Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

commissions of inquiry

A NEW ACT

Working Paper 17

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
K1A 0L6

Commission

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Secretary

Jean Côté, B.A., B.Ph., LL.B.

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Philip W. Slayton, B.A., B.C.L., M.A.

Research Personnel

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Alan D. Reid, B.A., B.C.L., LL.M.
Gaylord Watkins, B.Sc., LL.B., LL.M.

Special Consultant

Brian Crane, B.A., LL.B., M.A.

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Foreword

Over the past several years the Commission has been engaged in a study of the general problems associated with procedures before administrative tribunals, and it has now begun to issue a series of studies respecting various permanent agencies. In addition to these permanent tribunals, however, government frequently establishes another type of tribunal: *ad hoc* commissions to advise on or investigate any number of matters.

As this paper reveals, commissions of inquiry do not squarely fall within any one of the traditional divisions of government—Parliament, the executive and the courts. They perform functions that cannot effectively be done by any of these institutions, and have, therefore, proved to be a useful tool of government. However, because they do not fully partake of all the attributes of any of the traditional branches of government, commissions of inquiry lack some of the safeguards associated with traditional government institutions. Consequently, commissions of inquiry should be used with caution and restraint, and should be accompanied by appropriate safeguards for the protection of the individual.

In this paper the Commission makes a number of proposals regarding inquiries, including a working draft for a new *Inquiries Act*, to obtain the reaction of the public. The comments received will be considered in preparing final recommendations for our report to Parliament. We would, therefore, welcome your comments on our proposals.

Our proposals for revision of the *Inquiries Act* evolved after substantial discussion with many people. In particular, we are indebted to the members of our "Inquiries Task Force", a group

set up by the Commission consisting of a number of distinguished commissioners of inquiry and commission counsel. While this group is in no way responsible for the proposals advanced in this paper, their wise counsel ensured a searching analysis of the issues and alerted us to innumerable difficulties. We are most grateful for their assistance. We would also like to thank the members of the committee set up by the Canadian Bar Association to constitute a channel for an exchange of views and information regarding our administrative law project for many helpful suggestions.

I.

Introduction

Commissions of inquiry attract attention. They often deal with matters of great public importance and concern—bilingualism and biculturalism, the non-medical use of drugs, the proposed Mackenzie Valley pipeline, the concentration of corporate power. Sometimes commissions enquire into a scandal of the day—into matters relating to Lucien Rivard or Gerda Munsinger, into the sex lives of immigration officers, or into the finances of the national airline. On occasion they are severely attacked, because of the persons appointed commissioners (are they unsuitable, unrepresentative or unqualified?), or the procedures employed (have the rights of witnesses been respected?), or the recommendations (are they superficial or biased?).

Commissions of inquiry that are not appointed are often as controversial as those that are. The parliamentary opposition demands to know who did what to whom. The press wants an inquiry into some grave policy matter. The government, for whatever reason, refuses to appoint a commission. It may say the circumstances are inappropriate for an inquiry or give some other "good" reason, but the politicians and pundits cry "cover-up".

Those who act as commissioners have from time to time complained about the machinery. There is too little guidance about how to proceed. Perhaps the commission's terms of reference are too vague or too narrow. The empowering statute may be thought unsatisfactory, with the rights of witnesses ambiguous and the commission's powers inadequate.

And so, as the public inquiry increases in prominence as an instrument of government, there is, from many quarters, a com-

mensurate increase in comment and controversy. Increasingly, fundamental questions are being asked about the place of commissions of inquiry in our system and the way in which inquiries operate.

This paper first gives some information about commissions of inquiry, including a historical review of the present *Inquiries Act*, (R.S.C. 1970, c. I-13). Then, it comments on the place of inquiries in Canadian government. From this account, desirable powers and structures are inferred. The present Act is reviewed in light of those powers and structures. Finally a new, and we hope better, Act is proposed. The Act proposed is, of course, only a working draft to focus public discussion on the issues set forth in this paper.

II.

Commissions of Inquiry

A. What is an "inquiry"?

This paper is concerned only with federal commissions of inquiry. Analogous institutions operate in every province, but they are, of course, creatures of provincial legislation, dealing with matters within provincial jurisdiction, and possessing their own particular features.

In general, when we refer in this paper to a "commission of inquiry", "commission" or "inquiry", we are referring either to a public inquiry or to a departmental investigation established under the federal *Inquiries Act*. We avoid the phrase "royal commission". Technically, a royal commission is a commission issued under the Great Seal of Canada, which in practice generally means a commission established under Part I of the *Inquiries Act*. But the adjective "royal" is much abused, with some commissions technically entitled to its use not employing it, and others appropriating it when they have no business doing so. In our view, the term is best ignored.

The *Inquiries Act* is divided into two parts. Part I provides for "public inquiries", which are described as inquiries "made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof". Part II is the authority for "departmental investigations"; these investigate and report upon the business of a government department and perhaps on the official conduct of persons working for that department.

There are at least forty-seven federal statutes that confer powers of inquiry and refer to the *Inquiries Act* (a list of these statutes appears as Appendix C). These include the *Combines Investigation Act, Canada Corporations Act, Immigration Act, Canada Labour Code, Public Service Employment Act,* and *Canada Shipping Act.* In general, reference to the *Inquiries Act* is made in order to give the powers conferred by Part I or Part II of that Act to an office or body established by the statute making the reference. These various statutes give officials the powers of a Part I or Part II commissioner when investigating such diverse matters as offences under the *Combines Investigation Act*, companies suspected of being formed for fraudulent or unlawful purposes, whether or not any person shall be allowed to come into or remain in Canada, employment in any industrial establishment, and loss by a fisherman of income through the discharge of pollutant by a ship.

There are at least forty other federal statutes conferring various powers of inquiry without referring to the *Inquiries Act* (these statutes are listed in Appendix D): these include, for example, the *Anti-Dumping Act, Bankruptcy Act, Dominion Controverted Elections Act, Immigration Appeal Board Act, National Transportation Act, Railway Act, Tariff Board Act* and *Territorial Lands Act.* Power is given to inquire into such diverse matters as whether the dumping of goods is likely to cause material injury to the production in Canada of like goods; offences under the *Bankruptcy Act*; corrupt election practices; measures to assist in a sound economic development of the modes of transportation controlled by Parliament; railway accidents and measures to prevent such accidents; the conditions affecting the production, manufacture, cost and price of goods produced in or imported into Canada; and questions affecting territorial lands. A statute either explicitly gives particular powers of inquiry, or else simply contains a general authorization to inquire, with more particular powers to be decided on by the Governor in Council (the Cabinet). Some important inquiries have been established under these forty other statutes; the Mackenzie Valley Pipeline Inquiry, for example, is a creature of the *Territorial Lands Act.*

It is beyond the scope of this paper to recommend particular changes to the statutes that refer to the *Inquiries Act*, changes that will in many cases be necessary if a new Act of the kind we propose

is adopted. Obviously a careful review of all related legislation will be necessary before a new *Inquiries Act* is passed. In principle, we are opposed to the granting of powers in one statute by reference to machinery established in another statute if the effect of such a grant is to prevent easy and full knowledge of powers that various people and institutions possess, or is to give inappropriate powers. If powers are granted in this way, it is often difficult, especially for the man-on-the-street, to determine exactly who has what powers. Furthermore, it is clearly desirable that powers be tailored to meet exactly the needs of any given office or circumstances; reference to a set of powers given for another purpose is unlikely to produce this result. We would prefer that reference in other statutes to the *Inquiries Act* be deleted, and that those other statutes explicitly set forth whatever powers and structure are appropriate for the circumstances in question.

B. *The Inquiries Act:* A brief history

An Act respecting inquiries concerning Public Matters was given Royal Assent on May 22, 1868. This Act, a version of the original 1846 statute, contained only two sections. By the first section, whenever the Governor in Council "deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof" he may give commissioners the power to summon witnesses who must testify under oath and produce whatever documents or things are requested by the commissioners. The second section gives a commissioner the same power to enforce the attendance of witnesses and to compel them to give evidence as is possessed by "any Court of law in civil cases"; it provides that any "wilfully false statement" made by a witness shall be punished in the same manner as perjury; and it states that no witness "shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution".

On May 7, 1880, Royal Assent was given *An Act to authorize making certain investigations under oath.* This Act provided for a

Minister, with the authority of the Governor in Council, to appoint a commissioner or commissioners to investigate and report upon the business of a government department and perhaps on the official conduct of persons working for that department. The commissioner or commissioners were given, among other powers, the power of access to any public office or institution and the records it contained, and the power to issue subpoenas for witnesses, who would have to testify under oath, and who could be required to bring with them any "document, book, paper or thing" in their possession and relevant to the inquiry. The Act of 1880 provided that a person who failed to attend when required, or to produce any required document, book, paper or thing, or who refused to be sworn or answer any proper question, was liable to a fine not exceeding four hundred dollars on summary conviction.

Passage of this Bill occasioned vigorous debate in the House of Commons. One legislator said "that the powers to be bestowed by this Bill are inconsistent with the whole spirit of the British Constitution and the administration of justice". Another's "substantial objection" was that it was "contrary to our general dealings with criminal cases, to permit an enquiry to be entered upon or to proceed in an investigation when once we have touched a charge of crime". Said this member of Parliament: "According to the British Constitution, there was but one mode in which men ought to be charged, preliminary or otherwise, with crimes against the law, and that was in the ordinary process before the ordinary Courts." A third parliamentarian could not understand why the 1868 *Inquiries Act* was not sufficient to cover any need for an enquiry.

Sir Charles Tupper gave this explanation of the Bill:

> The necessity for such an Act was suggested by the complaints that are made against public officers. Complaints of a serious character, which, if true, would warrant the dismissal of an officer, are made to the Departments, and you are at present obliged to hold an *enquête* by a party who has no power to administer an oath, and who must receive the unattested statements of the parties making the complaint, who are often disposed to deprive the officer of his position. The effect of this Bill, if it becomes law, will be to enable the heads of Departments to authorize a Commissioner to take testimony in such cases. It is, in fact, a protection to the officer attacked, and a protection to which he is entitled.

Sir John A. Macdonald commented on the Act of 1868: "The general Act, which was introduced immediately after Confedera-

tion, provided . . . [for] a very formal proceeding, and it established a tribunal somewhat in the nature of a preliminary impeachment."

In 1889, the Act of 1868 was amended to provide protection similar to that now given by section 5 of the *Canada Evidence Act*. By the amendment, still in force, a witness before either a federal or a provincial inquiry shall not be excused from answering a question on the ground that his answer might criminate or tend to criminate him. Any evidence so taken, however, is not admissible in a criminal proceeding, except in the case of a witness charged with having given false evidence, or procured, or attempted to procure or conspired to procure the giving of false evidence. In moving second reading of the Bill, Sir John Thompson explained that "it originated in a suggestion from the Government of Quebec in relation to an enquiry into a public matter which interested that body. It appears the progress of the enquiry was arrested by a claim of privilege on the part of a witness, and it was apprehended the same would be made in regard to other witnesses."

The 1868 and 1880 Acts were joined in one statute in the 1906 Revised Statutes of Canada as *An Act respecting Public and Departmental Inquiries*. The Act of 1868 became Part I, and the Act of 1880, Part II, of the new statute. In 1912, important sections were added to what was now the modern *Inquiries Act*. Section 11 authorized a commission to engage counsel, experts of various kinds, and other necessary staff and to delegate powers. Section 12 provided: "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." And by section 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".

The 1912 amendments to the consolidated statute were extensively debated in the House of Commons. When Mr. Doherty, the Minister of Justice, first introduced the Bill, it contained only what became section 11. On second reading, Sir Wilfrid Laurier asked: "But if the commissioners have the power to engage counsel to assist them, does not my hon. friend think the party whose conduct is being investigated should have a similar power?"

The opposition strenuously attacked that part of s. 11 allowing the delegation of a commissioner's powers. Two amendments were proposed, one providing for witnesses to be represented by counsel, and the other removing the power of delegation. The government accepted a version of the first, but responded to the second only by requiring the authorization of a delegation by order in council. The opposition expressed deep unhappiness with the legislation.

Said Mr. MacLean, the member from Halifax:

> I think, concerning this Bill, that one might very truthfully use the words which the right hon. the Prime Minister (Mr. Borden) used in a statement issued to the public during the recent campaign in reference to the Canadian navy, that it was ill-advised, ill-considered and hasty, or something to that effect. It seems to me that the Minister of Justice has not bestowed the amount of care upon this Bill that he should have done. He has consented to several amendments, but taking it in its present form, the Bill can only be productive of harm and doubt.

The final part of the present Act was put into place in 1934 by *An Act to amend the Inquiries Act.* This statute added Part IV dealing with international commissions and tribunals.

It is difficult if not impossible to discover the exact number of inquiries that have been constituted under the various versions of the *Inquiries Act.* No possible source of this information—sessional papers, departmental reports and files, the list of royal warrants, the Index and Register to the Orders in Council, etc.—is complete. An examination of the sources suggests that, roughly speaking, from 1867 to the present day, about 400 commissions have been appointed under Part I, and, from 1880, close to 1,500 under Part II. Sometimes it is uncertain under what authority a commission of inquiry has been appointed. On some occasions, a royal warrant was issued, but no order in council can be discovered; some commissions appear to have been established without either a royal warrant or an order in council. There is no way to estimate what must be the very many times that the powers bestowed upon a commissioner by the Act have been exercised pursuant to another statute which makes explicit reference to the Act.

While a complete history of Canadian commissions of inquiry—or even a history touching only the more influential and important inquiries—is a task well worth doing, it cannot be ours. Most people who follow Canadian affairs remember a good many inquiries. They remember inquiries into dominion-provincial

relations, pilotage, the place of firemen on diesel locomotives, price spreads in food products, the Canadian automobile in domestic markets, health services, the Gouzenko affair, freight rates, television broadcasting, government organization, taxation, bilingualism and biculturalism, the non-medical use of drugs, and innumerable other subjects, from the narrow and perhaps trivial to the general and (on the face of it) significant. Some inquiries have been controversial; others have been almost totally ignored. Some have had a substantial impact on government policy; the recommendations of others have been seemingly ignored, although they may have had indirect effects difficult to assess. But it is significant that much of the history of Canada could be interpreted through the work of commissions of inquiry.

III.

The Place of Commissions of Inquiry in Canadian Government

> "In the United Kingdom, in Canada and in many of its provinces as in other parts of the Commonwealth, Royal Commissions of inquiry have become, in a sense, a part of the regular machinery of government. . ."—Schroeder J.A. in *Re The Ontario Crime Commission* [1962] O.R. 872, at 888.

Broadly speaking, commissions of inquiry are of two types. There are those that advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And there are those that investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government. Many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy. But almost every inquiry primarily either advises or investigates.

Why have a system of inquiries at all? If facts are needed, there is a vast public service to find them out. If policy is wanted, we have the public service and their political masters, Parliament and the executive, to develop it. If wrongdoing is suspected, we have laws, police and courts, with all of their powers of investigation, and with safeguards for wrongdoers, to deal with the matter.

With such a complex and many-faceted system of government, offering a variety of ways to deal with almost any problem that might arise, why do we have the *Inquiries Act* at all, and why have there been so many and so many important commissions of

inquiry? What tasks are the traditional institutions of a parliamentary democracy unable to perform, or perform well?

A. Advising

Advisory commissions are generally, although not always, established under Part I of the *Inquiries Act*, the Part entitled "Public Inquiries". Such commissions advise the government on policy. In this respect, they supplement the activities of the legislature and the executive. Is the assistance of commissions of inquiry needed; and, if so, why?

(i) *the legislature*

In a parliamentary democracy, Parliament is supreme. There is no matter beyond the competence of the elected representatives of the people. Nor, because Parliament is democratic and representative, is there a forum better able or more qualified for debating and deciding policy questions confronting Canada.

But for some tasks, the legislature may need and seek assistance. Parliament's strength is also its weakness; its political responsiveness to the current concerns of Canadians makes it difficult for legislators to grapple with complex problems that are not of immediate political concern and require considerable time for their solution.

In politics, a day can be a lifetime. There are often no hours to devote to subtle but significant problems, requiring sustained inquiry and thought. The decision may ultimately rest with the legislature; but the legislature needs very good advice.

A related matter is the partisan nature of politics. In our system, politics must be and should be partisan. But just as an adversary model of conflict resolution may not be appropriate for resolving some sorts of issues (of labour or marital relations, for example), so political resolution is an inadequate way to deal with some kinds of problems. Members of either the House of Commons or the Senate, under conditions of rigid discipline, pursue policies often arrived at for reasons of political expediency in

hard-fought and emotional campaigns. The legislature is not always the best place for objective, dispassionate inquiry into problems of the day.

A third difficulty is that Parliament may be wise, but it is not necessarily expert; one may not find among members of Parliament the expertise for understanding and resolving complex questions. Informed advice is necessary.

Finally, as democratic as Parliament may be, there is still an important need in Canada for other means of expressing opinions and influencing policy-making—what Harold Laski called "institutions of consultation". There are, of course, the "traditional ways"; establishing pressure groups, giving speeches, writing to the newspaper, and so on. But these traditional means are not always adequate. Today the need for other avenues of expression and influence is often focussed in greater demands for *public participation.* Increased participation allows those individuals and groups to express their views to public authorities. It also provides more representative opinion to decision-makers, so as to properly inform them of the needs and wishes of the people.

When it comes to assisting the legislature, then, advisory commissions of inquiry, broadly speaking, perform three functions that we may describe as supplementary functions. They bring objectivity and expertise, free from the constraints of a legislative timetable, to the solution of problems. They provide an additional vehicle for the expression of public opinion. And they gather and transmit representative opinion. In general, they advise on one or both of two things—expert solutions, and public opinion.

(ii) *the executive*

What of the executive, advised by the public service? The executive shares the characteristics of its parent, the legislature. The Cabinet is pressured for time, partisan, not always (by itself) expert, and not necessarily fully aware of or properly influenced by currents of opinion. It too needs advice on expert solutions and public opinion.

Can the public service provide adequate advice? There is little doubt that the Canadian public service is as expert as any. And, one assumes, it would, left to its own devices, be objective and take

whatever time was necessary to find the best solution to a problem. But the public service is a creature of its political master. Expert, public servants may be; but they are and should be servants nonetheless. Often, and rightly, public servants will be required to operate within the time and political constraints of their employers. They will experience to the full the disabilities that are a feature of the legislative and executive branches.

Nor do public servants have a constituency of their own. Accordingly, it is very difficult for the public service to gather and transmit public opinion independently. Even if that could be done, it might well be thought improper. More importantly, public servants enjoy no more confidence than the government. The public service will be trusted and believed as much as the government, and no more.

Advisory commissions of inquiry occupy an important place in the Canadian political system. They supplement in a valuable way the traditional machinery of government, by bringing to bear the resources of time, objectivity, expertise, and by offering another forum for the expression of public opinion.

B. Investigating

Investigatory commissions, more often than not, are established under Part II of the *Inquiries Act*, that Part referring to "Departmental Investigations". It is almost impossible to determine the exact number established since the 1880 Act, although the figure is probably about 1,500. Some of the better-known recent Canadian investigatory commissions are the Dorion Inquiry into the "Rivard Affair" (reporting in 1965); the Spence Inquiry into "matters relating to one Gerda Munsinger" (1966); the Estey Inquiry into the financial controls, accounting procedures and fiscal management of Air Canada (1975); and the L'Heureux-Dubé Inquiry into the Montreal office of the Department of Manpower and Immigration (1976). The first three were appointed under Part I of the Act; that, no doubt, is because strictly speaking they were not simple departmental investigations, and because it was thought that the investigation required the larger

Part I powers. Appointment under Part I, in these three cases, in no way detracted from their essentially investigatory, rather than advisory, character.

The investigatory commission is a tool borrowed from Britain; it is part of the baggage of parliamentary democracy. But it is revealing that in Britain few bodies of this kind are created under statute, with the power to summon witnesses and those other powers that can only be conveyed by statute. There have been less than twenty inquiries constituted under the relevant United Kingdom legislation, the *Tribunals of Inquiry (Evidence) Act, 1921.* Almost all British "commissions" to advise or to investigate are *ad hoc* creations of ministerial appointment or royal warrant, with no formal powers. Apparently, this way of proceeding has proved satisfactory. Inevitably it raises the question whether Canada is too free in creating powerful commissions. Is there another efficacious and less-dangerous procedure? Should the Canadian Cabinet or individual ministers, generally speaking, appoint committees rather than establish commissions?

Investigatory commissions, like advisory commissions, supplement the mainstream institutions of government by performing tasks that these institutions are likely to do less well.

(i) *the executive*

Very often, investigatory commissions are investigating government itself. Indeed, by the present *Inquiries Act*, Part II inquiries can do nothing else except investigate and report on the state and management of a government department and the conduct of officials of that department. Part I investigatory commissions, although often inquiring into matters that are not solely governmental, frequently consider and judge the actions of the government as well. Clearly the public service cannot reasonably perform inquiries of this sort. Public servants might well not be impartial in such investigation. And most certainly, the man-on-the-street would suspect bias and would accordingly discount findings and recommendations produced by such an inquiry.

For much the same reasons, the political masters of the public service are disqualified. They might well not be impartial in their inquiry; and, in any event, the public will be conscious of the fact

that it is not in the executive's interest to uncover mismanagement or corruption in the affairs of government. Furthermore, politicians suffer from lack of time and, perhaps, lack of expertise.

(ii) *the legislature*

What of Parliament, either itself, or using the committee system? We confront again the familiar deficiencies. Investigation may be partisan in nature. Even if it is not, it will be seen as such by many people. Expertise may be absent. And, under the pressure of politics, time that is required may not always be taken. Parliament and its committees are adversarial in nature, subject to party discipline impeding free expression of individual thought, and concerned with a multiplicity of subjects most of which must be dealt with quickly according to a rigorous and selective timetable.

(iii) *the judiciary*

It is much more difficult to determine what tasks are more appropriate to commissions of inquiry than to the judiciary. After all, the courts have as one of their functions the establishing of facts concerning alleged wrongdoing and the imposition when necessary of an appropriate penalty. Is this not, on the face of it, the function performed by many commissions of inquiry? And, if it is, why supplant a well established institution, offering appropriate safeguards and procedures, by cruder machinery peripheral to the main institutions of government?

One compelling answer is that in our system courts are not truly investigatory bodies. Courts adjudicate on alleged facts produced by the investigations of others.

Another answer is that normally a matter only proceeds to the courts when the substantive law can reasonably be applied. The judicial machinery only comes into play when "offences", as defined by substantive law, may have been committed, or when "rights" are being claimed, or "duties" have not been performed, and so on.

But it may often happen that facts need to be established concerning a matter that does not naturally fall within the legal scheme strictly conceived. The substantive law is not applicable.

Some other kind of institution must be utilized to solve the problem.

There are, then, matters that need to be investigated and resolved, but which do not naturally or properly fall within the "jurisdiction" of the courts. Commissions to investigate may be valuable tools to dispose of such matters. But two *caveats* must be entered. First, matters that can be referred to the courts should be. That is because the courts offer to those being investigated a full range of safeguards that are most valuable to a society that respects justice. Second, when a matter falls outside the scope of our judicial institutions and needs must be referred to an inquiry, then, for the same reasons of justice, the inquiry must provide at least some safeguards analogous to those found in the courtroom.

(iv) *the police*

The police force is clearly not the appropriate institution to perform this particular investigatory function. In the first place, although Canada's police forces undoubtedly possess excellent investigatory skills, they are skills of a specific kind; they do not convincingly extend, for example, to problems of maladministration, failure to implement policy directives properly, organizational difficulties, and so on. Secondly, although the police may be excellent at discovering and assembling facts, they may be less capable of interpreting the significance of facts once found out; this is likely to be particularly the case in matters touching on politics and policy. Thirdly, in any event it is quite inappropriate in our system for police forces to offer conclusions or comment on governmental matters. Their job is to investigate; not to judge. Finally, police investigations are necessarily secret investigations. On occasion allegations are made that create widespread public disquiet, perhaps even a crisis of confidence. On such occasions, confidence must be restored, and that can only be done by an investigation operating as much as possible in the public eye.

(v) *conclusion*

Investigatory commissions supplement the activities of the mainstream institutions of government. They may investigate government itself, a function that must clearly fall to some body

outside the executive and public service. They possess an objectivity and freedom from time constraints not often found in the legislature. They can deal with questions that do not require the application of the substantive law by the courts. And they can reasonably investigate and interpret matters not wholly within the competence of Canada's various police forces.

C. Conclusion

The fear has been expressed that, free from political control, commissions of inquiry may become dangerous, both to individual freedoms and to government policy. Those who experience fear of inquiry independence seek ways for control to be exerted. Can it be done, they ask, through the granting of very limited powers only? Through very narrow terms of reference? Through strict budgetary control?

The fear of the consequences of independence appears ill-founded. A sensible Act will provide safeguards against serious threats to individual freedoms and human rights. It is hard to see how the necessary freedom of government to make and implement policy can be seriously impeded by commissions empowered only to inquire and report. Such commissions may, of course, generate political pressures of various kinds; but that is an unexceptional risk that government necessarily takes in establishing a body of this sort.

In any event, there is no effective means of control over policy consequences if the concept of an independent inquiry is to be protected. We mention elsewhere in this study the desirability of limiting an inquiry's mandate, but this means of "control" is of limited use if inquiries are not to be paper tigers. Similar considerations apply to budgetary constraints. There may be some risks; but the game, surely, is worth the candle.

Finally, we recognize that commissions of inquiry may often be put to political use. It has been suggested, for example, that commissions may be established to stave off pressure, to postpone an awkward issue, to back up (hopefully) a government decision already made, or to make the man-on-the-street so sick of a

particular issue that he will accept any resolution so long as the subject ceases to appear in the pages of his favourite newspaper. It is inevitable that this be the case. It should cause no trepidation—provided that the system of inquiries established by statute is reasonable and efficient, properly reflecting the basic distinction between the two types of inquiry, and giving adequate safeguards to those who may be involved in the inquiry process. All of our institutions of government fit into the scheme of politics broadly conceived. If, from a political point of view, they are used improperly, the remedy is a political remedy, and not a legal one.

IV.

The Structure and Powers of Commissions of Inquiry

A. Form follows function

We have described the advisory and investigatory functions of commissions of inquiry. An institution should have the form suggested by its function. In this chapter, working from the preceding analysis of the role of inquiries, we advocate a form for commissions of inquiry that we recommend be established by a new *Inquiries Act*. The structure and powers we propose are built on what we believe to be the essential distinction between commissions to advise and commissions to investigate.

B. The advisory/investigatory distinction

The distinction between advisory and investigatory commissions of inquiry is an important feature of the new inquiry system we propose. The new statute we suggest reflects this distinction, offering to the Cabinet a choice between two sorts of commissions.

As this paper has emphasized, a commission of inquiry, although having the capacity to supplement the work of the more traditional instruments of government, is an unusual institution which may seriously affect individual rights. The power to compel people to give evidence under oath to a body appointed by the executive but responsible to no one is not to be given lightly. Such a body may be "efficient", but in a free society such a power

should be, as much as possible, limited to the courts. It is important to provide in the inquiry system a means to conduct an inquiry with the least possible danger to individuals or organizations that may be caught up in the process. To do so is made easier since many kinds of inquiry do not require strong powers. Such inquiries are what we term advisory inquiries, and it is to provide for them that we offer our proposed Part I.

At the same time, the Commission realizes that many inquiries have an investigatory task that can only be properly met if the commission has strong powers. Part II of our draft statute gives these powers, but at the same time makes considerable effort to give individuals involved a strong measure of protection.

With the statute offering a choice, it will be unnecessary to grant every commission strong powers whether it needs them or not. Furthermore, should the Cabinet wish to create a Part II commission, the fact that it could create a weaker Part I inquiry will require justification of a powerful inquiry. The structure we suggest should stimulate political debate on how much power any given inquiry needs; in a country committed to individual rights, such debate is highly desirable. Power to compel a person to reveal matters about which he wishes to remain silent should not lightly be given.

It may, from time to time, be expedient in very exceptional circumstances, to create a commission of inquiry with powers even greater than those afforded by our proposed Part II. To create such a commission would be a serious step indeed, in effect giving the powers of a judge to a non-judicial institution. We do not believe that the creation of such a commission should be facilitated by a general statute. It should require a special Act with the possibility of full debate in Parliament, and all the safeguards that such debate provides.

It may be argued that, should Parliament adopt the inquiry scheme we suggest, the government would only create Part II inquiries, regarding Part I commissions as insufficient in strength for even the most academic inquiry. We reject this argument. We see no reason why many matters that in the past have been the subject matter of an inquiry could not have been adequately handled by using the framework of the proposed Part I. It would neither be reasonable nor in the spirit of the system we propose were the Part I machinery to be ignored.

What is to be done, it may be asked, if a Part I inquiry finds itself unable adequately to perform its functions without stronger powers? The answer we propose is that at this stage a commission would return to the Governor in Council and request those powers. If the case for Part II powers was sound, Cabinet could grant them and justify the change to anyone who might question it. Thus the decision to use these unusual powers must be adverted to by the political authorities responsible to Parliament and to the people. There is no difficulty should a Part II inquiry move into the realm of policy advice. Nothing in Part II prevents such a commission making policy recommendations, and it would be an unobjectionable practice free from danger.

Some may feel that inadequate safeguards are provided for those participating in a Part I inquiry. But as we have explained, in the absence of subpoena, "contempt" and other powers, there is no problem of safeguards that correspond to those powers. It should be noted that witnesses before a Part I inquiry have, under our scheme, no immunity from civil suit, permitting an aggrieved person to sue for defamation if he wishes.

Finally, it has been observed that all commissions—advisory or investigatory—are fact-finding commissions, and that the distinction we make is accordingly an illusory one. We do not agree. The "facts" sought out by an advisory commission will be very different from the "facts" pursued by an investigatory commission, which may well be interested in questions of fault and blame.

C. An alternative: the "Shopping-List" approach

The structure we propose is complex. It establishes a clear demarcation between commissions that advise and commissions that investigate. What other approaches might be adopted, approaches with the virtue of simplicity, and ones that do not establish such a clear two-part system?

Only one clear alternative emerged from our discussions, what we term the "shopping-list" approach. The Act would be much simpler. It would not have a basic two-part division. It would list the various powers and attributes that a commission might possess,

and the various safeguards that might be afforded witnesses. In establishing an inquiry, the Cabinet could select from these lists the powers, attributes and safeguards that it considered necessary and appropriate for the inquiry in question.

This approach is simple and flexible. But we reject it for two reasons. First, it may place an undue burden on the Cabinet. Wishing to establish an inquiry, and perhaps needing to proceed very quickly, the Cabinet may make hasty and unwise choices, requiring revision later, placing serious obstacles in the way of the commission's work, and perhaps threatening the "rights" of witnesses. Perhaps the most likely result would be the granting of wide powers that are unnecessary and might be abused. Second, a "shopping-list" statute would offer no control at all over executive action. The Cabinet would not be required to decide what kind of inquiry—advisory or investigatory—they wished to establish. Safeguards would not be automatically associated with powers. A Cabinet acting hastily might over-select from this list, granting to a commission wide powers that are unnecessary and may be abused. In short, we would in practice be back to a system much like we now have.

D. Advisory commissions

An advisory commission might consider any policy matter of substantial importance, or complex problem requiring expert solution. It is impossible to anticipate even broad categories into which the subject matter of such inquiries might fall, although history gives us some clues—federal-provincial relations, health services, broadcasting, bilingualism and biculturalism, and so on. Accordingly, the structure and powers of commissions to advise must be broadly tailored. No inappropriate or unnecessary features or powers, perhaps threatening individual rights, must be created or bestowed (for example, features and powers more apposite to commissions to investigate); neither, however, must fetters be placed on an institution that needs range freely.

Similarly, it is impossible to anticipate the number or kinds of persons appropriate to conduct any given commission to advise.

Decision on this matter should be taken for each such commission that is created. It is quite unwise to place restrictions on the appointment of commissioners (for example, to specify that the chairman or one member must, or must not be, a judge).

Who is to establish the inquiry and appoint the commissioners? General inquiries to advise the government to be as authoritative as possible and to be independent of any department that might be involved in the inquiry, should be appointed by the Governor in Council, rather than by an individual Minister. In any event, it is unlikely that a matter of enough importance to require an advisory commission will find its subject matter falling readily within any one Minister's mandate.

No commission should depend on the making of a suitable allocation by any Minister concerned. There should be no possibility of an inference that a commission is anything less than completely free of government control or interference. Commissions should come under the aegis of some central body, perhaps the Privy Council, through whom requests for funds should flow.

Earlier we noted that an important function of advisory commissions is to facilitate the expression of public opinion and to gather and transmit that opinion to decision-makers. The expression of public opinion is of two kinds. The simplest variety is the presentation of views, generally on one occasion only, by way of oral submissions or written brief or both. These views may be the views of an individual, of an informal *ad hoc* group of people, or of an organization (sometimes a large and powerful organization). The sentiment expressed may be of almost any kind, directly relevant or quite irrelevant to the subject matter of the inquiry.

The second kind of expression is found when a commission of inquiry, although an advisory commission, has something like an adjudicatory function. There may be something approaching a *lis inter partes*. This second kind of expression generally consists of the repeated advocacy of a particular point of view by a group or organization known to represent that particular point of view and often formed for the purpose of promoting it. Such advocacy is generally of an adversarial nature; it addresses itself to and attempts to refute what appear to be incompatible attitudes. It is designed to convince and convert. Persons, groups or organizations

presenting opinion in this way resemble what are often known as "intervenors".

The structure provided by statute for commissions that advise should facilitate the expression and transmittal of such opinion. It is desirable, first, that the statute express the principle that, subject to reasonable conditions established by the commission in question, free expression of opinion be invited. Secondly, in appropriate cases intervention should be made possible, and the quality of the intervention promoted, by commission funding of intervenors. So that there be no doubt on the matter, new legislation should provide explicitly for this possibility. In any given case, the criteria for funding intervenors would be subject to the discretion of the commission.

Should advisory commissions have the power to enforce the attendance of witnesses, to compel witnesses to give evidence, and to force production of documents or other things deemed relevant by the commission? If these commissions are really commissions that advise there seems little reason to provide them with such powers. In the first place, it is unlikely that such powers would ever be necessary. It would be highly unusual in a democracy to have to force the expression of opinion to government. Reticence of experts to express views on subjects within their competence is rare. In the second place, it would be inappropriate to use coercive machinery of any kind for the purpose of obtaining advice.

It has been suggested that sometimes an individual with relevant opinion or information might wish to testify before an advisory commission, but might be reluctant to do so unless subpoenaed. Public servants, for example, or officers of a corporation, might not wish in certain circumstances to appear to be volunteering opinion or information, and might, although wanting to testify, prefer or require a subpoena. We acknowledge this point, but think it of insufficient weight to justify giving automatic subpoena powers to Part I inquiries. In the first place, it is unattractive to facilitate by statute what appears to be a form of hypocrisy. Secondly, it would be ill-advised to provide this important power to cover unusual circumstances in what is otherwise an anomalous context. In the unlikely event that a commission finds itself incapable of performing its functions adequately without that power, it should expressly request it from the Governor in Council which can then determine if it is really essential.

Commissioners and commission counsel should have whatever immunity they would possess if they were, or were before, a body whose actions were judicial rather than administrative and whose decisions were binding rather than recommendatory. It may be sufficient on this score to grant the immunity of a court of record, although a recent internal Law Reform Commission study suggests that the real question is not whether the vague phrase "court of record" is employed, but whether the body in question really has the attributes of a court. To be safe, a new Act should specifically grant immunity from civil suit (putting aside any constitutional problems that such a grant may generate). The work of a commission should not be impeded because of fear by various participants of subsequent frivolous civil suits.

In order firmly to establish the independence of commissions they should have the clear power themselves to publish their report (with the cost of publication being paid from the commission's budget), except in highly exceptional circumstances where the Governor in Council may prohibit publication. Much of the value of a commission lies in its independence; self-publication promotes and publicizes that independence.

Since advisory commissions are not concerned with the investigation of wrongdoing of any kind, and since under the proposed new statute such commissions have no subpoena or contempt powers, provisions to safeguard witnesses seem unnecessary, apart from the exceptional case where the Governor in Council may have granted these powers. New legislation need not, therefore, make provision for rights of cross-examination, calling witnesses, making statements, and so on. However, since the right to be represented by counsel is so fundamental, and persons appearing before commissions to advise might feel the need for legal advice, it seems desirable to ensure that right.

Finally, new legislation should, of course, make provision for the appointment by advisory commissions of whatever staff they require, together with the establishment of the necessary offices and other facilities. It should be entirely clear that the appointment of staff is solely the concern of the commission.

In summary, the structure and powers of commissions to advise must be broadly tailored in any new legislation; no restrictions should be placed on the number or qualifications of commissioners; commissions to advise should be appointed by the Gover-

nor in Council; the Act should provide for the expression of opinion before such commissions, including provision for the funding of intervenors when judged advisable by the commission; subpoena or contempt powers should not automatically be given commissions to advise; those appearing before such commissions should be given by statute the right to be represented by counsel, but further protection is not necessary; commissioners and commission counsel should be protected from civil suit; and, as an administrative matter, legislation should contain provision for the appointment of necessary staff and provision of required facilities.

E. Investigatory commissions

Investigatory commissions are very different from commissions to advise. Their function is narrow. Their form must be precise.

(i) *establishing an investigatory commission*

It is undesirable narrowly to restrict the jurisdiction of investigatory commissions to departmental or governmental business and the official conduct of public servants. No doubt many if not most investigations will be made into such matters. Indeed, as we pointed out in the preceding chapter, the need to have such investigations is a major justification for the commission of inquiry structure. But it may on occasion be necessary to establish commissions to investigate matters related to government, but not directly concerned with the state and management of departmental business or the conduct of governmental employees. A new Act should not preclude this possibility.

It must, however, be clear that to establish an investigatory commission is to adopt an exceptional measure, requiring justification in the political arena. The institution of an investigatory commission can easily be abused. Time-consuming inquiries may be established to depoliticize matters that are properly political, questions that can and should be speedily resolved in the political arena. Expensive and procedurally cumbersome commissions may

be constituted to investigate matters that can be dealt with administratively in an adequate and efficient way. Inquiries looking into situations that could be handled by the courts, with all the safeguards they provide, may destroy the reputations of innocent people.

A revised *Inquiries Act* should provide that investigatory commissions only be established to inquire into matters that the Cabinet is prepared to deem of "substantial public importance". It is not sufficient that it be deemed "expendient to cause inquiry to be made", the formula found in the Ontario *Public Inquiries Act*, 1971, (s. 2) and in the Alberta *Public Inquiries Act* (R.S.A. 1970, c. 296, s. 2). The characterization of a matter as being (or not being) of substantial public importance is one that can and should be publicly debated. The decision to appoint an investigatory rather than an advisory commission is one that the government should be prepared to defend; it must not be forgotten that under the scheme we propose investigatory commissions have unusual powers that must be fully justified.

What is of "substantial public importance"? A new statute should not list categories of such matters; legislative life being what it is, inevitably such a list would quickly prove incomplete and obstructive. In most instances, however, whether a given matter is of such a kind should be evident. Does it involve, for example, serious accusations of incompetence or venality in government itself? Serious breakdown in the implementation or administration of an established government policy? Natural disaster badly handled or an unexplained serious accident? It is fair to say that, although one cannot anticipate all questions that can reasonably be deemed to be of substantial public importance, "one will know one when one sees one".

The Cabinet should not only be required to deem a matter to be investigated as of substantial public importance (and defend that decision politically); but also should be careful to define strictly the operations of any particular commission in the order in council creating the commission. A mandate should be quite specific and as narrow as is reasonable in the circumstances. It is contrary to the principles of our form of government and system of law to permit unrestrained investigation.

No restriction should be placed on the number or qualifications of those who sit on an investigatory commission. Generally,

one commissioner will be sufficient, and there is something to be said for appointing a member of the judiciary a commissioner. Judges are well acquainted with the process of establishing facts through hearing testimony. They are experienced in considering the relevance and weight of evidence, and are sensitive to the safeguards that must be provided witnesses when possible wrongdoing is being considered. By and large, the public respects judges and regards them as objective. But, again, one cannot fully anticipate the variety of matters that might in the future call for investigation. It might be necessary to have more than one commissioner; or it might be desirable to have only one, but one with expert qualifications other than legal qualifications. As well, there are dangers to appointing judges as commissioners. Most commissions, even those that are investigating rather than advising, have to begin with, or take on, political overtones. To illustrate this, one need only mention the Rivard and Munsinger commissions. It is unwise to threaten in any way the non-political nature of the judiciary. This is a difficult question about which there has been much discussion and the Commission particularly invites the comments of the public on the issue.

Investigatory commissions should be appointed by the Cabinet. If such commissions are not to be restricted to investigating departmental matters, it would be illogical and impractical to have ministerial appointment. Even if a given subject for investigation did naturally fall within one department's business, it would add to the independence, authority and prestige of a commission to be appointed directly by the Cabinet. To ensure that a commission be and appear independent, funds for its operation should be administered by a central government source, rather than through any particular Ministry.

(ii) *the powers of the commission*

To function effectively, investigatory commissions, unlike advisory commissions, must be able to enforce the attendance of witnesses; enforce the production of documents and other relevant things; compel witnesses to give evidence; enforce adherence to rules of practice and procedure that may be established; and maintain order firmly. Enforcement of these powers should take the form of laying an information before the ordinary courts. Such

a procedure may in some respects be less efficient than permitting a commission itself to punish for "contempt", but normal procedures should be respected in the interests of individual liberties. Punishment would usually be a fine, but in unusual circumstances imprisonment might be necessary.

All participants in an investigatory commission, including witnesses, should have immunity from civil suit. As we have said, the work of a commission should not be impeded because of fear by various participants of subsequent frivolous civil suits. We propose that witnesses in an investigatory commission have immunity, since anyone affected adversely by their testimony will be able, under the terms of our draft statute, to come forward with his side of the story. Unsworn witnesses in an advisory commission should not have immunity, leaving a civil suit against a witness as the recourse for a person who believes himself to have been slandered.

Finally, investigatory commissions should have the clear power themselves to publish the report that they produce, to further promote and publicize their independence, except in those cases where the Cabinet decides otherwise.

(iii) *protection of those concerned*

A person who should be presumed wholly innocent in every sense of the word—someone who is before a commission of inquiry only because he is thought to possess useful information innocently obtained, or even someone who is not present and knows nothing of the inquiry in question—may nonetheless find himself affected adversely by the proceedings. Those appearing may find that their conduct is called into question by commission counsel or by witnesses. The nature of the "case" that they have to "meet" may never be explained; perhaps there is no opportunity to make a full statement or cross-examine witnesses; legal counsel may not be present; the proceedings may be public and widely reported. Similarly, someone not even appearing as a witness may be mentioned in an adverse manner in the course of an inquiry; for him, there is not even the limited safeguard of at some point actually appearing before the inquiry. It is possible that a man not suspected, let alone charged, with wrongdoing may be ruined by irresponsible accusers whom he is not even able properly to confront.

What safeguards are necessary? It is imperative that all those appearing before a commission have the right to be represented by counsel. One who appears as a witness before an investigatory commission should have the right to be heard concerning any matter raised at the hearing that may adversely affect his interests, and, at the commission's discretion, to call, examine or cross-examine witnesses personally or by counsel. The commission's discretion regarding the calling and examining of other witnesses should be exercised having regard to the importance of the interest affected and the need to proceed expeditiously with the work of the commission. Those who did not appear initially as witnesses, but who have been commented on adversely in the testimony of others, should have the opportunity at the discretion of the commission to appear as witnesses (with the right to counsel and cross-examination) should they wish to do so. A similar right is given by s. 5(1) of the *Ontario Public Inquiries Act*, 1971, to "any person who satisfies [a commission] that he has a substantial and direct interest in the subject matter of its inquiry . . ." We think it is sufficient to show an adverse interest to give a person an opportunity to be heard. Its seriousness, as we mentioned, may be taken into account in determining the extent that other witnesses should be heard on this issue. In litigation concerning s. 5, (*Re Ontario Crime Commission*), Schroeder J.A. observed:

> In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.

Proposed findings by an inquiry concerning the conduct of any person should be disclosed to that person, and he should have the right to comment on those findings. There should be a right to legal aid, with those not qualifying for legal aid eligible for some or all of their legal costs at the discretion of the commission. A standard witness fee should be paid.

An investigatory commission should have discretion to hold *in camera* hearings, and to order restrictions on the reporting of public hearings, and witnesses should have the right to request a commission to exercise this discretion. It should, however, always be remembered that since one function of a public inquiry is often to allay public concern of some sort, and since it is desirable that a commission be seen to be operating fairly, wherever possible a commission to investigate should operate publicly. Schroeder J.A. observed of organized crime in *Re Ontario Crime Commission* (1962) that "inquiry and publicity are both powerful weapons in coping with this and other characteristic modern social evils". But sometimes closed doors and restrictions on publicity are desirable. Section 4 of the *Ontario Public Inquiries Act* deals well with the question of *in camera* hearings as follows:

> All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
>
> (*a*) matters involving public security may be disclosed at the hearing; or
>
> (*b*) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, in which case the commission may hold the hearing concerning any such matters *in camera*.

The problem of publicity in any particular situation can be solved by a commission at its discretion issuing an appropriate order to the media. In exercising its discretion, a commission should weigh the value of publicity with the harm that might be suffered by the witness and others if particular testimony is made public.

We think a witness who gives evidence under oath before a commission should have the same safeguards as a witness in a judicial proceeding. The underlying reasons for the evidentiary privileges against disclosure are not restricted to judicial proceedings. If state secrets, the marital relationship, trade secrets and so on constitute valid reasons for refusing to give testimony in court, we see no reason why this is not equally true of commissions. The Commission has already given its views on privileges in its report on *Evidence* and we would like to see that formulation adopted for commissions of inquiry and other administrative tribunals with whatever changes may be necessary to adapt the formulation to

that purpose. Apart from this, we do not think there should be any formal rules of evidence before commissions of inquiry. Ultimately, we think sections 4 and 5 of our Evidence Code dealing with the general rules of admissibility and exclusion should be adopted for all administrative tribunals.

For purposes of illustration and because of its frequent application before commissions of inquiry, we think it may be worthwhile to discuss one of the most important of these privileges: the safeguard against self-crimination. At a criminal trial, the accused cannot be compelled to testify and incriminate himself. But there is nothing in Canada's present law of evidence or in the present *Inquiries Act* that permits someone who may be liable to later criminal prosecution arising out of the matter being investigated by the commission to refuse to give answers, even when those answers are incriminating. The only protection available is that afforded by s. 5(2) of the *Evidence Act*, which provides in part that where a witness objects to answer upon the ground that his answer may tend to criminate him, his answer shall not be used or receivable in evidence against him in subsequent criminal proceedings. It does not provide that the witness may refuse to answer in such circumstances. Furthermore, the jurisprudence suggests that a witness before a commission may even be compellable when he has already been charged with a related criminal offence.

Should basic protection against self-crimination be offered witnesses appearing before investigatory commissions? Many would say it should. But, in the first place, there is no general right against self-crimination in Canadian law; the common law principle *nemo tenetur seipsum accusare* ("no one is bound to criminate himself") was abolished when s. 5 was introduced in 1893. Secondly, once it has been accepted that commissions to investigate are desirable in certain circumstances, it is irrational to introduce protection for witnesses that will in many instances prevent meaningful investigation. An inquiry barred from examining wrongdoing that may lead to criminal prosecutions would have very little room for manoeuvre.

A major deficiency in the protection afforded by s. 5 of the *Evidence Act* is that it must be invoked by the witness himself, by objecting to answer a question; if the witness does not do so, his answers are to be considered voluntary. And a commissioner has no

duty to caution a witness to whom a criminating question is put, and explain to him his rights under s. 5. A witness should not have to invoke the protection himself; it should be automatic. This is the effect of s. 38 of the Evidence Code proposed by the Commission in its report to Parliament on *Evidence*. The proposed section reads as follows:

> An accused in a criminal proceeding who has testified in a prior proceeding (other than a preliminary hearing in respect of the matter with which he is accused) has a privilege to prevent such testimony from being used against him, unless such criminal proceeding is a prosecution for perjury in giving the testimony.

This provision is intended to replace s. 5 of the present *Evidence Act* and by s. 87 of the proposed Code, it is intended to apply to "every investigation, inquiry, hearing, arbitration or fact-finding procedure governed by the law of Canada...", including commissions of inquiry. As we noted earlier, however, it may be advisable to adapt the language of the Code in a special statute applying to administrative tribunals, including commissions of inquiry.

Publicity is a related problem. Publicity surrounding a commission of inquiry may jeopardize the right to a fair trial of a commission witness who is an accused at the time of the inquiry, or subsequently becomes one. The *Criminal Code* already places restrictions on publicity of preliminary inquiries. Difficulties facing inquiries regarding publicity can be overcome by a commission issuing, when necessary, orders limiting or forbidding publicity. The solution is not for the authorities to forfeit the right to prosecute an individual when they wish to obtain his testimony before an inquiry; there is no good reason for bestowing what would in effect be immunity upon inquiry witnesses.

What of appeal? First, should there be an appeal from the findings of an investigatory commission? On this matter, little can be added to what was said by Lord Salmon's 1966 [United Kingdom] Royal Commission on Tribunals of Inquiry:

> These Tribunals have no questions of law to decide. It is true that whether or not there is any evidence to support a finding is a question of law. Having regard, however, to the experience and high standing of the members appointed to these Tribunals and their natural reluctance to make any finding reflecting on any person unless it is established beyond doubt by the most cogent evidence, it seems to us highly unlikely that any such finding would ever be made without any evidence to support it. Any adverse finding which a Tribunal may make against any persons will depend upon what

> evidence the Tribunal believes. Accordingly it would be impossible to reverse such findings without setting up another Tribunal to hear the evidence all over again. This would be as undesirable as it would be impractical. In matters of the kind with which the Tribunals are concerned, it is of the utmost importance that finality should be reached and confidence restored with the publication of the report.

A means for reviewing jurisdiction is, however, essential. A Commission's jurisdiction might be challenged in several ways. It might be said that there exists some technical flaw in the creation of the commission; that, in effect, there is no commission at all. It might be argued that the commission in question is exceeding its mandate and is investigating matters it has no authority to investigate. It could be alleged that safeguards provided witnesses by statute are not being respected. And it may be argued that the rules of natural justice are being abused. Challenge of this sort is not unknown. A recent example is the plaintiff's declaration in *Landreville v. The Queen* [1973] 1 F.C. 223. In that case, Pratte J. held, *inter alia*, that *certiorari* did not lie: "The Royal Commission had no power to make a decision and it is well established that *certiorari* only lies to quash something which is a determination or a decision."

The Commission currently has under way a study on judicial review of federal administrative tribunals, including commissions of inquiry. We think it best, therefore, to await the completion of that study before advancing firm views on the precise form such review should take. The study is expected to be ready when we make our report to Parliament on the *Inquiries Act* at which time we will be giving our final views on this question. For the moment, however, it seems useful to set forth some general considerations and our preliminary orientation.

There are in theory at least three possible procedures for challenging jurisdiction. The challenge might go to the Trial Division of the Federal Court, or to the Federal Court of Appeal. Or the matter might be referred to a court (the Federal Court of Appeal would be the logical choice) by way of stated case, following a procedure such as that set out in the *Ontario Public Inquiries Act, 1971*. As for the latter option, the advantage would be that jurisdictional challenge would be facilitated by shifting the burden of obtaining a ruling from a challenger to the commission itself (although the commission might refuse to state a case,

requiring action by the challenger). The disadvantage of a stated case would be that abuse of the process would probably be easy; a commission's activities could be hampered by repeated demands for a stated case. There is some evidence that this has been the Ontario experience. As well, the procedure would be an anomaly in federal administrative law; there is something to be said for a degree of uniformity.

We think that advantage could equally be obtained by making applicable to commissions of inquiry the provisions of s. 28(4) of the *Federal Court Act* under which a federal board, commission or tribunal may seek the opinion of the Federal Court of Appeal on a question of law. That section is not under its present wording applicable to commissions of inquiry, but we will be recommending amendments to correct this deficiency.

In short, then, we favour the application of general procedures for the review of jurisdictional points from administrative tribunals to commissions of inquiry. The difficulty is that the existing general procedures are defective on a number of counts. In the first place, review will be hampered by uncertainty as to whether any particular commission function is administrative or quasi-judicial in nature. Accordingly, anyone who with respect to that function wishes to challenge jurisdiction will not know whether he should proceed to the Trial division using s. 18 of the *Federal Court Act* or to the Court of Appeal under s. 28. It is entirely possible to be told that you are in the wrong court; if the Chief Justice or his designate does not exercise his discretion under Rule 359 to remit the matter to the right court, then the whole action must be begun again. We will be making recommendations about this matter.

Again, Canadian jurisprudence suggests that in Canada the principles of natural justice do not apply to administrative functions. From a policy point of view, it seems eminently arguable that the courts supervise commissions of inquiry to make certain that they comply with the demands of fundamental fairness. It is true that the inquiry system, designed to serve the national interest, may require some sacrifice of individual rights and interests, but such sacrifice should be kept to an absolute minimum. The law must ensure that those involved in an inquiry should be entitled to basic fairness. This goal will be kept in mind in our examination of ss. 18 and 28 of the *Federal Court Act*.

Finally, there is some difficulty associated with the role of commission counsel in an investigatory inquiry. An inquiry is not a trial. As Laidlaw J.A. (dissenting, but not on this point) said in *Re Ontario Crime Commission*, "there is no contest in any matter and there are no litigants before the Commissioner". Yet to a witness, and particularly to a witness who may be a subject of the inquiry, commission counsel, in examination and cross-examination, may appear to be acting much like a prosecutor, before a commissioner who may appear to behave as an independent adjudicator. In some circumstances, such an appearance may be inevitable. Strictly speaking, however, commission counsel are just that—lawyers acting on behalf of the commission. Their duties may easily extend to advising the commissioners about testimony or on the course the inquiry should take, assisting the commissioners in assessing evidence, and writing some or all of the final report. To some witnesses, and perhaps to the public, counsel's apparent dual role may seem grossly unfair; we all know that no man should be a judge in his own cause.

It has on occasion been proposed that commission counsel, in order to avoid the problem we have just described, should have no role beyond examination and cross-examination of witnesses. Other advice and assistance a commission requires should be provided by separately appointed persons who are designated as "advisors" rather than "counsel". Such a system could easily be established in a new Act, and is not without merit.

After considerable reflection and consultation, we decided not to recommend the establishment of such a system. It is of great importance to reaffirm and make clear that an inquiry is not a trial, and any system that might promote confusion of this sort must be avoided. Nor is it desirable to create a complicated commission structure which might easily impede its expeditious operation. In the last resort, the commissioners themselves must be relied on to be independent, impartial and fair, and to make these characteristics apparent to all.

In summary, the structure and powers of commissions that investigate must by statute be strictly defined and carefully limited. The mandate of any particular commission, as set forth in the order-in-council creating it, should be as narrow as is reasonable in the circumstances. Restraint must be exercised in setting up such commissions in the first place. On the other hand, no artificial

restrictions should be placed by statute on the kinds of matters that may be investigated. And the permitted number and preferred qualifications of commissioners (appointed by the Cabinet) should be broadly defined, for situations requiring investigation can never be fully anticipated.

Commissions to investigate must have the full powers they need to discharge their mandate completely. Those participating in such a commission should have the immunity they would possess if the commission were a court of record. And commissions should have the power to publish their report, save when prevented from doing so by the Cabinet.

Finally, proper safeguards must be provided for those involved in the inquiry. There must be a right to appear; to have counsel; to cross-examine; to comment on proposed adverse findings; to obtain legal aid and costs at the discretion of the commission; to request *in camera* hearings and restrictions on publicity; to have the benefit of privileges available to witnesses in judicial proceedings (in particular the right against the use of criminating answers in contemporaneous or subsequent criminal proceedings) and to challenge a commission's jurisdiction.

F. Conclusion

Form follows function. Because of the broad function of commissions to advise, their structure and powers should be broadly tailored. Statutory provision should promote the expression and transmittal to decision-makers of relevant public opinion. Because of the nature of an advisory commission's work, subpoena and "contempt" powers, and corresponding safeguards for witnesses, are unnecessary.

Because of the narrow, and possibly dangerous, function of commissions to investigate, their form must be precise. Structure and powers must be strictly defined and carefully limited. There must be provision for the full powers necessary to discharge a mandate; but full and proper safeguards must be available for all those involved in the inquiry.

A commission of inquiry with extraordinary powers akin to the powers of a Superior Court should not be provided for in a

general statute. Such an extraordinary commission should require a special Act of Parliament. In this way, creation of such a commission will be visible and the subject of political debate.

Commissions of inquiry, like most instruments of government, can further the state's well-being, or disrupt the polity and oppress the citizenry. It is the political mood, rather than law reform commission reports or new statutes, that will determine which it is to be. But law reform commission reports and new statutes can ensure that, if the better route is chosen, the way is clearly marked.

V.

The Present *Inquiries Act*: A Critique

A. Drawing the threads together

We have explained what is normally meant by "commission of inquiry"; have given a brief history of the *Inquiries Act*; discussed the place of commissions of inquiry in Canadian government; argued that the essential distinction is between commissions that advise and commissions that investigate; and have set forth the structure and powers indicated by the place of commissions in government and by the essential distinction between advising and investigating. In this and the next section of this paper, we attempt to draw the threads together. Here we briefly review the present Act in light of what we have said so far. In the next section we propose a new Act.

B. The present Act: Part I

The full title of the present statute is *An Act respecting public and departmental inquiries*. This title and indeed the rest of the Act reflects a distinction that, as we have explained, we consider inappropriate.

Part I of the present Act deals with "Public Inquiries"; as a matter of history these inquiries are, in our terminology, generally those that advise. Section 2, the first section of Part I, says:

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

The section permits the Cabinet (Governor in Council)—clearly the appropriate body—to at any time ("whenever he deems it expedient") cause an inquiry to be made into in effect any subject (there is little if anything that cannot be described as connected with "the good government of Canada or the conduct of any part of the public business thereof"). Such flexibility is appropriate to the creation of purely advisory commissions of the kind we describe in this paper. However, Part I commissions under the present system possess substantial powers and may be investigatory, and accordingly should only be created in unusual and important circumstances. Section 2 does not so provide. The new system we suggest would require the Cabinet to deem the subject to be investigated of "substantial public importance" before an investigatory commission with significant powers would come into being.

Section 3 states:

> **3.** Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted.

It is the Cabinet which appoints the commissioners. Nothing is said about the qualifications these commissioners must have. In both these respects, for reasons we gave earlier in this paper, the section is sound.

The same cannot be said of sections 4 and 5:

> **4.** The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.
>
> **5.** The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

We argued earlier that advisory commissions need not have the powers given them in these sections. The absence of such powers would justify absence of extensive safeguards for witnesses, although it is probably desirable to state as a matter of principle the right to legal counsel.

Section 5 presents particular difficulties. The phrase "court of record" is of uncertain meaning. Does it, for example, refer to an inferior or superior court of record? Does enforcement under s. 5 refer simply to a power to fine or imprison or can a commission, for example, forcibly compel attendance? Does the power extend to punishment of someone who disrupts proceedings? What is the machinery for execution of a penalty imposed by a commission?

Finally, it is our view, as we have explained, that free and public expression of opinion before advisory commissions be promoted, to the extent that intervenors not only be permitted, but in some circumstances be funded as well. It is a clear deficiency of the present statute that it makes no provisions for such matters.

To conclude: the first two sections of Part I can be retained. Sections 4 and 5 should be removed. New sections should be added to deal with public participation.

Matters common to both advisory and investigatory commissions—funding, physical facilities and staff, immunity and the right to publish, *in camera* hearings and publicity—will be dealt with in Part III, the general part.

C. The Present Act: Part II

Section 6 of the Act—the first section of Part II—defines the scope of what in the present statute are departmental investigations:

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

We propose that investigatory commissions not be restricted to departmental or governmental business, or the official conduct of

public servants. Rather, they should be available to investigate any matter deemed by the Cabinet to be of substantial public importance. The purpose is not to facilitate and promote the free and frequent use of commissions of inquiry. We have earlier stressed that inquiries are appropriate only in unusual and exceptional circumstances, and that their use should be justified in the political arena. Inquiries are properly used only to investigate, for example, incompetence or venality in government itself, or serious breakdown in the implementation or administration of an established government policy. Commissions of this kind should be appointed, not by a minister with Cabinet authority, but by the Cabinet itself.

Sections 7, 8 and 9 deal, broadly speaking, with a commission's power to enter a public office or institution and examine documents; summon persons and require them to give evidence on oath; issue subpoenas to persons requiring them to bring with them documents or other things; and issue commissions permitting the person commissioned to take evidence. The sections read:

> **7.** The commissioner or commissioners may, for the purposes of the investigation, enter into and remain within any public office or institution, and shall have access to every part thereof, and may examine all papers, documents, vouchers, records and books of every kind belonging thereto, and may summon before him or them any person and require him to give evidence on oath, orally or in writing, or on solemn affirmation if he is entitled to affirm in civil matters; and any such commissioner may administer such oath or affirmation.
>
> **8.** (1) The commissioner or commissioners may, under his or their hand or hands, issue a subpoena or other request or summons, requiring and commanding any person therein named to appear at the time and place mentioned therein, and then and there to testify to all matters within his knowledge relative to the subject-matter of such investigation, and to bring with him and produce any document, book, or paper that he has in his possession or under his control relative to any such matter as aforesaid; and any such person may be summoned from any part of Canada by virtue of the subpoena, request or summons.
>
> (2) Reasonable travelling expenses shall be paid to any person so summoned at the time of service of the subpoena, request or summons.
>
> **9.** (1) If, by reason of the distance at which any person, whose evidence is desired, resides from the place where his attendance is required, or for any other cause, the commissioner or commissioners deem it advisable, he or they may issue a commission or other authority to any officer or person therein named, empowering him to take such evidence and report it to him or them.
>
> (2) Such officer or person shall, before entering on any investigation, be sworn before a justice of the peace faithfully to execute the duty entrusted to him by such commission, and, with regard to such evidence, has the same

powers as the commissioner or commissioners would have had if such evidence had been taken before him or them, and may, in like manner, under his hand issue a subpoena or other request or summons for the purpose of compelling the attendance of any person, or the production of any document, book or paper.

The powers given by these sections are, in general, necessary powers, although they may be capable of clearer expression. The s. 7 power to enter offices to examine papers is unexceptional for an independent body, and may be helpful, although it is in some measure redundant if there is power to subpoena papers directly. Section 8, giving the subpoena power, should be retained, although it would be reasonable to add here a new section giving the power to issue a search warrant. Section 9 makes necessary provision for the delegation of the power to hear evidence, although one may question whether it is desirable to give the delegates full commission powers (s. 9(2)). If they are to have such powers, the appropriate safeguards for participants must be attached. It may be both simpler and better to provide for the hearing and reporting to the commissioners of evidence.

Section 10 is the enforcement section:

10. (1) Every person who

(*a*) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,

(*b*) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,

(*c*) refuses to be sworn or to affirm, as the case may be, or

(*d*) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid,

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

(2) The judge of the superior or county court aforesaid shall, for the purposes of this Part, be a justice of the peace.

Generally this section is adequate. However, it provides no penalty for a person who refuses to respect a commission's practice and procedure, or who generally disrupts proceedings, or who fails to honour an order regarding publicity. Again, "a penalty not exceeding four hundred dollars" is no longer adequate; this figure has not changed since the original 1880 Act.

Should the penalty be a fine only, or should a jail sentence be available? In most cases, a fine will prove an adequate sanction, and we do not think it need be very high. Those who would be willing to pay a fine of $1,000, say corporations, would probably be equally willing to pay more. For those who still refuse to testify, imprisonment may be necessary but we think a short sentence should prove adequate in most cases. We do not believe severe sanctions should be permitted merely because the need for an inquiry into a matter of such crucial importance may conceivably arise where such sanction would be required. The power to deprive an individual of his liberty for a long period should not be given because exceptional situations may arise. It is better, if such a situation does arise, for Parliament to deal with it at the time. The fact is that *no* federal commission appears to have found it necessary to exercise such powers to perform its functions.

Should a commission be able itself to impose punishment for disobedience, as is the case under some provincial Inquiries Act? Or should punishment be left to the courts as is the case under the existing federal Act? It may be argued that giving the power to commissions to punish for contempt would assist in the efficient and expeditious performance of their duties. But efficiency in requiring an individual to testify before a body that is not a court should not be too assiduously sought, particularly where it involves a breach of the principle that no man should be a judge in his own cause. Though it is clearly less efficient to lay an information before the ordinary courts, this is not usually considered too high a price to pay in a democracy. There is no evidence that federal commissions have not been able adequately to perform their functions because they did not possess these powers. Here again we think that if in particular circumstances the need to grant such powers appears necessary, Parliament can grant them by special statutes. This might in any event be necessary for commissions, which do not have the administrative underpinnings of courts to enforce such powers.

Part II makes no mention of safeguards for those involved in a Part II commission. Part III, the general part, does give a right to counsel and a right to reply to charges of misconduct. But, in addition, sections should be added clearly conveying the right of a witness to cross-examine other witnesses; the right of someone who has been commented on adversely in the testimony of others to

appear as a witness (with the right to counsel and cross-examination); and the right of a witness to expenses at the discretion of the commission.

We have already noted that a new *Inquiries Act* Part II should give witnesses before commissions some of the privileges possessed by witnesses before the courts, and that these should be modified to conform to sections 32 to 45 of the Evidence Code with such changes as may be necessary to apply them to commissions. Similarly, sections 4 and 5 of the proposed Code (the general rules of admissibility and exclusion) should, appropriately modified, govern administrative hearings, including inquiries.

Finally, Part II should include the standard provision for a fee and reasonable travel expenses to be paid to all witnesses.

To summarize, s. 6 should be replaced by a section extending the scope of Part II inquiries to investigations of any matter deemed by the Cabinet to be of substantial public importance, and providing that commissioners should be appointed by the Cabinet; the essential meaning of ss. 7, 8 and 9 should be retained, although the sections could benefit from redrafting, and s. 9 should not grant full commission powers to those delegated to hear evidence; s. 10 should be enlarged to cover interferences with hearings and the penalty should be somewhat reinforced; new sections must be added dealing with those matters we have described—full safeguards for witnesses, appeals, and so on.

D. The present Act: Part III

Part III of the present Act, the general part, applies both to what are, at present, public inquiries and departmental investigations.

Section 11 reads as follows:

> **11.** (1) The commissioners, whether appointed under Part I or under Part II, if thereunto authorized by the commission issued in the case, may engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry.
>
> (2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any other qualified

persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

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

(4) The persons so deputed shall report the evidence and their findings, if any, thereon to the commissioners.

Section 11(1) should be retained. The rest of the provision should be dropped. Part II provides for the delegation by a Part II commission of the power to hear evidence; we have recommended that this power be the only power capable of delegation. Commissions that advise should have no need to depute persons in the sense described in s. 11. Indeed, it would generally detract from the effectiveness of commissions if they did so, since there is no substitute for the commissioners hearing the evidence themselves. We observed in our historical note that in 1912, when Part III was added to the Act, the s. 11(3) provision was highly controversial and occasioned much debate in Parliament. We agree with the objections. These broad powers should be exercised only by persons in whom Cabinet itself has imposed that trust.

Sections 12 and 13, as already noted, provide for the right to counsel and a right to reply to allegations of misconduct. They read as follows:

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 has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.

These sections should be continued in modified form.

There remain a number of matters common to all commissions that should be provided for in the general part. A commission should have the discretionary power to hold *in camera* hearings, and order restrictions on publicity; it would be desirable to grant those powers in the context of a statement of principle that, save in exceptional circumstances, hearings are public and open. Witnesses should have the right formally to request a commission to exercise these discretionary powers. It should be set out that a

commission, in addition to hiring whatever staff is necessary, may arrange for whatever physical facilities it requires. Commissions should come under the aegis of some central body like the Privy Council (as is the case now) with experience in the matter through which requests for funds should flow; commissions should not in any event be dependent as is now sometimes the case on a department it is investigating. It should be provided that a commission may establish rules of practice and procedure to govern its operations. A new Act should state that, save in exceptional circumstances, a commission may itself publish its findings, or impose on the government a duty to publish within thirty days.

To summarize, s. 11(1) should be retained, but the rest of that section should be struck; ss. 12 and 13 should be retained in modified form; and a number of new sections should be added to Part III, dealing with funding, physical facilities, rules of practice and procedure, publication, *in camera* hearings and publicity.

E. The present Act: Part IV

Part IV, of one section only, deals with international commissions and tribunals:

> **14.** (1) The Governor in Council may, whenever he deems it expedient, confer upon an international commission or tribunal all or any of the powers conferred upon commissioners under Part I.
>
> (2) The powers so conferred may be exercised by such commission or tribunal in Canada, subject to such limitations and restrictions as the Governor in Council may impose, in respect to all matters that are within the jurisdiction of such commission or tribunal.

Section 14 was added to the Act in 1934 as a measure of international reciprocity. It was obviously intended to cover not international commissions but commissions of other countries. The reference to "under Part I" in s. 14(1) should be changed to make it apply to Parts I and II.

F. Conclusion

In light of the analysis we have presented, it is evident that the present *Inquiries Act* is inadequate in many respects. It does not reflect what we believe to be the essential distinction between advising and investigating. It gives unnecessary powers to Part I

commissions. It does not facilitate the expression of public opinion before a commission that advises (perhaps advising in part *about* public opinion). It unnecessarily and unwisely limits the scope of Part II inquiries to departmental or governmental business, or the official conduct of public servants. Inadequate safeguards are provided for those participating in a Part II inquiry; nothing is said about *in camera* hearings, publicity, whether witnesses need answer criminating questions or other matters of privileges, review of a commission's jurisdiction, and other important matters. The Act contains no provisions regarding the laying down of rules of practice and procedure, immunity and publication of the report. Because of these deficiencies, the case for a new statute is strong.

VI.

A New Act for a New System

A. The final step

We have set forth our views on the place of commissions of inquiry in Canadian government; on the structure and powers this suggests; and on the extent to which the present *Inquiries Act* provides for a system that does efficiently, but with adequate safeguards, what needs to be done. One step remains—to propose the text of a new statute.

B. A new Act

An Act respecting inquiries to advise and investigate

[The title reflects the new distinction, replacing the distinction between public inquiries and departmental investigations.]

SHORT TITLE

1. This Act may be cited as the *Inquiries Act*.

PART I

INQUIRIES TO ADVISE

2. The Governor in Council may, whenever he deems it expedient, establish an advisory commission to enquire into and

advise upon any matter connected with the good government of Canada.

3. The Governor in Council may appoint one or more commissioners to an advisory commission.

[Sections 1-3 are similar versions of ss. 1-3 of the existing Act.]

4. (1) An advisory commission shall accord to any person, group or organization satisfying the commission that he or it has a real interest in the subject matter of the commission's inquiry an opportunity to give evidence during the inquiry.

(2) Where an advisory commission determines that it is appropriate in order to promote the full expression of relevant information and opinion, it may pay all or any part of the legal, research and other costs of a person, group or organization giving evidence before it.

[This new section expresses the principle of free expression of opinion before an advisory inquiry, emphasizing that one role of such inquiries is to provide an alternative means of gathering public opinion and transmitting it to decision-makers. The section provides for the funding of so-called "intervenors" in circumstances where the commission sees fit.]

5. The Governor in Council may, if satisfied on application by an advisory commission that the commission cannot effectively perform its functions without having some or all of the powers of an investigatory commission, confer on the commission such of the powers of an investigatory commission, subject to such restrictions and conditions, as it deems expedient.

[The new s. 5 empowers the Cabinet in the unusual situation where this may be necessary to give an advisory commission power to examine witnesses under oath, obtain a search warrant, and so on. Under the existing Act these powers are given as a matter of course. The exercise of such powers against persons who are not accused of a criminal offence or witnesss before a court, but are simply called to advise the government about policy matters is unusual in a democracy. They should be sparingly used and only on the express authority of the main political executive body in the country.

[Sections 4 and 5 of the existing Act are to be removed.]

PART II

INQUIRIES TO INVESTIGATE

6. The Governor in Council may, whenever he deems it expedient, establish an investigatory commission to investigate any matter he deems to be of substantial public importance.

7. The Governor in Council may appoint one or more commissioners to an investigatory commission.

[Sections 6 and 7 replace the existing s. 6. The new sections are, in one respect, much broader in scope, providing for investigation into *any* matter deemed to be of substantial public importance, not merely departmental matters. However, the existing Part I now permits investigations into other matters.

In fact, the "deeming" provision imposes a new limitation on the creation of investigative commissions. It must be one that Cabinet deems of substantial public importance. This is, of course, a political question for it alone to decide, and is not reviewable by the courts. Investigatory commissions are now to be appointed by the Cabinet, rather than by a minister under the authority of the Cabinet.]

8. (1) An investigatory commission may issue a summons or a subpoena requiring any person to attend at the time and place mentioned therein to testify on oath orally or in writing to all matters within his knowledge relevant to the subject matter of the investigation, and to produce any relevant document or other thing under his control.

(2) A summons or subpoena issued under this section by a commission consisting of one commissioner, shall be under the hand of the commissioner, but if there is more than one, then of the Chairman or a commissioner designated by the commission.

(3) A summons or subpoena issued under this section has effect throughout Canada.

(4) A summons or subpoena issued under this section shall be in the form set forth in the Schedule.

(5) A person to whom a summons or subpoena is issued under this section shall be paid such travelling expenses at the time of service as the Commission deems reasonable.

(6) A commission may, in its discretion, pay all or part of the expenses of any person who attends as a witness as it deems reasonable and proper.

[Section 8 is intended to replace s. 8 and part of s. 7 of the existing Act. Subsection (4) provides for forms for summons and subpoenas. Subsection (6) is new in providing for the expenses of witnesses.]

9. (1) If by reason of the distance at which any person whose evidence is desired resides from the place where his attendance is required, or for any other cause, an investigatory commission deems it advisable, it may authorize any person to take evidence and report to the commission.

(2) A person authorized to take evidence under this section shall, before doing so, be sworn before a justice of the peace faithfully to execute that duty.

[Section 9 reproduces the existing s. 9, but the part giving full commission powers to a person authorized to take evidence has been dropped. Section 9 does authorize such person to administer the oath but summons and subpoenas are to be issued by the commission.]

10. Every person who

(*a*) fails without valid excuse to attend as required by a subpoena,

(*b*) refuses to be sworn,

(*c*) refuses to answer any proper question he is required by the commission to answer,

(*d*) refuses to produce any document or any other thing he is required by the commission to produce,

(*e*) refuses to comply with any order made by the commission under section 19, or

(*f*) disrupts a hearing of the commission,

is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

[Section 10 reproduces the existing s. 10. Paragraphs (*e*) and (*f*) are new. The financial penalty has been raised, and imprisonment permitted.]

11. A commissioner may, for the purpose of an investigation under this Part, enter into and remain within any public office or institution, and shall have access to every part thereof and may examine any of its records and papers.

[The new s. 11 replaces the portion of the existing s. 7 not replaced by the new s. 8.]

12. (1) Where an investigatory commission satisfies a judge of a superior court of criminal jurisdiction that there is reasonable ground to believe that there is anything in a building, receptacle or place that there is reasonable ground to believe will assist the commission in its enquiry, the judge may issue a search warrant, authorizing any person named therein to enter such building, receptacle or place and search for such thing.

(2) A peace officer who makes a search under this section may remove anything he finds that may be relevant to the commission's enquiry and deliver it to the commission.

(3) The commission may keep custody of anything delivered to it under this section for a period of three months, after which it shall return the thing to the person entitled to it.

(4) A judge of a superior court of criminal justice may, on application by the commission or a person having an interest in a thing removed under this section, extend or shorten the period set forth in subsection (3).

(5) A search warrant shall be in the form set forth in the Schedule.

[Section 12 is new and authorizes the issue of a search warrant.]

13. Any witness who believes his interests may be adversely affected by testimony given before a commission and any other person who satisfies a commission that any such testimony may adversely affect his interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the commission's discretion, to call and examine or cross-examine witnesses personally or by his counsel in respect of the matter.

[Section 13 is new and gives witnesses and other persons whose interests may be adversely affected the opportunity to be heard, and in the commission's discretion to examine other persons regarding the matter.]

14. (1) Subject to this section, the formal rules of evidence in judicial proceedings do not apply to hearings under this Act.

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

[Section 14 underlines that a commission is not subject to formal judicial rules of evidence. The Commission has already indicated in sections 4, 5 and 87 of the Evidence Code in its Report on *Evidence* the general rules of admissibility and exclusion that should apply to all federal fact-finding tribunals. The section does, however, expressly provide that privileges—which are based on rules of public policy not restricted to judicial proceedings—apply in the same way as they do to judicial proceedings. The Commission has in its Report on *Evidence* stated what these should be and that with appropriate modifications they should extend to all federal fact-finding bodies, including commissions of inquiry.]

PART III

GENERAL

15. A Commission shall establish and make known such rules of practice and procedure as it considers necessary or desirable.

[Section 15 is new. It permits a commission to establish rules of procedure.]

16. A commission may engage the services of counsel and other professional, technical, clerical or other assistants to assist in performing its functions, and may arrange for necessary offices and other physical facilities.

[Section 16 is intended to replace the existing s. 11(1). It also makes provision for obtaining physical facilities. Sections 11(2), (3) and (4), permitting commissioners to depute and giving the person deputed the powers of the commissioners, have been dropped. Deputation for the purpose of taking evidence is now provided for by s. 9; it is undesirable that a person deputed have full commission powers.]

17. No action for defamation lies against a commissioner or commission counsel in the performance of his duties under this Act or against a person, in respect of testimony given on oath under this Act.

[Section 17 is new and makes clear that those engaged in commission hearings have similar privileges as their counterparts in judicial hearings.]

18. Any person, group or organization appearing before a commission may be represented by counsel.

[Section 18 is new and affirms the right to counsel.]

19. (1) All hearings of a commission shall be open to the public, except that the commission may on its own motion or at the request of any person, hold a hearing *in camera* if it is of the opinion that the public interest in adhering to the principle that hearings be open to the public is outweighed for any reason, such as possible danger to public security, the interest in privacy regarding intimate personal or financial matters, or the danger of jeopardizing the right of anyone to a fair trial.

(2) All public hearings of a commission may be freely reported, except that a commission may, on its own motion or at the request of any person, issue an order restricting or forbidding the reporting of any matter where it is of the opinion that the public interest in adhering to the principle that hearings may be freely reported is outweighed for any reason, such as possible danger to public security, or the interest in privacy respecting intimate, financial or personal matters, or the danger of jeopardizing the right of anyone to a fair trial.

[Section 19 is new. It is intended to ensure as much as possible the principle that commission hearings be open to the public and freely reported in the media.]

20. No report of a commission established under this Part that alleges misconduct by any person shall be made until reasonable notice of the allegation has been given to that person and he has had an opportunity to be heard and, at the commission's discretion, to call witnesses.

[Section 20 is intended to re-enact the existing s. 13. The right to counsel is set forth in the proposed s. 18.]

21. A commission may release its report to the public within thirty days after its submission to the Governor in Council, unless the Governor in Council by order otherwise directs.

[Section 21 is intended to ensure early publicity for commission reports.]

PART IV

FOREIGN COMMISSIONS

22. The Governor in Council may confer upon an advisory or investigatory body established by a foreign country or a constituent part thereof any of the powers conferred upon commissions by this Act, subject to such restrictions and conditions as it deems fit.

[Section 22 is an amended version of the existing s. 14.]

C. A guide for commissioners

A person who suddenly finds himself a commissioner has seldom had previous experience with commissions of inquiry or anything resembling them. Even lawyers and judges, used to the workings of the legal system, may know little about the many administrative and legal problems associated with inquiries. A clear and comprehensive statute is necessary, but not sufficient, for the proper workings of a commission; there must be in addition a "guide" or "manual" for the assistance of those involved in an inquiry.

Such a guide should present the law that governs a commission's life. It should contain the *Inquiries Act,* together with explanatory notes. It might offer a brief history of inquiries. It should draw attention to jurisprudence of particular interest and importance. It should offer unofficial guidance, culled from the experience of those who have acted as commissioners, about difficult situations that might arise and how a commissioner might deal with such situations. It should suggest what might be the various stages of any particular inquiry.

The guide should also offer advice about administration. For example, what staff might be necessary? What are the relevant Treasury Board rules? How are the finances to be handled? How is a budget submitted? How is the reporting of evidence to be dealt with? How are files to be disposed of when the work of the commission comes to an end? How should translation and publication of a report be expedited?

Finally, such a guide might offer a bibliography of material on commissions of inquiry, a model procedure, and a set of forms and precedents. It might suggest, for example, the text of a letter to be sent to persons who might have a special interest in the inquiry; the form of a letter to be sent to witnesses about whom commission counsel intends to make submissions concerning conduct; and so on.

VII.

Conclusion

For the reasons given, there is no doubt that commissions of inquiry serve a useful purpose. Yet, they can be a waste of time if they are inefficient or lacking in powers, or dangerous if they have immense powers that are not wisely used.

In this working paper, the Commission is proposing a new statute which it believes is an improvement over existing legislation. These are tentative conclusions because they have not been put to the test of public criticism. The Commission is most anxious to receive comments from others before it decides on the nature of any report it may make to Parliament.

APPENDIX A

The Present *Inquiries Act*

CHAPTER I-13

An Act respecting public and departmental inquiries

SHORT TITLE

Short title

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

PART I

PUBLIC INQUIRIES

Inquiry

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

Appointment of commissioners

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

Powers of commissioners

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to

affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine. R.S., c. 154, s. 4.

Idem

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

PART II

DEPARTMENTAL INVESTIGATIONS

Appointment of commissioners

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

Powers of commissioners

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

May issue subpoena or summons

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

Expenses

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

Evidence may be taken by commission

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

commission or other authority to any officer or person therein named, empowering him to take such evidence and report it to him or them.

Powers for that purpose

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

Witnesses failing to attend, etc.

10. (1) Every person who

(*a*) being required to attend in the manner provided in this Part, fails, without valid excuse, to attend accordingly,

(*b*) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same,

(*c*) refuses to be sworn or to affirm, as the case may be, or

(*d*) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid,

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

Justice of the peace

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

PART III

GENERAL

Employment of counsel, experts and assistants

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

Experts may take evidence and report

(2) The commissioners may authorize and depute any such accountants, engineers, technical advisers, or other experts, or any

other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

Powers

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

Report

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

Parties may employ counsel

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

Notice to persons charged

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

PART IV

INTERNATIONAL COMMISSIONS AND TRIBUNALS

Authority to confer powers upon

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

Exercise of powers in Canada

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

APPENDIX B

A Working Draft of the proposed New Act

An Act respecting inquiries to advise and investigate

SHORT TITLE

1. This Act may be cited as the Inquiries Act.

PART I

INQUIRIES TO ADVISE

2. The Governor in Council may, whenever he deems it expedient, establish an advisory commission to enquire into and advise upon any matter connected with the good government of Canada.

3. The Governor in Council may appoint one or more commissioners to an advisory commission.

4. (1) An advisory commission shall accord to any person, group or organization satisfying the commission that he or it has a real interest in the subject matter of the commission's inquiry an opportunity to give evidence during the inquiry.

(2) Where an advisory commission determines that it is appropriate in order to promote the full expression of relevant information and opinion, it may pay all or any part of the legal, research and other costs of a person, group or organization giving evidence before it.

5. The Governor in Council may, if satisfied on application by an advisory commission that the commission cannot effectively perform its functions without having some or all of the powers of an investigatory commission, confer on the commission such of the powers of an investigatory commission, subject to such restrictions and conditions, as it deems expedient.

PART II

INQUIRIES TO INVESTIGATE

6. The Governor in Council may, whenever he deems it expedient, establish an investigatory commission to investigate any matter he deems to be of substantial public importance.

7. The Governor in Council may appoint one or more commissioners to an investigatory commission.

8. (1) An investigatory commission may issue a summons or a subpoena requiring any person to attend at the time and place mentioned therein to testify on oath to all matters within his knowledge relevant to the subject-matter of the investigation, and to produce any relevant document or other thing under his control.

(2) A summons or subpoena issued under this section by a commission consisting of one commissioner shall be under the hand of the commissioner, but if there is more than one, then of the Chairman or a commissioner designated by the commission.

(3) A summons or subpoena issued under this section has effect throughout Canada.

(4) A summons or subpoena issued under this section shall be in the form set forth in the Schedule.

(5) A person to whom a summons or subpoena is issued under this section shall be paid such travelling expenses at the time of service as the Commission deems reasonable.

(6) A commission may, in its discretion, pay all or part of the expenses of any person who attends as a witness as it deems reasonable and proper.

9. (1) If by reason of the distance at which any person whose evidence is desired resides from the place where his attend-

ance is required, or for any other cause, an investigatory commission deems it advisable, it may authorize any person to take evidence and report to the commission.

(2) A person authorized to take evidence under this section shall, before doing so, be sworn before a justice of the peace faithfully to execute that duty.

10. Every person who

(*a*) fails without valid excuse to attend as required by a subpoena,

(*b*) refuses to be sworn,

(*c*) refuses to answer any proper question he is required by the commission to answer,

(*d*) refuses to produce any document or any other thing he is required by the commission to produce,

(*e*) refuses to comply with any order made by the commission under section 19, or

(*f*) disrupts a hearing of the commission,

is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

11. A commissioner may, for the purpose of an investigation under this Part, enter into and remain within any public office or institution, and shall have access to every part thereof and may examine any of its records and papers.

12. (1) Where an investigatory commission satisfies a judge of a superior court of criminal jurisdiction that there is reasonable ground to believe that there is anything in a building, receptacle or place that there is reasonable ground to believe will assist the commission in its enquiry, the judge may issue a search warrant authorizing any person named therein to enter such building, receptacle or place and search for such thing.

(2) A peace officer who makes a search under this section may remove anything he finds that may be relevant to the commission's enquiry and deliver it to the commission.

(3) The commission may keep custody of anything delivered to it under this section for a period of three months, after which it shall return the thing to the person entitled to it.

(4) A judge of a superior court of criminal jurisdiction may, on application by the commission or a person having an interest in a thing removed under this section, extend or shorten the period set forth in subsection (3).

(5) A search warrant shall be in the form set forth in the Schedule.

13. Any witness who believes his interests may be adversely affected by testimony given before a commission and any other person who satisfies a commission that any such testimony may adversely affect his interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the commission's discretion, to call and examine or cross-examine witnesses personally or by his counsel in respect of the matter.

14. (1) Subject to this section, the formal rules of evidence in judicial proceedings do not apply to hearings under this Act.

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

PART III

GENERAL

15. A commission shall establish and make known such rules of practice and procedure as it considers necessary or desirable.

16. A commission may engage the services of counsel and other professional, technical, clerical or other assistants to assist in performing its functions, and may arrange for necessary offices and other physical facilities.

17. No action for defamation lies against a commissioner or commission counsel in the performance of his duties under this Act or against a person in respect of testimony given on oath under this Act.

18. Any person, group or organization appearing before a commission may be represented by counsel.

19. (1) All hearings of a commission shall be open to the public, except that the commission may on its own motion or at the request of any person, hold a hearing *in camera* if it is of the opinion that the public interest in adhering to the principle that hearings be open to the public is outweighed for any reason, such as the possible danger to public security, the interest in privacy regarding intimate personal or financial matters, or the danger of jeopardizing the right of anyone to a fair trial.

(2) All public hearings of a commission may be freely reported, except that a commission may, on its own motion or at the request of any person, issue an order restricting or forbidding the reporting of any matter where it is of the opinion that the public interest in adhering to the principle that hearings may be freely reported is outweighed for any reason, such as possible danger to public security, or the interest in privacy respecting intimate, financial or personal matters, or the danger of jeopardizing the right of anyone to a fair trial.

20. No report of a commission that alleges misconduct by any person shall be made until reasonable notice of the allegation has been given to that person and he has had an opportunity to be heard and, at the commission's discretion, to call witnesses.

21. A commission may release its report to the public within thirty days after its submission to the Governor in Council, unless the Governor in Council by order otherwise directs.

PART IV

FOREIGN COMMISSIONS AND TRIBUNALS

22. The Governor in Council may confer upon an advisory or investigatory body established by a foreign country or a constituent part thereof any of the powers conferred upon commissions by this Act, subject to such restrictions and conditions as it deems fit.

SCHEDULE

FORM A
(Section 8)
SUMMONS

To:

You are hereby summoned to attend at an inquiry conducted by (*name of commission*) to be held at ..... in the.....of..... on .....day, the.....day of ....., 19..... at the hour of .....o'clock in the.....noon and so from day to day until the inquiry is concluded or the commission otherwise orders, to give evidence concerning the matters in question in the inquiry [and to bring with you and produce at such time and place .....
.....
.....]

Dated this .....day of....., 19.....

(*Name of Commission*) .....

.....
Commissioner

FORM B
(Section 8)
SUBPOENA

To:

You are hereby summoned and required to attend at an inquiry conducted by (*name of commission*) to be held at .....
.....in the.....of.....
on .....day, the .....day of.....
19.....at the hour of ..... o'clock in the.....noon and so from day to day until the inquiry is concluded or the commission otherwise orders, to give evidence touching the matters in question in the inquiry [and to bring with you and produce at such time and place ....
.....
.....]

Dated this.....day of ..... , 19.....

(*Name of Commission*) .....

.....
Commissioner

Note:

If you fail to attend and give evidence at the inquiry, or to produce the documents or things specified, at the time and place specified, without lawful excuse, you may be prosecuted and punished by fine or imprisonment.

FORM C
(Section 12)
SEARCH WARRANT

To: The Peace Officer in the (*Territorial Division*)

WHEREAS it appears on the oath of ..... of the ..... of ..... in the ..... of ..... that there are reasonable grounds for believing that (describe things to be searched for and the inquiry in respect of which search is to be made) are in ..... at ..... (hereinafter called the premises);

This is, therefore, to authorize and require you between the hours of (as the judge may direct) to enter into the said premises and to search for the said things and to bring them before (*name of commission conducting the inquiry*).

GIVEN UNDER MY HAND this ..... day of ....., 19.....at .....

.....
Judge
(*Name of Court*)

APPENDIX C

Statutes Referring to *Inquiries Act*[1]

Citation	Short Title (and supplementary provisions)	Major Reference
A–3 (R.S.C. 1970)	Aeronautics Act	s. 8
B–1	Bank Act	s. 65
B–4	Quebec Savings Bank Act	s. 56
C–3	Canada Deposit Insurance Corporation Act	s. 12(2)
C–7	Canadian Dairy Commission Act	s. 9(2)
C–12	Canadian Wheat Board Act	s. 22
S.C. 1970-71-72, c. 47	Clean Air Act	s. 18
C–23	Combines Investigation Act s. 6 – Inquiry by Dep. Director s. 7 – Application for Inquiry s. 8 – Inquiry by Director s. 9 – Notice s. 10 – Entry of Premises s. 13,20 – Counsel s. 14 – Discontinuance s. 15 – Reference to A.G. of Canada s. 18 – Evidence s. 19 – Reports by Commission ss. 22,26 – Interim and final reports s. 25 – Authority of technical assistants s. 27 – Private Inquiries s. 41 – Obstruction: penalty s. 47 – Inquiry into monopolies, as in s. 8	s. 21
C–32	Canada Corporations Act	ss. 114(30) 53(3)(*b*)

[1]This table was compiled by means of a QUIKLAW computer search, using the statutes of Canada data base, as of July 1, 1975.

Citation	Short Title (and supplementary provisions)	Major Reference
R.S.C. (1st Supp.) c. 10, s. 12	s. 114.1 – Investigating ownership of securities	
C–33	Corrupt Practices Inquiries Act	
C–40	Customs Act	s. 124
R.S.C., c. 14 (1st Supp.)	Canada Elections Act	s. 70
E–2	Electoral Boundaries Readjustment Act s. 16 – Rules of Procedure	s. 14
E–13	Excise Tax Act	s. 61
E–15	Explosives Act s. 2 – Definition of "Inspector" s. 4 – G. in C. may make regulations for Inquiry s. 17 – Offences	s. 16
S.C. 1970-71-72, c. 65	Farm Products Marketing Agencies Act s. 7 – Powers of Council	s. 8(5)
F–10	Financial Administration Act s. 7(7) – Power of G. in C. unaffected by Treasury Board s. 62 – Inquiry and report	s. 2 s. 64
S.C. 1970-71-72, c. 7	Canada Grain Act	s. 80
G–17	Grain Futures Act	s. 7
H–3	Hazardous Products Act s. 7 – Regulations	s. 9(4)
I–2	Immigration Act Special Inquiries s. 14 – Arrest and detention s. 15 – Arrest without warrant s. 16 – Detention s. 17 – Conditional release s. 18 – Reports and deportation s. 19 – Examinations s. 22 – Immigration Officer report to Special Inquiry Officer s. 24 – Immediate Inquiry s. 25 – Order for inquiry s. 26 – Nature of hearing s. 27 – Decision s. 28 – Re-opening s. 31 – Appeal s. 46 – Offences s. 58 – Regulations regarding procedure s. 60 – Evidence	s. 11
S.C. 1970-71-72, c. 63	Income Tax Act	ss. 6(1) (*b*) 231(13)
I–6	Indian Act s. 113 – Committee of Inquiry	s. 9(4)

Citation	Short Title (and supplementary provisions)	Major Reference
I-15	Canadian and British Insurance Companies Act	s. 125(2) 152(2)
	s. 73 – Inspection of Companies	
	s. 76 – Inquiries	
I-16	Foreign Insurance Companies Act	s. 9(2)
	s. 28 – Inspection of Companies	
	s. 30 – Inquiries	
L-1	Canada Labour Code	ss. 62 86 95
	s. 6 – Complaint and Inquiry	
	s. 11 – Other Inquiries	
	s. 32.1 – Regulations; (2) Inquiries	
	s. 69 – Offences	
	s. 91 – Safety officers	
	s. 93(3) – Evidence	
	s. 97 – Enforcement: offences	
	s. 117(i) – Regulations	
	s. 118(f) – Powers of Canada Labour Relations Board to inquire	
	s. 132(2) – Recommendation by Board	
	s. 143(3) – Inquiry and Votes	
	s. 196 – Inquiries regarding industrial matters	
	s. 198 – Industrial Inquiry Commission	
	s. 200 – Regulations of Commission	
	s. 205 – Expenses	
	s. 207 – Witness Fees	
L-5	Canada Land Surveys Act	s. 54
	s. 52 – Commissioner, place of inquiry	
L-8	Livestock and Livestock Products Act	s. 9
	s. 13 – Powers of inspector	
L-9	Livestock Feed Assistance Act	s. 7
L-10	Livestock Pedigree Act	s. 12
N-6	National Energy Board Act	s. 24
	s. 11 – Jurisdiction	
	s. 24 – Powers of single member	
R.S.C., c. 28 (1st Supp.)	Northern Inland Waters Act	s. 16
O-2	Official Languages Act	ss. 14. 15(2)
	s. 30 – Powers of Commission	
O-4	Oil and Gas Production and Conservation Act	s. 47(4)
	s. 8 – Jurisdiction	
	s. 9 – Inquiry by deputing member	
	s. 14 – Investigation into waste: powers	
P-4	Patent Act	s. 4(2)

Citation	Short Title (and supplementary provisions)	Major Reference
P-6	Penitentiary Act	s. 12
P-7	Pension Act	s. 82
	s. 62 – Procedure upon receipt of application	
S.C. 1970-71-72, c. 52	Pilotage Act	ss. 14(6) 18(4)
P-14	Post Office Act	ss. 7(4) 48(3)
P-32	Public Service Employment Act	s. 7
	s. 6 – Delegation of authority	
	s. 21 – Appeals	
	s. 31 – Inquiry into incompetence and incapacity	
	s. 32(6) – Inquiry into political partisanship	
	s. 34 – Regulations by G. in C. regarding s. 32	
P-36	Public Service Superannuation Act	s. 4(1)(*i*)
S-9	Shipping Act	s. 746(4)
	s. 88 – Concealment of nationality from Inquiry	
	s. 120 – Inquiry can invalidate certificates	
	s. 128 – Examination for certificate	
	s. 545 – Preliminary inquiries into casualties	
	s. 546 – Power as to inquiry	
	s. 547 – Report to Minister	
	s. 549 – No inquiry into previous case	
	s. 551 – Preliminary inquiry unnecessary	
	s. 553 – assessors	
	s. 557 – Expenses of witnesses	
	s. 558 – Power over certificates	
	s. 560 – Costs paid by Min.	
	s. 568 – Rules for procedure	
	s. 569 – Inquiry into competency of officers	
	s. 575 – Naval courts	
	s. 609 – Port Wardens	
	s. 612 – Port warden to ascertain damage causes	
	s. 670 – Sales of goods by warehouses	
	s. 685 – Offences Committed abroad	
	s. 686 – Offences Committed at sea	
	s. 687 – Inquiry into causes of death	
	s. 704(6)(*d*) – Powers of officer to inquire into shipment of articles of war	
S.C. 1970-71-72, c. 39	Textile and Clothing Board Act	s. 11
	s. 8 – Filing complaint	
	s. 9 – Board to conduct inquiry	

Citation	Short Title (and supplementary provisions)	Major Reference
	s. 10 – Notice s. 12 – Evidence s. 13 – Hearing s. 14 – Submissions s. 15 – Examination of plans s. 16 – Termination s. 17 – Reports and recommendations s. 23 – Confidential Info.	
S.C. 1970-71-72, c. 48	Unemployment Insurance Act	s. 10(2)
	s. 68 – Payment of premiums s. 113 – Powers of officers	
V–4	Veterans Land Act	s. 41
W–5	War Veterans Allowance Act	s. 26

APPENDIX D

Statutes Providing for Inquiries without Reference to *Inquiries Act*

Citation	Short Title and Provisions
A–15	Anti-Dumping s. 16 – Grounds for Inquiry s. 16.1 – Referrals by G. in C. s. 29 – Right to appear
B–3	Bankruptcy Act s. 6 – Investigations by Superintendent s. 7 – Reporting to Province s. 132 – Examination by official receiver s. 157 – Authority of Court
C–19	Canadian Citizenship Act s. 18 – Powers of Inquiry
C–28	Dominion Controverted Elections Act s. 41 – Inquiry into Corrupt Practices s. 59 – Judge's report
S.C. 1970-71-72 c. 6	Canada Cooperative Associations Act S.76(2) – Inquiry by court: liability
C–29	Cooperative Credit Associations Act s. 56 – Inquiry by Superintendent s. 58 – Inquiries to Minister; report
C–34	Criminal Code Numerous provisions concerning preliminary inquiry and inquest by coroner.
R.S.C., c. 12 (1st Supp.)	Criminal Records Act S. 4 – Inquiry into application for pardon to National Parole Board s. 5 – Grant of pardon
C–41	Customs Tariff s. 16 – Inquiry by judge
D–7	Disenfranchising Act s. 5 – Inquiry by court s. 7 – Deposit for Petition s. 11 – Rules of court

Citation	Short Title and Provisions
	s. 12 – Place of inquiry; notice
	s. 15 – Attendance of witnesses
	s. 17 – Court of Record
E–10	Evidence Act
	ss. 29(8),30(12) – "legal proceeding" includes "inquiry"
E–12	Excise Act
	s. 66 – Powers of Inquiry
E–17	Export and Import Permits Act
	s. 5(2)(*a*),(*b*) – Addition to import control list: inquiries by Textiles & Clothing Board and Anti-Dumping Tribunal
F–8	Ferries Act
	s. 8 – Inquiries by Commission
G–11	Government Railways Act
	s. 61 – Power to examine witnesses during investigations
H–9	House of Commons Act
	s. 19 – Inquiry into attendants
I–3	Immigration Appeal Board Act
	s. 11 – Appeal: exceptions
	s. 12 – Appeal by Minister
	s. 13 – Reopening; additional evidence
	s. 23 – Appeal to Federal Court: (2)(*b*)(i) not after arrest pursuant to s. 14, 15
I–17	Department of Insurance Act
	s. 7 – Superintendent to ascertain expenditure
J–1	Judges Act
	s. 30 – Canadian Judicial Council
	s. 31 – Inquiries
	s. 32 – Report
	s. 37 – Acting on Inquiry
L–2	Department of Labour Act
	s. 4 – Inquiries for information
L–4	Land Titles Act
	s. 179 – Inquiries before judge
	s. 180(4) – Costs
N–4	National Defence Act
	s. 42 – Boards of Inquiry: scope
	s. 108 – Service Tribunal
	s. 238 – Inquiry and report by A.G.
	s. 259 – Offence of contempt of court
N–16	National Trade Mark and True Labelling Act
	s. 7 – National Research Council reports to Minister regarding commodities
N–17	National Transportation Act
	s. 5(1) – Application of Part IV (General jurisdiction and powers regarding railways)
	s. 22 – Duties of Commission
	s. 45 – Jurisdiction (of Commission)
	s. 48 – Initiation by Commission or Minister
	s. 76 – Fees and allowances

Citation	Short Title and Provisions
	s. 77 – Production of documents s. 81 – Inquiries: ordered by Commission or Minister s. 82 – Powers
P-2	Parole Act s. 16 – Suspension of parole after inquiry s. 22 – Additional jurisdiction: inquiries for Solicitor General of Canada
P-21	Prisons and Reformatories Act s. 41 – Board of Parole, appointed by Lt. Gov. of Ontario s. 110 – Parole Committee s. 151 – Board of Parole, appointed by Lt. Gov. of B.C.
P-35	Public Service Staff Relations Act s. 20 – Complaints: inquiry by Board s. 35(1)(*b*) – Powers of Board to make inquiries
R-2	Railway Act s. 10 – Inspecting engineers s. 198 – Powers of Commission: crossings s. 209(1) – Drainage & pipes inquiry s. 226 – Inquiry by Commission s. 277 – Inquiry into rates s. 328(5) – Inquiry into accounts s. 335 – Returns, evidence, witnesses s. 408 – Commission to inquire into rates and earnings of Grand Trunk
S.C., 1974, c. 12	Railway Relocation and Crossing Act s. 16(2) – Inquiry into construction s. 17 – Inquiry into construction
R-9	Royal Canadian Mounted Police Act s. 31 – Inquiry into conduct of member
S-5	Science Council of Canada Act s 13 – Council may initiate inquiries
S-8	Senate and House of Commons Act s. 6 – Copies of journals available to inquiries s. 34(7) – Inquiry into allowances
R.S.C., c. 39 (1st Supp.)	Shipping Conferences Exemption Act s. 11 – Inquiry and Report by Director
S-11	Small Loans Act s. 8 – Special Report after inquiry by Minister
S.C., 1970-71-72 c. 15	Statistics Act s. 10 – Agreements with provincial governments s. 11(3) – Exchange of information (from inquiries) s. 22 – Acquiring statistics
T-1	Tarriff Board Act s. 4 – Duties of Board s. 5 – Powers s. 7 – Assistants
T-5	Canada Temperance Act s. 144 – Offences inquired into

Citation	Short Title and Provisions
T-6	Territorial Lands Act s. 19(*h*) - Powers of G. in C. to inquire
T-14	Transport Act s. 4 - Application of Procedure
Y-3	Yukon Placer Mining Act s. 50 - Inquiries by Commission to determine title s. 79 - Costs

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DISSENT—
Mr. Justice John C. Bouck, Vice-Chairman

It is with regret that I am forced to dissent from some of the recommendations in this Working Paper as proposed by the other three Commissioners. My reasons are set out under the following headings:

(1) *Recommendations for Repeal of the Inquiries Act, R.S.C. (1970) c. I-13 and Adoption of a New Statute*

The Working Paper proposes the repeal of the existing legislation and enactment of a new Statute. In my view, it has failed to make a case for such an extreme remedy. Throughout, it refers to the present *Act* as being "inadequate", "deficient", "unsound", "giving unnecessary power", etc. Yet, there are very few examples, if any, of actual situations where these allegations can be shown to have substance. Therefore, most of the criticism becomes just a matter of opinion.

If Commissions appointed under the present *Act* have apparently been able to carry out their duties without difficulty, then I am not convinced of the need for change. There is no sense in recommending reform merely for its own sake.

There may be parts of the present legislation which need change, but in my view, these should be limited to the areas where in practice and not just in theory the *Act* has been found deficient.

(2) *Appointment of Judges as Commissioners of Inquiry*

The Paper does not take any particular stand on this vexing question other than to point out some of the advantages and disadvantages of asking a judge to sit as a Commissioner. It is

a serious problem which I believe requires more thorough analysis: see, for example, *Royal Commissions*, J. D. Holmes, Q.C. (1955) 29 A.L.J. 253.

It may be impossible to find the kinds of Commissions where judges should be appointed and the kinds where they should not. Still, I think the issue is important enough to have received more thorough study in this Working Paper.

(3) *Supervision of Commissions of Inquiry by the Courts*

The Paper recommends that the general procedure for the review of jurisdictional points from administrative tribunals be applied to Commissions of Inquiry. My objection to this arises from the fact that as the law now stands, there is no right for a court to review the proceedings of a tribunal that is only exercising an administrative function as distinct from one that is performing a judicial or quasi-judicial role. It has been held that Royal Commissions such as the ones under discussion in this Working Paper, do not carry out a judicial or quasi-judicial function because they do not render a final decision: *Landreville v. The Queen* (1973) F.C. 1223 at 1227.

The prerogative writs of certiorari, quo warranto, mandamus, etc., the grounds upon which they are issued, and the remedies which they produce, apply only to those tribunals that are not simply performing an administrative duty. Therefore, either the prerogative writs will have to be adapted in some way or other to Royal Commissions that are administrative in nature, or a whole new body of law will have to be developed describing some new method of review. For example, will a court be allowed to quash the proceedings of a Commission of Inquiry or prohibit it from hearing certain evidence? Alternatively, will it be able to compel a Commission to hold hearings and listen to submissions which the Commission may believe are irrelevant? This is an enormously complicated problem and the Working Paper does not meet the issue to my satisfaction.

Lastly, in principle, I do not believe courts should supervise the proceedings of Commissions of inquiry any more than they should supervise the proceedings of a Parliamentary Committee.

(4) *Evidence Before a Commission of Inquiry*

Since a Commission of Inquiry is not conducting a judicial proceeding, there is no necessity that it comply with the Rules of Evidence designed for disputes between parties who are appearing in a court of law. Nonetheless, these rules do serve as a useful guide to Commissioners and the body of law built around them is helpful to illustrate the dangers that can occur if they are ignored.

It is not clear what is the current practice with respect to Rules of Evidence before Commissions appointed in accordance with the existing law. They probably differ, depending upon such things as the nature of the inquiry and the purpose for which the Commission was established. If one had to set a Rule, it would likely be that Commissions should follow the Rules of Evidence except where there is a good reason to depart from them: see for example, *Re: Huston* (1922) 52 O.L.R. 444 at 448 (Ont. C.A.).

Section 14 of the draft Statute in this Paper advocates the abolition of all Rules of Evidence in hearings held pursuant to the *Act*, except for certain Rules relating to privilege. This would leave the matter of Evidence completely at large, and I am not persuaded any particular benefit will flow from it.

In fact, the opposite might occur, and it could easily open the floodgates to all kinds of testimony based upon rumour, innuendo, etc., which could be very damaging and very unfair to others. At least, under the existing practice, Commissioners are constrained to some extent by the Rules of Evidence, and I question the prudence of abandoning them altogether. Once again, the Paper itself fails to illustrate by example how the present practice is unsatisfactory. If it is working well, then I see no need for change since we may be inventing solutions for non-existing problems.

The other objection I must regrettably take is to dissent from the application of the provisions of the Commission's proposed Evidence Code in proceedings before a Commission of Inquiry. The reason for this is because I do not agree with many of the sections of the suggested Code. This is not the time nor the place to spell out my reasons in detail.