappropriate to an ordinary commission of inquiry:

> it was . . . pressed. . . . upon us. . . . that it was against natural justice that the plaintiffs should have been denied the right they claim of cross-examining every witness who was heard by the investigator. The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think that any such right exists at common law. The investigation was primarily an administrative function under the statute, and while the investigator was bound to act judicially in the sense of being fair and impartial, that, it seems to me, is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses. It is natural, as Lord Shaw said in the *Arlidge* case, that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers.[46]

The United Kingdom has a statute which is not universally duplicated. It is The Witnesses (Public Inquiries) Protection Act, 1892, and it defines an "inquiry" as including one held under the authority of a Royal Commission, and extending to all evidence whether it "is or is not given on oath". The statute makes it a misdemeanour, punishable by £100 fine or three months' imprisonment — plus compensation to the injured person — if any person (who cannot prove bad faith)

> threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify or injure any person for having given evidence upon an inquiry, or on account of the evidence which he had given.

The Balfour Committee reported that:

> As a general rule, it appears no difficulty was found in obtaining evidence. The exceptions are few in number. In one instance (the Trades Disputes Commission) no trade unionist was willing to give evidence; in another instance certain miners were unwilling to give evidence on the ground that it might injure their fellow-workmen or themselves in their relationship with their employers; in another instance a Board of Trade official declined to give evidence on the ground that the subject would come before him officially for opinion; in another instance some suggested witnesses refused to give evidence for publication.

The Committee reported that nineteen chairmen of royal commissions who were queried were about equally divided as to whether it was desirable to have a general power to send for persons and papers; therefore, it made no specific recommendation. Shortly after the end of the first Great War, a member in the British House of Commons demanded an inquiry into

[46] *Ibid.*, at p. 453.

certain matters of the Ministry of Munitions. The view of various members being that the committee should have power to examine witnesses on oath, the Government undertook to introduce legislation. The result was a general act, The Tribunal of Inquiry (Evidence Act) 1921. It does not apply to all inquiries, but is limited to those

> Where it has been resolved. . . by both Houses of Parliament that it is expedient that a tribunal be established for inquiry into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State. . . .

The act provides that, if the appointing instrument includes the power (the inclusion is discretionary), the commissioners shall have all such "powers, rights and privileges as are vested in the High Court" to: (a) enforce attendance of witnesses and to examine on oath, (b) compel production of documents, and (c) subject to rules of court, issue a commission or request to examine witnesses abroad. If any person fails to obey, the chairman may certify the offence to the High Court, which, after a hearing, may

> punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the Court.

In turn, a witness before such a tribunal enjoys the same immunities and privileges as if he were a witness before the High Court. The concluding section states that such a tribunal:

> (a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal 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; and
>
> (b) shall have power to authorize the representation before them of any person appearing to them to be interested to be by counsel or solicitor or otherwise, or to refuse to allow such representation.

Commissioners themselves must watch their tongues. In 1902 the Governor of New Zealand issued a commission to investigate charges made by a prisoner against a warden. Jellicoe, a solicitor, sued Haselden, a commissioner, for words spoken during a hearing, which he regarded as detrimental to his professional reputation. Privilege was pleaded but without success. Stout C.J. commented that:

> it seems to me that to decide that a commission issued by His Excellency with unlimited powers of inquiry into, it may be, private affairs, protected

> commissioners from actions, however malicious their statements in public may be, would be to lay down a new and dangerous precedent and law. The other consideration is that if a commissioner may libel and slander persons not before the Commission, and not in a confidential report, great evil may be worked.[47]

Williams J. included in his opinion these words:

> I think, therefore, that the Commissioners are not in any sense a court, but if in some remote way they come under that denomination they are not Judges, as their functions are non-judicial; and therefore, that they do not come within the authorities which decide that the utterances of judicial persons are absolutely privileged.[48]

The Privy Council had before it more recently a comparable set of circumstances. The Government of Canada directed an inquiry to be made under the authority of the Combines Investigation Act.[49] Section 18 of the act makes provisions of the Inquiries Act applicable when "not repugnant to the provisions of this Act". Mr. O'Connor, a barrister, sued the commissioner because of oral statements made during a hearing. The defence of privilege was treated as dependent upon the defendant's status as a commissioner. Lord Atkin considered that Lord Esher accurately stated the law in *Royal Aquarium* v. *Parkinson*[50] where he said that judicial privilege

> applies whenever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. . . This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act.

At page 82 Lord Atkin says:

> While it is true that some tribunals charged with the duty of inquiry whether an offence or breach of duty has been committed have been held entitled to judicial immunity. . . there were in those cases conditions as to the way in which the tribunal exercised its functions, and to the effect of its decisions which led to the conclusion that such tribunals had attributes similar to those of a court of justice. On the other hand, the fact that a tribunal may be exercising merely administrative functions though in so doing it must act 'judicially' is well established, and appears clearly from the *Royal Aquarium* case above cited. If it is exercising such functions it seems to be immaterial whether it is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders made for the purpose of effectuating its inquiries; see *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* [1931] A.C. 275.[51]

[47] *Jellicoe* v. *Haselden*, *supra*, at pp. 356–7.
[48] *Ibid.*, at p. 363.
[49] R.S.C., 1927, c. 26.
[50] [1892] 1 Q.B. 432, at p. 442.
[51] *O'Connor* v. *Waldron*, [1935] A.C. 76.

Consequently, an inquiry under the Combines Investigations Act being held to be administrative in character, Mr. O'Connor's right to proceed with his action was restored.

The Report. Section 2 of the Inquiries Act merely states that the Governor in Council may "cause inquiry" to be made; it says nothing about the scope of the report. By long practice, instructions are given by the order in council directing the issue of the commission, or they are set out in the commission itself. In the *Kelly* case, a contention was that there was no authority to instruct the commissioners. At page 238 Howell C.J. said:

> It was urged in the argument that the Commissioners were not empowered to and should be restrained from making a report and finding of fact. If they do, I do not see what harm it can do to anyone. Commissioners are appointed to make inquiries for the benefit of the executive. Take the case of the ordinary Royal Commission without power to call witnesses, are they to take down questions and answers given by those who are willing to give information and simply return them to the executive? Are they to make inquiry and then not tell what they have found out as a result of the inquiry? They make an inquiry to find facts, to find the condition of matters, and having informed themselves, they hand over the information. Without a report it seems to me their work would be incomplete.

The Manitoba Act before the court did not include what are sections 12 and 13 of the Dominion's Act:

> 12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom a 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.

In 1938 an article was published in Maclean's Magazine criticizing a contract made by the Dominion Government and John Inglis Co. Ltd. for the manufacture of Bren machine guns. An order in council of September 7th, 1938, directed the issue of a commission under Part I of the Inquiries Act to the Honourable H. H. Davis of the Supreme Court of Canada. The text of the order in council referred to John Inglis Co. by name, and directed the Commissioner

> to inquire fully into the preliminary discussions and negotiations leading up to and the completion of the said contract and into share-holdings and the transactions if any, in the shares or securities of the said company and the connection or activities, if any, of any members of the House

> of Commons in the discussions and negotiations leading up to the said contract or in the affairs of the said company or in the sale of shares or securities of the said company, and generally to inquire fully into all matters relating to the said contract and to the affairs of the said company and to the steps taken to protect the public interest; and to report upon the same.

A lengthy inquiry was held. J. L. Ralston, K.C., headed counsel provided by the Government. Aimé Geoffrion, K.C., and J. C. McRuer (now Chief Justice) appeared on behalf of the John Inglis Company. Among counsel for other parties was Mr. H. F. Parkinson, K.C. After the taking of evidence was completed, Mr. Geoffrion advised the Commissioner that his view was that, by reason of section 13,

> no charges being laid, no report of misconduct, or no report can be made against us, because there was no charge of misconduct and no notice to us.

Mr. Parkinson, in turn, said with respect to his clients, who had been mentioned in the evidence, that:

> The firms. . . are, I submit, entire strangers in this inquiry. You, Mr. Commissioner, are forbidden to make a report against us, and by that I apprehend the meaning to be, adversely commenting upon us or upon our conduct. Of course, you may find it necessary, Mr. Commissioner, in reporting the evidence with respect to the contract itself to make some reference to Cameron, Ponton & Merritt or to Plaxton and Company, but your comments, Mr. Commissioner, should not go beyond the barest possible statement of fact. I submit that section 13 means that you must not make any adverse comments.

Mr. Justice Davis also chronicles in his report the following:

> Mr. McRuer contended that it is the Order in Council that governs and not the wording of the commission, having regard to the words of the commission (which are not in the Order in Council) 'and any opinion he may see fit to express thereon.' Mr. McRuer argued that the words in the Order in Council 'to report upon the same' means that your Commissioner is to report the facts that he has found disclosed in the inquiry
>
> > '. . . . it cannot mean any more than to report the facts. Otherwise the Government would be asking you, Mr. Commissioner, to comment on the facts, to express an opinion on the facts. That would be to give judicial weight to the argument that will be presented by one side or the other in the political debate as to what conclusion ought to be drawn from the facts. The Government has not considered asking you, Mr. Commissioner, to do that, and I think very wisely. I think it would be most unwise to ask you, Mr. Commissioner, occupying the high judicial office that you do, to make comments or express opinions that would lend weight to one side or the other in the debates that may follow. That is for the House of Commons. You are asked to report the facts. You

> are asked to report the evidence, and the opinions to be formed will be for the House of Commons, for the people at large and for the press.'

The Commissioner added that Government counsel were of the view that in the existing inquiry an adverse report of misconduct against any person was prohibited by sections 12 and 13 of the statute. He quotes counsel as saying:

> it seems to me that one must say that the scope of your final action is no more and no less than is connoted in the word 'report' in the statute, and that power of reporting is always subject to the provisions of section 13 prohibiting reports in respect of misconduct.

Also:

> this is a factual inquiry and not an inquiry in which opinions are asked or are involved, that is, opinions upon particular subjects.

At page 35 of his report Mr. Justice Davis gives his conclusion:

> That a report upon the Inquiry is contemplated by the statute is not open to doubt. But that a finding of misconduct cannot 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, is expressly enacted by section 13 of the statute. No charges of misconduct, however were formulated against any particular person. . .
>
> Having fully weighed the objections advanced on this ground, as well as the weighty considerations brought to my attention by counsel that the rights of the individuals interested in the contract might become the subject of legal controversy elsewhere, I have come to the conclusion that it is inexpedient to comment upon the evidence in respect of its bearing on the conduct of the individuals concerned.
>
> The facts are all in evidence; and as said by Government counsel in opening their argument
>
> > 'So far as the facts are concerned, there are very few which are even in dispute.'
>
> I cannot myself recall at the moment any fact to which direct proof was adduced that is in dispute. It will be for those charged with the responsibility of dealing with the facts, i.e., the Government and Parliament, to examine and study them and to take such action, if any, thereon as they may see fit.[52]

[52] Since that inquiry, commissions have been issued on three occasions to judges of the Supreme Court of Canada. In 1942 Sir Lyman Duff C.J. was directed "to inquire into the report upon the organization, authorization and dispatch of the Canadian Expeditionary Force [to Hong Kong] and, without restricting the generality of the foregoing, the selection and composition of the Force and the training of the personnel thereof; the provision and maintenance of supplies, equipment and ammunition and of the transportation therefor; and as to whether there occurred any dereliction of duty or error in judgment on the part of any of the personnel of any of the departments of the Government whose duty it was to arrange

In *James* v. *Chartered Accountants Institute*,[53] Cozens-Hardy M.R. had to consider the words "the member having first had an opportunity of being heard". He considered that the expression meant that notice must be given in time to afford reasonable opportunity to attend:

> But to say that this means anything like personal service, or that we have to trea tthe matter as though — in a case where there is really no issue to be tried — the council is powerless unless actual service of the notice is proved, is, I think, going altogether beyond what principle or authority requires.[54]

The meaning of sections 12 and 13 has recently been considered by the Ontario Court of Appeal.[55] In that instance the Commissioner commenced an inquiry under the Combines Investigation Act. After some evidence was taken he wrote the companies concerned advising them that it had been alleged that they were parties to a combine. After setting out the charges, he invited them, if they so desired, to submit representations, either in writing, in person or by counsel. The companies were before the court on a *certiorari* application: amongst other grounds, that they had applied for copies of evidence taken before notice was given them and that their request had been refused. Gillanders J.A., in the course of his opinion, discussed sections 12 and 13 of the Inquiries Act. Extracts from his judgment are:

> Should they be construed to mean that, before any investigation can be properly made in pursuance of the application directed to the Commissioner, notice must be given to all persons who might be named in such application of the allegations contained in the application, the times and places where each step of the investigation is to be held with

for the authorization, organization and dispatch of the said Expeditionary Force resulting in detriment or injury to the expedition or to the troops comprising the Expeditionary Force and if so what such dereliction or error was and who was responsible therefor".

The second was with respect to V–E Day disturbances at Halifax. The Order in Council directed Mr. Justice Kellock "to inquire into the said disorders and matters connected therewith, and to report his findings to the Governor General in Council".

The third was with respect to the espionage matter. It directs Justices Taschereau and Kellock "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". (The directions in this inquiry differ from the others in that (a) the commissioners were commissioned under Part I of the Inquiries Act "and any other law thereto enabling" and (b) the order in council gave directions as to procedure.)

[53] (1907), 98 L.T. 225.

[54] *Ibid.*, at p. 229.

[55] *Re The Imperial Tobacco Co. et al.* v. *McGregor*, *supra*.

permission to be represented by counsel, and permitted to cross-examine witnesses, as it was contended they have the right to do? In my opinion the provisions of the statute do not so require. Section 13 of the Inquiries Act does not require notice to be given before the investigation commences and of the time and place where each statement is to be taken with the right to be present and represented by counsel. . .[56]

Also:

Appellants submit that it is self-apparent from p. 1 of the report that the application for the investigation constituted a formal charge against them and that, in consequence, they were entitled to be represented by counsel throughout, and not being given notice of it at the beginning and evidence having been taken in their absence, they have been deprived of a right given by the statute which goes to the root of any report founded on such an investigation. The contention has given me some difficulty, but from a reading of the whole Act, I think that the appellants were at the outset persons whose conduct was being investigated and, in the course of the inquiry when allegations were made against them, the Commissioner before making any report informed them of such allegations in a reasonable way and that they were given the right to be represented by counsel if they so desired.[57]

In view of the fact that two members of the Supreme Court of Canada were commissioners in the "espionage inquiry", the following quotation is from its final report. At page 676, after quoting sections 12 and 13, it is stated:

The statute does not require that the Commission shall *assign* Counsel to persons called to testify. The Commission is given a discretion to allow or refuse representation by Counsel where a witness 'whose conduct is being investigated under this Act' asks permission to be so represented, up to the time when a charge is made against him in the course of the investigation. 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.

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

Drafting the Text. The Balfour Committee reported:

We are of opinion that *all* dissenting views ought to be in the hands of all the Commissioners before any report is signed.

Sir Frederick Pollock was chairman of a royal commission on records. In a letter of January 30th, 1912, he wrote Mr. Justice Holmes:

[56] *Ibid.*, at pp. 639, 640.
[57] *Ibid.*, at p. 643.

> Our commission on records is now incubating its first report: the business of the Chairman as I conceive it is to insist on the text being short and readable, to relegate details and authorities to appendices and if possible to avoid asking for legislation.[58]

The Balfour Committee declared that:

> The Commission or a quorum are alone authorized under the Royal Warrant to report, and we consider that no Report should be accepted for presentation to the King unless signed by all the Commissioners or at least by the quorum.
>
> Dissent on the part of a minority less than a quorum or on the part of an individual commissioner should take the form of a memorandum of notes of dissent and the reasons thereof. The Secretary of State should refuse to present to the King any such dissent unless, in his opinion, it conforms with these conditions.

In the event of a divided report, that signed by the chairman is deemed to be "the" report — although it is not necessarily acted upon. An extreme illustration is that of the Sankey Commission (1919), which investigated the British coal-mining industry. The Royal Commission had thirteen members; the "majority" report was signed only by Lord Sankey and two members. The practice presumably is founded on the consideration that, as the chairman is best informed as to the thoughts of the several members, the report he signs may be regarded as the one containing more to which all subscribe than any of the others.

The conclusions of a commission of inquiry being a confidential report to the Crown, commissioners are entitled to the protection which reports of officials to Ministers may enjoy. That is to say, publication is by the Crown and for that the Crown is answerable. In Canada no legislative direction requires a copy to be laid before Parliament, but the practice is to present to the House of Commons reports of all commissions which functioned under Part I.[59] Printing is done on the order of the House (in anticipation, the Government may have the report put in type, but the House issues the order to print). The practice of tabling was adopted in England[60] in order to afford protection to newspapers. The English statute, The Parliamentary Papers Act, 1840, enacts that, on the production of a certificate that publication was ordered,

> no proceeding, criminal or civil, may proceed against persons for the publication of papers printed by order of either House. . .

[60] After *Stockdale* v. *Hansard* (1839), 9 A. & E. 1.

[58] Holmes-Pollock Letters, vol. i, p. 188.

[59] Part II inquiries reports are presented only after the House has ordered production.

The House made a general order commanding classes of reports to be printed and presented to the House. Thus publishers found protection in *Mangena* v. *Edward Lloyd Ltd.*[61] and in *Mangena* v. *Wright*,[62] although a specific order to present to the House had not issued with respect to the report then in issue.

Dissolution of a Commission. Todd says:

> A royal commission continues in existence until it has completed its labours, unless its duration be expressly limited by the terms of the Letters Patent or Act of Parliament, under which it was appointed; or unless it be sooner revoked and discharged by the Crown or by Act of Parliament.[63]

But such bodies being administrative instruments, practice has made them susceptible to the ordinary rule that, if money is not available, they cease to exist without any special formality. The Balfour Committee reported:

> We believe that, although it is essential that the investigations and conclusions of a Royal Commission should be carried out and arrived at in entire independence of ministerial or other control, it is equally essential, in the interests of administration and economy of public funds, that there should be a possible authoritative decision on the responsibility of Ministers as to the scope of every such inquiry.

It is accepted that the Crown may, at any time, rescind the commission; also, that a state of desuetude results from non-provision of funds. Pollock wrote Holmes on May 19th, 1915, that:

> We are a frugal Commission and the Treasury does not threaten to cut us down in wartime.

The Hyndman Commission on Grain (previously referred to) never reconvened after the decision of the Manitoba Court of Appeal. A general election had resulted in a change of government; when the new Minister was asked about its progress, he replied that it had discontinued its work: "They have run out of supplies".[64] The fact that a parliamentary grant was made in the same session for possible future inquiries into the grain business was not regarded by the House as reviving the previous commission of inquiry.

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[61] (1908), 98 L.T. 640.
[62] [1909] 2 K.B. 958.
[63] *Supra*, at p. 447.
[64] House of Commons Debates, March 14, 1922.