1987

IN THE MATTER OF: The Royal Commission on the Donald Marshall, Jr. Prosecution

- and -

IN THE MATTER OF: The Canadian Charter of Rights and Freedoms;

- and -

IN THE MATTER OF: John F. MacIntyre and an application for funding of legal counsel

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SUBMISSION ON BEHALF OF THE DEPARTMENT OF THE ATTORNEY GENERAL

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value there is that portion of the Facility of Payment paragraph which says:

> The Company may, during the minority of the Insured, make any other payment or grant any privilege provided in the Policy to any of the persons described in this paragraph.

The company then has the right to elect under that paragraph what it will do with the monies. It has apparently elected to pay such monies to the insured personally which in my opinion it can do.

As to the argument regarding the presumption of advancement, I am of the opinion that this presumption applies here. There has been nothing offered by the hearing of the petition or the affidavit in support or anything to be drawn from the application for the policy or the policy itself to prove as is required in such cases that there was something available to rebut the presumption. This is carefully explained in *MacGillivray on Insurance Law*, 5th ed. vol. 2, p. 1130. There several cases are discussed and in each there was something specific to rebut the presumption. Here there is nothing.

For the foregoing reasons I am of the opinion that I cannot compel the insurance company to pay to the petitioner and therefore I must dismiss the application but in view of the small amounts payable under the policies and the problem involved for the Court, without costs.

RE THE ONTARIO CRIME COMMISSION, Ex parte FEELEY AND McDERMOTT

Ontario Court of Appeal, Laidlaw, Aylesworth and Schroeder, JJ.A. May 30, 1962.

Public Inquiries — Appeal VII I — Royal Commission investigating evidence of crime in Ontario — Imputations of serious crimes made against certain individuals during course of hearings — Rights of latter to be represented at hearings and examine and cross-examine witnesses — Public Inquiries Act (Ont.), s. 5(1).

During the course of a Royal Commission inquiry investigating the existence of certain alleged crime conditions in Ontario, in which grave imputations of serious crimes were alleged against particular individuals, counsel representing the latter requested the Commissioner to be allowed to represent them at the hearing and, specifically, that he be allowed to examine and cross-examine witnesses and be furnished with a transcript of the previous evidence of one of the individuals concerned which had been given *in camera*. The Commissioner refused all such specific requests on the ground that the hearing was purely investigative in character, having none of the attributes of a trial or proceeding *inter partes* involving personal or property rights. Counsel for the individuals, the applicants herein, appealed the Commissioner's rulings by way of a stated case to the Court of Appeal pursuant to s. 5(1) of the *Public Inquiries Act*, R.S.O. 1960, c. 323 which permits an appeal by any "person affected" to test the "validity of any decision, order, direction or other act of a commissioner". *Held*, Laidlaw, J.A., dissenting, that the applicants were undoubtedly "persons affected" within the meaning of s. 5(1) and the wide powers conferred on the Court of Appeal by that section included the right and power to review the exercise of the Commissioner's discretion in refusing applicants the right to examine and cross-examine witnesses and his refusal to order the production of the transcript sought by them. In this regard, *held*, that the refusals of the Commissioner constituted an invalid exercise of his discretion and the applicants were entitled to the privileges claimed. Inasmuch as allegations of a very grave character had been made against the applicants it was only fair and just that they should be afforded an opportunity to call evidence and elicit facts by examination and cross-examination so as to be able to place before the Commission a complete picture, rather than incur the risk of the Commission's obtaining only a partial or distorted one, and it would be improper to deny them such rights.

Per Laidlaw, J.A., dissenting: The Commission hearing in no sense constituted a trial or adjudication affecting any rights of the applicants and the maxim *audi alteram partem* had no application to the proceedings. On the contrary the inquiry was purely investigative in character and designed to obtain all relevant information in the most effectual, expeditious and efficient manner possible. Such aims would be entirely defeated if every person affected by evidence given in the course of the inquiry were permitted to call, examine and cross-examine witnesses. In the instant case the Commissioner in the exercise of his discretion, deemed it expedient, advisable and proper in the particular circumstances to deny such privileges to the applicants and with

respect to matters concerning the practice and procedure of the inquiry (and the rulings in question were rules of procedure), the Commissioner should have an absolute discretion in determining the procedure best suited to make the inquiry effective, efficient, practical and expeditious. Such must also have been the intent of the relevant legislation, the *Public Inquiries Act*, which nowhere sets forth any rules of practice or procedure to govern or control such a Commission and which therefore indicates that the Commissioner should be free to regulate the proceedings as he sees fit, provided only that he acts judicially in the sense that he must be honest, fair and impartial in the conduct of the inquiry and in the report which he subsequently makes.

[*Re Children's Aid Soc. of County of York*, [1934] O.W.N. 418, folld; *Wolfe v. Robinson* (1961), 31 D.L.R. (2d) 233, [1962] O.R. 132; *St. John et al. v. Fraser et al.*, [1935] 3 D.L.R. 465, 64 Can. C.C. 90, [1935] S.C.R. 441; *Chambers v. Winchester* (1907), 15 O.L.R. 316; *Lane v. City of Toronto* (1904), 7 O.L.R. 423; *Re Godson & City of Toronto* (1889), 16 O.A.R. 452, distd]

APPEAL from certain rulings of Commissioner conducting Royal Commission pursuant to *Public Inquiries Act* (Ont.). Reversed.

W. C. Rose, Q.C., for Vincent B. Feeley, Joseph P. McDermott and one "Mr. X"; *B. J. MacKinnon*, Q.C., for the Ontario Liberal Party; *F. A. Brewin*, Q.C., for the New Democratic Party; *R. F. Wilson*, Q.C., for the Commissioner but not heard on the argument.

LAIDLAW, J.A. (dissenting):—Pursuant to the provisions of the *Public Inquiries Act*, R.S.O. 1960, c. 323, a commission was issued appointing the Honourable Wilfrid Daniel Roach, Justice of Appeal of the Supreme Court of Ontario, a Commissioner to inquire into and report upon,

1. the administration of the laws and regulations regarding the incorporation and operations of social clubs having regard to allegations made by the Leader of the Opposition in his speech of November 29th, 1961.
2. any improper relationships, as alleged by the Leader of the Opposition in his speech of November 29th, 1961, between senior officials of the legal staff of the Department of the Attorney General and any person or persons, and more particularly relating to —
   (a) the termination of investigations,
   (b) the suppression of evidence,
   (c) the payment of money;
3. the extent of crime in Ontario and the sufficiency of the law enforcement agencies to deal with it.

Mr. R. F. Wilson, Q.C., was appointed counsel for the Commission.

The Commission commenced hearings on March 20, 1962. On April 4th a witness known as "Mr. X." was called by counsel for the Commission to give evidence *in camera*. On

the following day, April 5, 1962, Mr. Walton C. Rose, Q.C., appeared before the Commissioner and took the position that he had a right to represent the witness "Mr. X." and also two other persons, Joseph P. McDermott and Vincent B. Feeley, both of whom had been subpoenaed to give evidence but had not been called prior to that time. He also asserted a right to call witnesses and examine them in chief and cross-examine witnesses called by counsel for the Commission or by any other person with respect to evidence given by the said witnesses which might be deemed by him prejudicial to or against the interests of his clients. Mr. Rose made a further application to the Commissioner for a transcript of the evidence given by "Mr. X." upon payment for it. The Commissioner refused to recognize the right claimed by Mr. Rose to call witnesses and to examine them in chief or the right to cross-examine witnesses called by counsel for the Commission or by any other person, but the Commissioner made it perfectly plain that if Mr. Rose or any of his clients desired to call any witness or witnesses who had any knowledge or information touching the matters under investigation such witness or witnesses would be called by Commission counsel to give evidence upon request to the Commissioner through Commission counsel. Also, the Commissioner gave permission to Mr. Rose to be present at the hearings at all times in his capacity as counsel for "Mr. X.", Joseph P. McDermott and Vincent B. Feeley. The Commissioner refused permission to Mr. Rose to obtain a transcript of the evidence given by "Mr. X.".

Mr. Rose requested the Commissioner to state a case in writing to the Court of Appeal as provided in s. 5 of the *Public Inquiries Act*. The Commissioner refused to do so. Upon application made on behalf of "Mr. X.", Joseph P. McDermott and Vincent B. Feeley, to the Court of Appeal an order was made on April 27, 1962 directing the Commissioner to state a case. Pursuant to that order the Commissioner has done so and has set forth therein the following questions for decision of the Court:

1. Is counsel for the applicants (Mr. X., Joseph P. McDermott and Vincent B. Feeley) entitled to call witnesses and examine them in chief?
2. Is counsel for the applicants (Mr. X, Joseph P. McDermott and Vincent B. Feeley) entitled to examine or cross-examine witnesses called by counsel for the Commission or by any other person in respect of evidence given by the said witnesses which is against their interests?
3. Is counsel for Mr. X. entitled to obtain, upon payment, a transcript of the evidence of Mr. X. before the Commission?

When the case came on for hearing this Court was of the opinion that the Commissioner was not entitled to be represented on the argument and that it could not hear counsel on his behalf. After hearing argument on behalf of the applicants and other counsel who had appeared before the Commissioner, the Court required time to consider the questions in controversy, and the sitting of the Court was adjourned for the purpose of conference. It was agreed at once that it was desirable, if not urgent, to decide the questions at the earliest possible time. After consultation my brothers Aylesworth and Schroeder, JJ.A., were of the firm opinion that all the questions should be answered in the affirmative. Their opinion constituted the decision of the Court and that decision was announced forthwith upon resumption of the sitting of the Court. It was announced also that reasons for judgment would be given later.

During and after the conference with my learned brothers I entertained substantial doubt and after further anxious deliberation I have now concluded that all of the questions should be answered in the negative and that, therefore, with the utmost respect I must dissent from the opinion of my learned brothers and the decision of the Court.

It appears to me that decision of the questions submitted to the Court requires a study of certain subjects which I shall now proceed to discuss in the following order, namely, the nature of the proceedings before the Commission; the function and capacity of the Commissioner; the nature and effect of the directions and rulings of the Commissioner; the nature and extent of the rights claimed by the applicants; and lastly, the cases and opinions expressed therein touching the questions raised for decision of the Court.

It is of basic and utmost importance to observe at once and to bear in mind that the investigation of the matters into which the Commissioner was appointed to examine does not resemble in any way a trial in a Court of law. A hearing by the Commission has none of the attributes of a trial. There is no charge or accusation of wrongdoing and there is no right in question affecting "the purse, person, or property" of any person. There is no prescribed practice or procedure set forth in the *Public Inquiries Act* or in the commission or elsewhere excepting only in respect of certain specified matters which may be called into question by way of a stated case to this Court. There is no *lis inter partes* and there are no parties to the proceedings. There is no contest in any matter and there are no litigants before the Commissioner. The inquiry is purely investigative in character. It is a search

for facts and the truth or otherwise respecting allegations of malfeasance, misfeasance or non-feasance in the administration of certain public affairs.

The matters to be investigated are described in the commission. While the Commissioner is expressly empowered to summon any person and to require him to give evidence on oath and to produce such documents and things as the Commissioner deems requisite, nevertheless a Commissioner is not restricted to that course of proceeding. He is free to obtain information in any way or by any means or by any procedure he deems necessary or appropriate. Primarily, in the course of the inquiry the duty of putting questions to witnesses falls on the Commissioner personally but in accordance with well established practice learned counsel was appointed to be in attendance as counsel to the Commission and to aid the Commissioner in examination or cross-examination of witnesses and in such other respects as the Commissioner might deem necessary or proper.

After full investigation with the aid of Commission counsel as mentioned it becomes the duty of the Commissioner to make findings of fact and to report upon the matters which were the subject of investigation. It is not any part of his duty to determine any right or the guilt or innocence of any person. He does not exercise the functions of a Judge or jury and does not act in a judicial capacity except in the sense that he must be honest, fair and impartial in the conduct of the inquiry and in the report to be made by him. He does not pronounce judgment as between the Crown and subject or between subject and subject and his report has no legal consequence although it is possible that action might be taken thereafter and by reason thereof.

While the Commissioner refused to recognize the position taken by Mr. Rose or to grant the privileges claimed by him, it is not suggested that the Commissioner refused to hear any witness or that he rejected any available evidence. Every decision made by the Commissioner refusing the privilege sought by Mr. Rose to call and examine or cross-examine witnesses was plainly and simply a rule of procedure, namely, that any witness or witnesses whom Mr. Rose desired to call should be called and examined by counsel for the Commission and that Mr. Rose could not examine or cross-examine any witness. The clear purpose of the Commission was to obtain all available information relevant to the matters under investigation in the most effectual and efficient manner. The Commissioner in the exercise of his discretion deemed it expedient, advisable, and proper in the particular circumstances

to obtain that information by examination and cross-examination, if necessary, conducted by Commission counsel, and other counsel participating by leave of the Commissioner. In the absence of an absolute right of counsel for the applicants to call witnesses and to examine them personally and to cross-examine other witnesses can I now say that the Commissioner was wrong in the procedure preferred and directed by him to accomplish the object of the Commission? I think not.

The right of counsel to obtain upon payment the whole or any part of the transcript of evidence given by witnesses at a public inquiry is not absolute. The notes of evidence taken by a reporter form part of the official record of the proceedings and are under the control and subject to the direction of the Commission. Ordinarily a person who is granted leave to be represented by counsel at a hearing would be granted also the privilege of obtaining a copy of the transcript of evidence given by witnesses. While all of the parties appearing through counsel by leave of the Commissioner were furnished on his authority with a transcript of evidence nevertheless the Commissioner has set forth in the stated case his reasons for refusal to permit Mr. Rose to have a copy of the evidence of "Mr. X.". I think the reasons given by the Commissioner are sound and that in the particular circumstances his ruling was right. There is no reason whatever to interfere with the exercise of his discretion.

Counsel for the applicants did not argue that any of the rights now claimed by him have their origin or existence in common law. He contended that such rights exist by virtue of the *Public Inquiries Act* and the decision of this Court in *Re Children's Aid Soc. of County of York*, [1934] O.W.N. 418. He maintained first that each of the applicants is a "person affected" within the meaning of those words in s. 5 of the *Public Inquiries Act*. I cannot agree that any of the applicants is a "person affected" by any of the matters which may be called into question by way of a stated case under s. 5 of the *Public Inquiries Act*. Nevertheless, I am prepared for the purpose of my opinion to assume that the applicants are persons affected and that they fall within the scope of that section. But the right given to such persons by that section is to request the Commissioner to state a case in respect of certain matters expressly described therein, namely, "the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner". There is nothing in the section or elsewhere in the statute which suggests to me in any manner whatsoever that a "person affected" by the validity of any of those matters has a right to call witnesses or to examine or cross-examine any witnesses called by counsel for the Commission or any other person touching the matters of inquiry. Questions which a "person affected" may raise under s. 5 are questions of law. The right to raise a question of law as therein provided and to take the procedure prescribed for the final decision thereof by the Court of Appeal does not include any right to raise any question of fact or to call or examine or cross-examine any witnesses. Indeed, the one right expressed in the Act, namely the right to raise certain questions of law may be taken to exclude other rights by the application of the maxim *expressio unius est exclusio alterius*.

Counsel for the applicants relies mainly and heavily on the decision of the Court of Appeal in *Re Children's Aid Soc. of County of York, supra*. I confess that the opinions expressed in that case by the learned Justices and the answers to the questions therein made by the Court cause some difficulty which I now think is more superficial than substantial. After careful consideration and with great respect I have concluded that none of the answers to the questions in that case is a decision of any question of law nor can I regard any of the opinions expressed by the learned Justices as a statement of any principle of law or equity founded on any precedent or authority. In substance and reality the Court of Appeal simply substituted its discretion in the particular circumstances of that case for the discretion exercised by the Commissioner. Therefore, I cannot consider the discretionary decision of that Court as a precedent or authority which I am now bound to follow in a case in which there are different facts and circumstances. The reasons for judgment and opinions expressed in that case do not disclose any right at common law of the kind or extent now claimed by counsel for the applicants and indeed as stated *supra* counsel does not argue that any such right existed at common law. Finally, there is not the slightest suggestion in any of the reasons for judgment that the decision of the Court rests on any right implied from the provisions of the *Public Inquiries Act*.

It was not contended by counsel for the applicants that the rulings and directions of the Commissioner were not made in the exercise of his discretion. On the contrary, counsel for the applicants proceeded on the basis that they were of that character. He relied on views expressed by Sir Charles Lowe as reported in Australian Law Journal, vol. 24, 1950-51 [p. 387]. It appears therein that the Commissioner gave "leave" to certain persons to appear separately before the Commission.

The "leave to appear" granted by him was plainly in the exercise of his discretion in the particular circumstances. Counsel also referred to *Royal Commissions Act*, No. 29-1923, New South Wales, vol. 19, in which it is expressly provided that "persons interested or a person whose conduct has been challenged to his detriment may by leave appear personally or through Counsel who may examine or cross-examine any witness on any relevant matter". Likewise, he referred to the Australian statute, *Royal Commissions Act*, 1902-33, found in vol. 4, Commonwealth Acts, 1901 to 1950, at p. 3710 wherein it is provided: "Any Counsel authorized by a Commissioner to appear in order to represent a person may insofar as the Commissioner thinks proper, examine and cross-examine on any relevant matter."

I refer to *Tribunals of Inquiry (Evidence) Act*, 1921 (U.K.), c. 7, s. 2(*b*) as follows:

> 2. A tribunal to which this Act is so applied as aforesaid —
> (*b*) shall have power to authorise the representation before them of any person appearing to them to be interested to be by counsel or solicitor or otherwise, or to refuse to allow representation.

Lastly, I reproduce s. 12 of the *Inquiries Act*, R.S.C. 1952, c. 154:

> 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.

Except in the special and perhaps unusual class of cases where a charge is made against a person in the course of an investigation, none of the statutes quoted *supra* gives any person an absolute right to appear through counsel or to call witnesses or to examine or cross-examine any witness called in an inquiry pursuant thereto. Each of them vests a discretionary power in a Commissioner to authorize or to grant such a privilege and the exercise of that power is necessarily governed by the evidence and particular circumstances in each case. Those statutory provisions merely codify and declare expressly the discretionary power which is inherent in the Commission and essential for the proper performance of its functions. While no similar express provision is presently found in the *Public Inquiries Act* in force in this Province, nevertheless, in my opinion, a commission pursuant thereto includes an inherent discretionary power of the same kind and extent as expressly set forth in the statutes quoted *supra*. I venture with great respect to suggest that consideration might be given to the desirability and advisability of an

amendment to the law of this Province to express this power of the Commissioners appointed pursuant to the provisions of the *Public Inquiries Act*.

If it be accepted that the rulings and directions of the Commissioner under consideration in the instant case were given in the exercise of a discretionary power possessed by the Commissioner it follows as a well settled principle that an appellate tribunal should not interfere with a ruling or direction of that character or substitute its discretion in place thereof except in certain well defined classes of cases. Thus, if a discretionary order in question proceeded upon a wrong principle it could be set aside on appeal. I refer only to *Metropolitan Properties Co. v. Purdy*, [1940] 1 All E.R. 188 and cases collected in *Holmested & Langton's Ontario Judicature Act*, 5th ed., p. 43. The exercise of the discretion of the Commissioner in this case does not fall within any class of case in which any interference whatsoever by this Court can be justified and I cannot substitute my discretion for that of the Commissioner in the particular circumstances of this case.

Apart altogether from my view that in *Re Children's Aid Soc. of County of York*, the Court of Appeal decided only in the particular circumstances of that case to substitute its discretion for that of the Commissioner and answered the questions submitted to them accordingly, there is another sufficient reason in my opinion to hold that this Court is not bound to now follow the decision in that case or to answer the questions now under consideration in the affirmative. The reasons for judgment of all of the learned Justices were given orally after hearing argument of counsel and it does not appear that any reference was made at any time in the course of the hearing to any prior judicial opinion or authority. No such reference is made by any of the learned Justices. It appears to me now that the views expressed by the learned Judges of the Supreme Court of Canada in *St. John et al. v. Fraser et al.*, [1935] 3 D.L.R. 465, 64 Can. C.C. 90, [1935] S.C.R. 441, are plainly relevant and are of great weight and authority notwithstanding the difference in the character of the investigation under consideration in that case and the proceedings in which the views were expressed. In that case the Court had under consideration an investigation pursuant to the *Security Frauds Protection Act*, 1930 (B.C.), c. 64 [renamed *Securities Act* by 1933 (B.C.), c. 58, s. 2]. Upon a careful consideration of that entire statute Crocket, J., came to the conclusion [at pp. 467-8 D.L.R., p. 94 Can. C.C., p. 445 S.C.R.].

> that the only reasonable inference to be drawn therefrom is that the Legislature never intended that notice should be given to any and every person, whose status or reputation might be affected thereby, of the examination of any other witness or witnesses and that any and all such persons should be afforded the privilege of cross-examining any such witness or witnesses.

He pointed out that the person appointed as investigator was given "no power to make any adjudication which is under any of the provisions of the statute in any sense binding upon the Attorney-General or upon anyone else". Davis, J., said at pp. 473-5 D.L.R., pp. 100-2 Can. C.C., pp. 451-4 S.C.R.:

> The Attorney-General contends that the provisions of the statute were only intended to afford to him the right of an investigation into the facts, upon the report of which it became his duty as a member of the Executive to form his own opinion and to exercise such if any of the powers as are given to him by s. 11 of the statute, and that if during the investigation every witness called was entitled to have his own counsel cross-examine all the other witnesses, the enquiry would become utterly ineffective, prolonged in duration and costly in administration. . . . Fundamentally, the investigator in this case was an administrative officer, and the machinery set up by the statute was administrative for the purpose of enquiring as to whether or not fraudulent practices had been or were being carried on in connection with the sale of the securities of the Wayside Co. . . . An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a Court of law adjudicating upon a *lis inter partes*. It means that the tribunal, while exercising administrative functions, must act "judicially" in the sense that it must act fairly and impartially. . . . The investigation was primarily an administrative function under the statute, and while the investigator was bound to act judicially in the sense of being fair and impartial, that, it seems to me, is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses.

Again, it appears to me that no distinction can be made between the nature of an inquisition before a coroner pursuant to the *Coroners Act*, R.S.O. 1960, c. 69 and an inquiry pursuant to the *Public Inquiries Act*, R.S.O. 1960, c. 323. I find the views expressed by Schroeder, J.A., in *Wolfe v. Robinson* (1961), 31 D.L.R. (2d) 233, [1962] O.R. 132, most pertinent, helpful and persuasive. He said at p. 237 D.L.R., p. 136 O.R.:

> . . . the verdict of the jury at a coroner's inquisition does not bind any person whose acts or omissions may be involved in the jury's findings, and it is not an adjudication of rights affecting either person or property. There are not "two sides" to an issue before the coroner in the sense in which there are two or more parties before a Judge or other functionary conducting a judicial proceeding, or a hearing in the nature of a judicial proceeding, which will lead to a determination of questions affecting either the litigant's person or his purse. I am firmly of the view, therefore, that the investigation entered upon and conducted by a coroner is not a hearing of such a character as to make applicable to the proceedings the maxim *audi alteram partem*.

He pointed out at p. 238 D.L.R., p. 137 O.R. that:—

> . . . . Parliament has not seen fit to enact nor has it authorized the enactment of Rules of Practice or Procedure applicable to a coroner's inquisition. The Provincial Legislature has not done so . . . The fact, therefore, that the Ontario *Coroners Act* provides for the examination and cross-examination of witnesses at a coroner's inquisition by the County Crown Attorney or by counsel representing the Attorney-General affords no basis for an argument either for or against the right of counsel representing any other person or interest to examine or cross-examine witnesses, and the practice and procedure to be followed at such a hearing must rest upon the common law.

Lastly, Schroeder, J.A., quoted [at p. 245 D.L.R., p. 144 O.R.] from a monograph on *Coroners' Inquests & Investigations* by Mr. J. W. McFadden, Q.C., as follows:

> "In the coroner's court no one, save the coroner, the jurors sworn on the inquest and the Crown attorney or counsel representing the Attorney General, has the right to examine witnesses. Counsel representing interested parties has no more rights in the court than the other members of the public . . . As a matter of courtesy, however, a coroner usually permits counsel representing interested parties to suggest to himself or to the person examining certain questions to be put to a witness."

The learned Justice concluded that:

> The denial to appellant's counsel of the privilege of cross-examining witnesses was not a denial of a legal right and certainly did not constitute a denial of natural justice.

The fact that the question in controversy and the character of the proceedings in the Courts in that case were wholly different than in the case now under consideration does not in my opinion lessen in any way the force of the views expressed by the learned Justice in their relevancy and application to an inquiry under the *Public Inquiries Act*.

I find a substantial conflict between the views expressed by the learned Justices of the Supreme Court in *St. John v. Fraser, supra*, and also by Schroeder, J.A., speaking for this Court in *Wolfe v. Robinson, supra*, and the views expressed in *Re Children's Aid Soc. of County of York, supra*. For that reason in addition to what I said *supra*, I feel that I am not bound to follow the decision in *Re Children's Aid Soc. of County of York*. I refer to *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293 at p. 300.

In conclusion I have considered certain special features of an inquiry to be conducted by a Commissioner appointed under the *Public Inquiries Act* as contemplated by the legisla-

tion. It was intended to be an effective, efficient and practical means of obtaining all available information from the public touching the matters under investigation. If every person affected by some or all of the evidence given by the witnesses had a right to be represented by counsel, to call witnesses, and to examine and cross-examine witnesses, called at the hearing or if every such person were granted such a privilege in the exercise of the discretion of the Commissioner then it appears to me plainly that the inquiry would in most, if not all cases, be rendered less productive, wasteful and inoperative and the purpose and intention of the Legislature thereby defeated. Persons represented by counsel and given the privilege of calling witnesses and of examining and cross-examining witnesses would in effect become parties in the proceedings and the inquiry would become a litigious contest contrary to the intention of the legislation. Again, it was no doubt the intention of the legislation that an inquiry thereunder should be an expeditious investigation but such intention would likewise be defeated if every person affected by evidence given in the course of the inquiry were permitted to call witnesses and to examine and to cross-examine witnesses. It is my view that it was the intention of the legislation that the Commissioner should have full and absolute control to regulate the proceedings and to determine for himself in the exercise of his absolute discretion the practice and procedure best suited to make the inquiry effective, efficient, practical and expeditious. The general rule as stated by Boyd, C., in *Chambers v. Winchester* (1907), 15 O.L.R. 316 at pp. 317-8 and with which I concur fully is as follows:

> The general rule as to the ordering of business is that the commissioner has the absolute power of regulating the proceedings of his own tribunal, so long as he keeps within his jurisdiction . . . . He is not to be under the supervision of any Court as to his manner of getting at such legal and permissible evidence as he may deem requisite for a full investigation.

During the course of argument I referred counsel to the report of a Commission in 1948 in which 19 witnesses were given leave to be represented by separate counsel and who were permitted to examine and cross-examine witnesses. (Lynskey Tribunal (see Cmd. 7616, paras. 5-7) referred to 3 Hals., 3rd ed., p. 24, note (*k*).) I do not know the circumstances which influenced the Commission to grant such leave and privilege to counsel in that case nor do I know what view an appellate tribunal might have taken in the matter if procedure had been available to review the exercise of discretion of the Commission. However, the decision of the Commission

in the exercise of its discretionary power in the particular circumstances of that case cannot be regarded as authority upon which to base a decision of this Court in the circumstances of the instant case.

I might also refer to the decision in *The Belfast Commission and The Irish Bar* (1886), 21 L.Jo. 556 in which it was stated by the President (Mr. Justice Day) at the outset —

> I wish it to be clearly understood that we are not sitting here to administer justice between parties; we are not sitting here to administer justice between the Crown and the subject; nor are we sitting here to determine any issues whatever whereof none are raised before us. We are sitting here simply as a Court of inquiry for the purpose of obtaining that information which will enable us to report to the Crown upon these matters which the Crown has seen fit to ask us to investigate. We do not recognise the presence of any parties, of any individuals. We are here simply for the purpose of inquiry. But I feel, as I may say we all feel, that much assistance may be derived from counsel and from other persons who may be in a position to suggest to us, through our secretary or otherwise, witnesses whom they think are in a position to throw light upon the transactions which we have to investigate. We shall be grateful for all such assistance, but at the same time it must be understood that the whole conduct of this inquiry rests exclusively with ourselves.

Counsel representing certain persons whose lives and properties had been affected sought the privilege to cross-examine witnesses and "to be allowed to produce witnesses and so endeavour to elicit the truth". The Commission ruled in the words of the President as follows:

> We will secure the attendance of all persons we require, and we shall be happy to receive every assistance, from counsel or otherwise. We do not recognise the right of counsel to examine or cross-examine, but we shall, if occasion arises, gladly avail ourselves of their services as *amici curiae*. We will allow any question to be placed on paper and put to the witnesses through us, and under that limit we shall be glad to avail ourselves of any assistance. We do not, however, recognise the right of any counsel as claimed here.

Counsel then inquired:

> Whether he represents anyone affected or not?

The President replied:

> No one is affected up to the present. If anyone is charged with criminal conduct, and it is proved, then the matter will be in a different stage. The question might then arise. At present, however, we recognise no right of any counsel to appear here as such.

The President continued later:

> I may say for myself that the right of counsel to examine or cross-examine is not admitted. What we may do in the matter of indulgence is one thing; but as to the right, I repudiate it altogether.

Finally the President ruled:

> That the Court would examine the witnesses for itself and would recognize no outside interference from professional men.

I refer to "An Act for facilitating the proceedings of the Commissioners appointed to hold a Court of Inquiry respecting Riots and Disturbances at Belfast" [*Belfast Commission Act*] (50 Vict. 1886 (U.K.), c. 4). I observe that the Commission is given thereby all such powers, rights and privileges as are vested in Her Majesty's High Court of Justice in Ireland on the occasion of an action or suit in respect of the enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise and the compelling the production of documents. The powers given to a commission issued pursuant to the *Public Inquiries Act* are similar in kind and extent. It is significant that there are no rules of practice or procedure set forth in either Act which govern or control the Commission and it may be inferred therefrom that it was the legislative intention that the Commission should be free to proceed with the inquiry and to regulate and control the proceedings in such manner as it might deem advisable and expedient in the particular circumstances. The views and rulings of The Belfast Riot Commission, quoted *supra*, appear to me to be apt and applicable with equal force to a commission issued pursuant to the *Public Inquiries Act* of this Province.

AYLESWORTH, J.A., concurs with SCHROEDER, J.A.

SCHROEDER, J.A.:—On December 11, 1961 the Lieutenant-Governor in Council issued letters patent appointing the Honourable Wilfrid Daniel Roach, a Justice of Appeal of the Supreme Court of Ontario, a Commissioner pursuant to the provisions of s. 1 of the *Public Inquiries Act*, R.S.O. 1960, c. 323, to inquire into and report upon:

> (1) the administration of the laws and regulations regarding the incorporation and operations of social clubs having regard to allegations made by the Leader of the Opposition in his speech of November 29th, 1961;
>
> (2) any improper relationships, as alleged by the Leader of the Opposition in his speech of November 29th, 1961, between senior officials of the legal staff of the Department of the Attorney General and any person or persons, and more particularly relating to —
>
> (a) the termination of investigations,
> (b) the suppression of evidence,
> (c) the payment of money;
>
> (3) the extent of crime in Ontario and the sufficiency of the law enforcement agencies to deal with it.

The appointment of the Royal Commission was the sequel

to a speech delivered in the Legislature by the Honourable J. J. Wintermeyer, leader of the Opposition, on November 29, 1961, an official printed copy of which was filed as part of the material in the present proceedings. In his address the leader of the Opposition charged that organized crime was flourishing in the Province on a broad scale; that well organized syndicates were at work in several areas carrying on their unlawful operations through incorporated social clubs which were used as a façade to cloak these illegal enterprises; that there was official laxity in connection with the incorporation, regulation and control of such clubs; that there were reasons to suspect that in the conduct of their criminal activities these lawbreakers enjoyed the co-operation, active or passive, of certain government officials, and in particular of certain senior officials in the Department of the Attorney-General and the Ontario Provincial Police in relation to (a) the termination of investigations, (b) the suppression of evidence and (c) the payment of money.

In the course of his speech the leader of the Opposition launched a scathing and virulent attack upon Vincent B. Feeley and Joseph P. McDermott, two of the applicants, alleging that they were the masterminds behind the organized gambling ventures carried on in the Province, and that to accomplish their ends they did not hesitate to attempt to corrupt members of the staff of the Department of the Attorney-General, senior officials of the Ontario Provincial Police, and judicial officers. It was also charged that they attempted to further their illegal operations by resorting to the commission of other criminal offences of a very serious nature. Frequent references were made to these two persons throughout the address which was climaxed by a demand for the appointment of a Royal Commission to investigate the charges made therein, and the said Commission was unquestionably appointed as a direct consequence thereof.

The learned Commissioner entered upon the hearings which he was authorized to conduct on March 20, 1962, and further hearings were held on March 26th, 27th, 28th, 29th, 30th, and on April 2nd, 3rd, 4th, 5th, 16th, 17th, 18th, 19th, 25th and 26th. Much of the evidence adduced before the Commissioner cast grave imputations upon both Feeley and McDermott, and the evidence of the individual identified and referred to in the proceedings as "Mr. X", a former associate of Feeley and McDermott, was heard *in camera*.

On April 5, 1962 counsel for the applicants, Mr. Walton C. Rose, Q.C., appeared before the Commissioner. He stated

that he had been retained as counsel by Feeley, McDermott and "Mr. X", and requested that he be permitted to represent them at the hearing and as their counsel be granted leave —

(a) to call witnesses on their behalf and examine such witnesses in chief,

(b) to examine or cross-examine witnesses called by counsel for the Commission or by any other person with respect to evidence given by the said witnesses which was, or which might be, adverse to the interests of his clients, and

(c) that he be furnished with a transcript of the evidence theretofore given by "Mr. X" on payment of the costs and charges therefor.

That request was refused by the learned Commissioner who took the view that Mr. Rose's clients were not "persons affected", since the terms of the commission authorized no more than an inquiry within defined limits and a report to be made thereon by the Commissioner; that the inquiry was therefore not a proceeding *inter partes* in which a binding decision or adjudication affecting personal or property rights or interests could or would be pronounced. This conclusion, he felt, was supported by the judgment of this Court in *Wolfe v. Robinson*, 31 D.L.R. (2d) 233, [1962] O.R. 132.

When the Commissioner refused to accede to counsel's request, the latter called into question the validity of the order or direction thus made and requested that a case be stated in writing to this Court in accordance with the provisions of s. 5 of the *Public Inquiries Act*, R.S.O. 1960, c. 323. This request was rejected and counsel thereupon, and pursuant to the same section, brought a motion before this Court for an order directing the Commissioner to state a case in writing. By order dated April 27, 1962 the learned Commissioner was directed to state a case in terms in which the following questions were propounded for the Court's opinion:

(a) Is counsel for the applicants entitled to call witnesses and examine them in chief?

(b) Is counsel for the applicants entitled to examine or cross-examine witnesses called by counsel for the Commission or by any other person in respect to evidence given by the said witnesses which is against the interests of the applicants?

(c) Is counsel for "Mr. X" entitled to obtain upon payment, a transcript of the testimony of "Mr. X" given before the Commission?

In compliance with the said order the learned Commissioner stated a case in writing and the same was heard and considered by this Court on May 7, 1962. Shortly after the conclusion of the argument it was ordered that questions (a), (b) and (c) above set forth be answered in the affirmative, all members of the Court being of the opinion that it was desirable not to postpone judgment, but rather that reasons for judgment be delivered later. My brother Aylesworth joins me in the following statement of the reasons for the conclusion to which we then attained.

It has been the practice in England for centuries to appoint Royal Commissions to make inquiry concerning matters affecting the good government of the country, the conduct of any part of the business thereof or of the administration of justice therein, or other matters relating to the welfare of the nation. The issuance of letters patent appointing such a commission is an exercise of the royal prerogative, and the true object is to authorize an inquiry to be made into questions of public interest and the public good as contrasted with private matters or litigation between private parties in which the public has no recognizable interest.

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 and statutes have been enacted which permit Commissioners so appointed to compel the attendance of witnesses and the production of documents, to examine under oath or affirmation, to impose penalties for disobedience and to afford such protection to Commissioners and witnesses as is enjoyed by Judges or witnesses in proceedings before the Courts.

The *Public Inquiries Act*, R.S.O. 1960, c. 323, is the enactment in this Province which pertains to such proceedings. The Federal statute applicable to Royal Commissions appointed by the Governor in Council is the *Inquiries Act*, R.S.C. 1952, c. 154. In the United Kingdom most Royal Commissions are conducted in accordance with the provisions of the *Tribunals of Inquiry (Evidence) Act*, 1921 (U.K.), c. 7.

It can be fairly stated that as a general rule there is no absolute right vested in anyone to appear before a Royal Commission except persons summoned to the inquiry. Counsel representing persons who claim to have an interest in the proceedings may not appear as of right, but only by leave of the Commissioner. There are, nevertheless, numerous instances in which counsel have been present at such investigations and have examined and cross-examined witnesses. In

the United Kingdom it has been the rule rather than the exception to permit persons affected to be represented by counsel with the privilege of calling witnesses and, within proper limits, to examine and cross-examine.

In the United Kingdom Statute, the *Tribunals Of Inquiry (Evidence) Act*, 1921 (U.K.), c. 7, power is given to a tribunal to which the Act is applied to authorize the representation before it of any person appearing to it to be interested, such representation to be by counsel, solicitor or otherwise, or to refuse to allow such representation. Section 12 of the Canadian *Inquiries Act*, R.S.C. 1952, c. 154, provides 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.

The following provision is made for representation of persons by counsel and for their right to examine and cross-examine witnesses in the *Royal Commissions Act*, (1902-33) Australia, Commonwealth Acts (1901-1950), vol. 4, p. 3710 at p. 3714, s. 6 FA. which reads as follows:

> Any barrister or solicitor appointed by the Attorney-General to assist a Commission, any person authorized by a Commission to appear before it, or any barrister or solicitor authorized by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by any of the Commissioners, or by the sole Commissioner, as the case may be.

It will be noted that none of these statutes makes provision for the exercise of a supervisory or appellate jurisdiction by an appellate Court except the *Public Inquiries Act* of Ontario, R.S.O. 1960, c. 323. This unique provision is contained in s. 5 of the Act which reads as follows:

> 5(1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.
>
> (2) If the commissioner refuses to state a case, any person affected may apply to the Court of Appeal for an order directing the commissioner to state a case.
>
> (3) Pending the decision of the stated case, no further proceedings shall be taken by the commissioner.
>
> (4) No action shall be brought or other proceeding taken with respect to anything done or sought to be done by the commissioner or to restrain or interfere with or otherwise direct or affect the conduct of any such commissioner.

The precursor of this statute was first enacted in Canada in 1846 by 9 Vict., c. 38. Its terms and provisions were similar in substance to ss. 1 and 2 of the present Provincial Act. This Act was carried into the Consolidated Statutes of Canada, 1859, as c. 13, which contained an additional provision for publication in the *Canada Gazette* of any advertisement required by any Act or law. That Act was repealed in Ontario in 1868 by 31 Vict., c. 6 and re-enacted by the same statute in like terms, but substituting a section providing for publication of official Acts in the newly constituted *Ontario Gazette*. Its provisions, so far as they related to public inquiries were in terms substantially the same as those now contained in ss. 1 and 2 of the present statute. The Act was continued in this form until 1884 when a section couched in the same terms as present s. 3(1) to (4) was added (*Vide Election Law Amendment Act*, 1884 (Ont.), c. 4, s. 46 [incorporated in "An Act respecting Inquiries concerning Public Matters", R.S.O. 1887, c. 17]). Thereafter the statute was carried forward in those terms until it was repealed by 1908 (Ont.), c. 8 and re-enacted in terms identical with those contained in ss. 1, 2 and 3 of the present Act. The provisions now contained in ss. 4 and 5 were not added until the enactment of 1921 (Ont.), c. 4. There have been no alterations in the Act since that year.

I have taken the trouble to trace the legislative history of the *Public Inquiries Act* in view of an argument of respondents' counsel based on the provisions of s. 3(5) which, it was contended, brought into operation the maxim *expressio unius est exclusio alterius*. It was urged that the right to examine and cross-examine witnesses existed only where the Commission was issued to direct an inquiry into matters within the scope of s. 3(1), and then only when the Legislative Assembly proposed to take action in accordance with the provisions of s. 3(4). It will be more convenient to deal with this point later.

The submissions of counsel opposing the application were founded to a large extent on the judgment of this Court in *Wolfe v. Robinson* (1961), 31 D.L.R. (2d) 233, [1962] O.R. 132, in which, it is said, the Court had enunciated the principle that at common law, when an inquisition was conducted solely for the purpose of ascertaining facts and reporting thereon there being no *lis inter partes* or any adjudication to be made affecting personal or property rights, no person summoned before the tribunal of inquiry was entitled either

by himself or by counsel to examine or cross-examine witnesses as he might in litigation between subject and subject or in a criminal prosecution. In my respectful opinion, counsel have misapprehended the effect of that decision and have placed altogether too broad an interpretation upon its *ratio decidendi*. The Court was there concerned with an inquisition conducted by a Coroner to determine when, where and how the infant child of the applicant Wolfe had come to its death. The history of the Coroner's Court was traced to its ancient origin and it was demonstrated that both in the United Kingdom and in this Country, it had been regarded as a criminal Court of record. More anciently, when the Coroner's verdict was also an effective adjudication as to the disposition of a suicide's property, his heirs, whose interests were adverse to those of the Crown claiming the property as an escheat, were permitted to cross-examine witnesses. (See pp. 238-9 D.L.R., pp. 137-8 O.R. where this point is fully discussed.) No such function was ever discharged by a Coroner in Canada.

It was pointed out in *Wolfe v. Robinson* that since Parliament had neither enacted nor authorized the enactment of rules of procedure applicable to proceedings at a Coroner's Inquest, the procedure was governed by the common law rules developed in the course of time and applied in the Coroner's Court. The Crown had contended that since the Ontario *Coroners Act* [R.S.O. 1960, c. 69] expressly provided for the examination and cross-examination of witnesses by the Crown Attorney and made no reference to counsel representing other persons, it followed that this was a right enjoyed by the Crown Attorney alone. This Court held that as the Coroner's Court was a criminal Court of record, the Provincial Legislature lacked constitutional authority to enact procedural rules for that Court, and further, that since by s. 91(27) of the *B.N.A. Act* the right to legislate as to criminal law and procedure in criminal matters was a right reserved to Parliament, the Ontario *Coroners Act* in so far as it purported so to enact would be *ultra vires*. This reference in the *Wolfe* case was to the rules of procedure developed at common law in the Coroner's Court and did not touch or concern any other form of hearing or investigation. The decision is thus to be confined; to place any wider construction upon it would be to violate well established principles governing the application of the doctrine of *stare decisis* which imperatively requires the language of the opinions in an earlier case to be construed with reference to the particular facts presented in that case. In advancing their argument on the authority of

the *Wolfe* case, counsel failed to attribute the requisite significance to the fact that the applicant was there moving for an order in lieu of *certiorari* quashing the proceedings, alleging that the Coroner's denial to his counsel of the right to cross-examine witnesses and participate in the proceedings was a denial of natural justice which deprived the Coroner of jurisdiction. The present application is for a specific remedy provided by statute to invoke which it is unnecessary to impugn the Commissioner's jurisdiction. For this additional reason the decision in the *Wolfe* case has no application here.

Counsel for the respondents further cited and relied upon the following authorities: *Chambers v. Winchester* (1907), 15 O.L.R. 316; *Lane v. City of Toronto* (1904), 7 O.L.R. 423 and *Re Godson & City of Toronto* (1889), 16 O.A.R. 452. It is unnecessary to say more than that these were all cases in which a restraining or prohibitory order was sought against a Commissioner. They did not involve an application to the Court such as the present one and, indeed, they were decided many years prior to the enactment of the provisions of present s. 5 under which this application is made. These decisions, therefore, are not relevant to the questions now before this Court.

Much reliance was also placed by counsel for the respondents upon the decision of the Supreme Court in *St. John et al. v. Fraser et al.*, [1935] 3 D.L.R. 465, 64 Can. C.C. 90, [1935] S.C.R. 441. There are many features in that case which distinguish it from the matter before this Court, chiefly the fact that in that case the Court had been asked to restrain proceedings not conducted under the power and authority of a Royal Commission but under a statutory power of inquiry made incident to the functions of a department of Government administering the *Security Frauds Prevention Act* [now *Securities Act*] of British Columbia. Authority had been delegated by the Attorney-General to the respondent, Fraser, to ascertain whether any fraudulent act or offence against the statute or the regulations had been or was about to be committed by a named mining company and for that purpose to examine any person company or thing whatsoever. The Vancouver Stock and Bond Company Ltd. had been an underwriter of the securities of the mining company and St. John, a shareholder and business manager of the underwriting company was called upon to give evidence and did so. A great deal of evidence had been taken between August 15, 1934 and October 22, 1934, and on the latter date the manager of the underwriting company and the company

issued a writ against the investigator for an injunction to restrain him from proceeding further with the investigation so far as they were concerned. The grounds alleged were that the investigator had failed to give them notice of the examination of witnesses with respect to their relations with the mining company in question, and had not afforded them an opportunity of cross-examining such witnesses, they contending that their status and reputation might have been affected by such examination. It was held throughout that the investigator could not be restrained from proceeding with the investigation; that the investigation provided for by the *Securities Act* was not a judicial proceeding in any sense of the term but was intended to be conducted by the investigator in private, and that no person or company should have the right of cross-examining any witness or witnesses brought before the investigator, whether the evidence of such witness or witnesses would affect the status or reputation of such person or company or not. It was in no sense a judicial proceeding for the trial of any offence but merely a private inquiry conducted for the information of the Attorney-General in order that he might take such proceedings as seemed advisable in the circumstances for the protection of the public. It was pointed out that the investigation provisions of the Act were a part of the administrative machinery set up for the attainment of the general purposes of the statute.

The fact that the investigator in *St. John v. Fraser* was not a Royal Commissioner; that the purpose of the private investigation was to obtain information for the Attorney-General upon which he might or might not see fit to act; that in form the action was for an injunction restraining the further conduct of the investigation on the ground that the plaintiffs had received no notice of the calling of witnesses, although when their counsel was in attendance, he had been accorded the privilege of calling, examining and cross-examining witnesses; and finally the fact that there was no express statutory authority vested in the Court to review the investigator's decisions, orders and directions and to determine their validity — all these are distinguishing factors which make that decision clearly inapplicable here.

The question to be determined upon this application is the scope and effect of s. 5, the extent of the powers exercisable by this Court thereunder, and whether on the stated facts such powers should be exercised in favour of the applicants. Beyond question the enabling words of s. 5(1) are words of the widest signification. Neither the validity of the Commission nor the jurisdiction of the Commissioner is called in

question by the applicants. What they do call into question is the validity of his decision, order, or direction that counsel for the applicants should not be permitted to call witnesses and examine them in chief, to examine or cross-examine witnesses called by counsel for the Commission or by any other person in respect to evidence given by such witnesses which is adverse to the interests of the applicants, and that he should not be entitled to receive, upon payment therefor, a transcript of the testimony of his client, "Mr. X", taken *in camera*, although copies of such transcript had been furnished to all other counsel appearing.

"Validity" is defined in Murray's English Dictionary as — "The quality of being valid in law . . . The quality of being well-founded on fact, or established on sound principles, and thoroughly applicable to the case or circumstances."

"Validity" as used in the statute is intended to denote the quality of being sound and well grounded, embracing the concept of flawlessness in reasoning, but more particularly solidity in the grounds upon which it is based. The legislators have been careful not to restrict the power of the Court to a determination of questions of law or jurisdiction as is frequently done in legislation conferring appellate jurisdiction over the exercise of the powers of an administrative tribunal. This strongly supports the view that the word is used in the broader sense indicated rather than in the narrower sense implying the quality of strict legal efficacy. No one has attempted seriously to argue that the applicants are not "persons affected". It would be difficult to conceive of persons who could be more directly or closely affected than the applicants upon whose alleged criminal activities the whole inquiry appears thus far to have been concentrated.

In the statutes conferring certain incidental powers on a tribunal of inquiry in England, Australia and Canada, it was clearly contemplated that certain persons summoned before those tribunals would be persons implicated or affected, and that for such reason or related reasons they might be deemed entitled to representation by counsel who, by leave of the Commissioner, might or ought to be accorded the right to examine or cross-examine witnesses. The absence of such a specific provision in the Ontario statute has no special significance in view of the very wide powers conferred upon the Court of Appeal as *curia designata* to review any decision, order, direction or other act of a Commissioner, the validity of which is called into question. Since a Royal Commission is not charged with the duty of making a binding decision affecting either personal or property rights the authority con-

ferred upon it being *ad inquirendum*, it is proper to assume that the decision, order or direction mentioned relates or may relate to matters of proceedure. Thus it plainly appears that a Commissioner's rulings upon such matters as the right of a person appearing to be represented by counsel, and the right of the latter to call witnesses and to examine and cross-examine them are open to review and that the Court of Appeal is entitled to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction with respect thereto is called into question. It is no answer to say that a Royal Commissioner's ruling upon such a question is an administrative determination and as such is not reviewable, because the language of s. 5 is broad enough to confer upon the Court of Appeal the power and the duty to review even administrative determinations. *Shell Oil Co. of Australia v. Federal Com'r of Taxation*, [1931] A.C. 275, furnishes an instance of a function of that character designed to be discharged by an appellate tribunal under the terms of an Act of Parliament of the Commonwealth of Australia.

The wide power conferred on the Court of Appeal by s. 5 also invests it with authority to review decisions, orders or directions made in the exercise of the Commissioner's discretion. If the Legislature had intended to restrict the Court's powers within narrower limits it could and would have used appropriate language to make that purpose clear. It is futile to contend that because a Commissioner is not authorized to make an adjudication affecting person or property, or to render a decision binding upon anyone, no person summoned to appear before him comes within the category of a "person affected". If that construction were to prevail then the provisions of s. 5 would be both meaningless and purposeless.

Doubtless Royal Commissions can and do serve a very useful purpose, the most familiar of which is the obtaining of information for the foundation of legislation. They are also freqently used in aid of executive action. Public uneasiness and apprehension arising in consequence of wide-spread rumours and insinuations of an extraordinary increase in crime, particularly when it is attributed to concerted efforts of highly organized criminal combines aided and abetted by alleged official laxity, afford strong grounds for an exhaustive inquiry to be made through the instrumentality of a Royal Commission. In the conduct of such an investigation inquiry and publicity are both powerful weapons in coping with this and other characteristic modern social evils. In the prosecution of an inquiry of this type the proceedings are characterized by less formality than in the conduct of matters before the established Courts, and the Commissioner is not bound to observe the strict rules of evidence or all the niceties of practice and procedure.

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.

Any suggestion that the examination and cross-examination of witnesses by counsel for the Commission, and more particularly by counsel for the two political parties, is adequate to elicit all relevant facts concerning the applicants, against whom so much incriminating evidence is being accumulated and widely circulated, fails to carry conviction. It is no improper reflection upon counsel for the two political parties to observe that they may well be more concerned with doing what they deem best calculated to serve their own clients' ends and in so doing with promoting interests perhaps violently opposed to those of the applicants. To impose a dual burden upon these latter counsel might make their position not only embarrassing but intolerable.

The views expressed as to the extent of the power and authority conferred upon the Court of Appeal by s. 5 have been stated as though the matters at bar were now being considered for the first time. This Court, however, in *Re Children's Aid Soc. of County of York*, [1934] O.W.N. 418, actually had to determine a similar application upon facts quite undistinguishable from those presently before us. In that case, as a result of a petition complaining that the Children's Aid Society of the County of York had discharged its functions under the *Children's Protection Act*, R.S.O. 1927, c. 279, in a negligent and incompetent manner, the Lieutenant-Governor in Council pursuant to the provisions of the *Public Inquiries Act*, appointed His Honour Judge Parker

of the County Court of the County of York as a Commissioner "to inquire into the conduct, management and administration of The Children's Aid Society of the County of York and all matters in connection therewith, or incidental thereto, and to report upon the evidence and facts brought out by the investigation".

During the course of the inquiry certain questions arose as to the calling and examination of witnesses and the Commissioner was requested by counsel for the petitioners to state a case for the opinion of the Court of Appeal in relation to those questions. This was refused and subsequently, by an order of the Court of Appeal, the Commissioner was directed to state a case upon the following questions:

> 1. Has the Commissioner jurisdiction under the commission herein to hear evidence relating to dealings by the said Society or its Local Superintendent with moneys paid to the Society for the benefit of any ward or wards of the Society and should he hear such evidence?
>
> 2. Is counsel either for G. B. Little, the Local Superintendent of the said Society, or for the petitioners, entitled to call witnesses and examine them in chief or must all witnesses be called only by the commission counsel?
>
> 3. Is counsel for the petitioners entitled to examine or cross-examine witnesses called at the instance of counsel for the commission or persons other than the petitioners?
>
> 4. Are the petitioners entitled to have the records of the said Society dealing with matters under review produced before the said commission and should such records be produced?

The Commissioner in stating the case added a fifth question:

> 5. A witness who, in my opinion, should have been, but was not, called by counsel for the petitioners, was called and examined by me. Permission was given to all counsel to examine this witness. I refused to allow counsel to cross-examine this witness. As Commissioner had I that right?

Questions 1, 2, 3 and 4, were answered by the Court in the affirmative and Q. 5 was answered in the negative. Mulock, C.J.O., Riddell, and Middleton, JJ.A., each delivered separate judgments and the following are extracts from their respective reasons. Mulock, C.J.O., stated, at p. 419, that

> . . . in answering the questions submitted it might be advisable to point out the nature of the inquiry in question. It is one to bring to light evidence or information touching matters referred to the Commissioner. . . . The Commissioner should avail himself of all reasonable sources of information, giving a wide scope to the inquiry. If, for example, some person were to inform the Commissioner where useful documents or other evidence could be obtained, it would seem reasonable that he avail himself of such a source of information. The inquiry is one on behalf of the general public, and should be conducted in public. . . . It is for the Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him. In the conduct of the inquiry, the Commissioner should allow counsel or laymen to assist him.

Riddell, J.A., stated [at p. 420] that

> A Royal Commission is not for the purpose of trying a case or a charge against any one, any person or any institution—but for the purpose of informing the people concerning the facts of the matter to be inquired into. Information should be sought in every quarter available. It is usual and proper to have counsel appointed to assist in the inquiry, but that does not imply that he alone has the right to call witnesses, or to determine what witnesses are to be heard. . . .
>
> Everyone able to bring relevant facts before the Commission should be encouraged, should be urged, to do so.
>
> Nor are the strict rules of evidence to be enforced; much that could not be admitted on a trial in Court may be of the utmost assistance to the Commission. Moreover, everyone should have the right to cross-examine any witness whom he believes to be in error or to be suppressing facts. This right, of course, is not to be abused by irrelevant questioning.

Middleton, J.A., stated [at p. 421] that

> It is an inquiry not governed by the same rules as are applicable to the trial of an accused person. The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.
>
> This is a matter in which the fullest inquiry should be permitted. All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed.
>
> This is not a matter in which any one should seek, or if seeking should be permitted, to burke the fullest investigation.

This emphatic pronouncement of a strong Court is a clear and binding declaration as to the character and extent of the powers exercisable by this Court on an application made pursuant to s. 5. Counsel's submission that the decision should be regarded as having been rendered *per incuriam* is wholly unacceptable. No valid ground has been shown upon which it can be distinguished from the case at bar. If the superintendent of the Children's Aid Society for York County was a person affected and therefore entitled to call, examine, and cross-examine witnesses through his counsel as was assumed in that case, then, *a fortiori*, the present applicants should be accorded the same right and privilege. The superintendent

of the society was confronted with a minor and trivial series of charges as compared with Feeley, McDermott and "Mr. X", who have been publicly accused of serious criminal misconduct on an extensive scale.

It is implicit in the reasons for judgment in the *Children's Aid Soc. of County of York* case that the Court assumed the right and power to review the exercise of the Commissioner's discretion in refusing the right to examine and cross-examine witnesses and to order production of documents, etc., and that his decision or order in refusing that right and privilege to a person affected was regarded as an invalid exercise of his discretion as Commissioner. The authority of that decision, pronounced almost 28 years ago, has never been challenged and it is in the highest degree improbable that the Legislature would have failed to overcome its effect by an appropriate legislative amendment if the construction placed by the Court upon that legislation was not in accord with the legislators' true intent.

One ground upon which it was argued that the said judgment had been rendered *per incuriam* was that the Court made no reference in its reasons to s. 3 or s. 5(4). Section 3 provides for the issuance of a commission to direct an inquiry into matters connected with elections to the Assembly and any alleged attempt to corrupt a candidate at any such election or a member of the Assembly after his election. Particular emphasis was placed upon the provisions of s-ss. (4) and (5) which read as follows:

> 3(4) The Assembly, upon the evidence taken under the commission being submitted, may take, under *The Legislative Assembly Act* or under any other authority belonging to the Assembly, such action as is deemed proper as fully as if such evidence had been given at the bar of the Assembly.
>
> (5) No such action shall be taken against any person so charged founded upon evidence given by any witness unless it appears that he had an opportunity of appearing before the commissioner and cross-examining the witness either at the time he was examined in chief or subsequently and that he had also an opportunity of calling witnesses on his own behalf.

It is contended that the specific reference in s. 3(5) to "an opportunity of cross-examining" a witness and "of calling witnesses on his own behalf" before a Royal Commission inquiry falling within the scope and limits of s. 3 brings into operation the maxim *expressio unius est exclusio alterius*, and that it follows that the right of examination and cross-examination is not to be accorded to any person appearing before a Royal Commissioner appointed to conduct an inquiry into matters falling outside the scope of s. 3.

Section 3 does not provide that a person appearing before a Commission of inquiry falling within its special scope has or has not the right to be represented by counsel and to examine or cross-examine witnesses. Subsections (4) and (5) merely declare that the Assembly, upon the evidence taken under the Commission being submitted, may take, under the *Legislative Assembly Act* [R.S.O. 1960, c. 208] or under any other authority belonging to it, such action as is deemed proper as "fully as if such evidence had been given at the bar of the Assembly", but subject to the proviso that such action shall not be taken against any person unless it appears that he had the opportunity of appearing before the Commissioner and cross-examining the witnesses called against him and that he also had an opportunity of calling witnesses on his own behalf. That conditional stipulation is in harmony with the salutary and well settled rule of our law that no one is to be condemned or punished unless he has had an opportunity of being heard, including not only his own right to testify but to call witnesses on his own behalf and to cross-examine those adverse to him. Section 3 affords no assistance in determining the construction to be placed on the broad terms of s. 5. Moreover, as stated previously, s. 3 has been a part of the statute since its enactment in 1884 [since 1887] and s. 5 was only added by amendment made to the Act in 1921.

Attention was also directed to the provisions of s. 5(4) which has been set out *supra*. It is contended that the language of that subsection supports the submission that the Commissioner is the complete master of the proceedings before him and is not subject to any supervision or control by this or any other Court. The argument is unsound. To give that effect to s. 5(4) it would be necessary to hold that s. 5(1) and s. 5(4) are so incompatible and inconsistent that they cannot stand together. In *Re McIntosh Investments Ltd. et al.*, 28 D.L.R. (2d) 322, [1961] O.R. 474, this Court discussed the principle of interpretation to be applied when there are two apparently conflicting provisions in a statute. It is well settled that revocation or alteration of a statute by construction is discountenanced by the Courts when the words may be capable of proper operation without so construing them. This is in accord with the broad general rule that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest: *Jennings et al. v. Kelly*, [1940] A.C. 206 at p. 229. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute book and it is the

duty of the Court to determine whether it is possible to give a reasonable meaning and effect to both sections taken together. Moreover, s. 5(4) is clearly not in conflict with the plain provisions of s. 5(1). These two subsections can stand together quite consistently without even an apparent conflict between their respective provisions. Upon a fair and reasonable construction of both subsections the purpose of s. 5(4) is to declare that no action shall be brought or other proceeding taken with respect to anything done or sought to be done by the Commissioner or to restrain or to interfere with or otherwise direct or affect his conduct, save as provided by s. 5(1). That construction is fully warranted by the rule of interpretation discussed and applied in the numerous authorities reviewed at length in *Re McIntosh Investments Ltd., supra.* There is nothing in s. 5(4) which derogates in any degree from the power conferred upon the Court of Appeal by s. 5(1).

The reasons for the conclusion reached by my brother Aylesworth and myself have been stated at such length not only in deference to the views of the learned Commissioner and to the high place which he holds in the esteem of his colleagues, but also because of the general importance of the questions in issue, having regard to the frequency of the appointment of Royal Commissions.

Appeal allowed.

BROWN, GOW, WILSON, et al. v. BELEGGINGS-SOCIETEIT N.V.

Conflict of Laws I D — Companies VII C — Bearer share certificates in Netherlands company held in Ontario in trust for German nationals—Netherlands Government passing wartime decrees cancelling certificates and declaring that property belonged to State as enemy property—Decrees passed in interests of securing reparations for losses suffered during war at hands of Germany — Whether recognized in Ontario.

An appeal from the judgment of McRuer, C.J.H.C., reported in 29 D.L.R. (2d) 673, [1961] O.R. 815, was launched by the plaintiffs but before argument the issue was settled out of Court.

RE SQUIRE

Ontario High Court, Schatz, J. May 11, 1962.

Wills V G, IV B — Realty left in trust to be conveyed to testator's grandson on attaining age 30 — Income to be accumulated for same period and paid to grandson — Power in trustee to make earlier payments for higher education up to fixed maximum but including capital—Whether absolute vested gift — Whether grandson entitled to conveyance at 21.

Testator left certain real property to trustees "To hold . . . until my grandson . . . reaches the age of thirty years" then to convey to the grandson absolutely. The income was to be accumulated for the same period and paid to the grandson on attaining 30, unless the grandson after the age of 18 desired "to pursue higher education" in which case the trustees were empowered to disburse up to $700 a year, resorting to capital if necessary, for this purpose. *Held,* there was an absolute, vested gift and the grandson was entitled to receive the property at the age of 21. Testator's intention that the gift should vest was indicated by the fact that the property was separated from the rest of the estate, the intermediate income was given to the same beneficiary, there was no gift over in the event of death of the grandson before the age of 30, and the grandson was excepted from the class of grandchildren in the subsequent gift of residue.

[*Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Wharton v. Masterman,* [1895] A.C. 186, apld; *Wheedon v. Lea* (1789), 3 Term Rep. 42, 100 E.R. 445; *Bickersteth v. Shanu,* [1936] A.C. 291, [1936] 1 W.W.R. 644; *Vawdry v. Geddes* (1830), 1 Russ. & M. 202, 39 E.R. 78; *Re Crothers* (1922), 22 O.W.N. 173; *Goodtitle d. Hayward v. Whitby* (1757), 1 Burr. 228, 97 E.R. 287, refd to; *Re Hume, Public Trustee v. Mabey,* [1912] 1 Ch. 693, distd]

Perpetuities — Wills IV M, V G — Gift of residue of estate to grandchildren living when youngest attains age of 30 — No exclusion of afterborn grandchildren—Second residuary gift to son—Whether residuary gifts inconsistent — Whether gift to grandchildren offends Rule against Perpetuities.

After making certain specific bequests to two children of his son A, testator directed that the residue of his estate be sold and the proceeds be divided among such of the other children of A as should be living when the youngest child attained the age of 30. Following this residuary bequest there was another residuary bequest to A. *Held,* there was no conflict between the two residuary clauses and hence the second did not cut down the first. It merely "swept up" any previous gifts that might fail or lapse. However, the first residuary bequest offended the Rule against Perpetuities and was void. The shares and their recipients could not be determined until the youngest child of A attained the age of 30. Since children born after testator's death were not excluded, the gift was not bound to vest within the period of the Rule. Hence the residue passed under the second residuary clause.

[*Re Freeman,* [1910] 1 Ch. 681; *Re Hornell,* [1945] 1 D.L.R. 440, [1945] O.R. 58; *Bristow v. Masefield* (1882), 52 L.J. Ch. 27; *Re Isaac,*

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*Jan. 27, 28.

*Nov. 10.

ARTHUR W. GODSON (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION ON THE CITY OF TORONTO AND JOSEPH E. McDOUGALL (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Prohibition—Restraining inquiry ordered by city council—R.S.O. (1887), c. 184 s. 477—Functions of county court judge.

The council of the City of Toronto, under the provisions of R. S. O. (1887) c. 184 s. 477, passed a resolution directing a county court judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded out of public monies in connection with such contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of the business of the city in that respect was defective. G. who had been a contractor with the city and whose name was mentioned in the resolution, attended before the judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge refusing to order such charges to be formulated he applied for a writ of prohibition.

Held, affirming the judgment of the Court of Appeal for Ontario, Gwynne J. dissenting, that the county court judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court.

Held, per Gwynne J. that the writ of prohibition would lie and in the circumstances shown it ought to issue.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Robertson (2), who ordered a writ of prohibition to issue to restrain the county court judge of the county of York from proceeding with an inquiry against the plaintiff.

PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 452 (2) 16 O.R. 275.

The Municipal Corporations Act (1), provides by sec. 477, as follows:

"In case the council of any municipality at any time passes a resolution requesting the judge of the county court of the county in which the municipality is situate, to investigate any matter to be mentioned in the resolution and relating to a supposed malfeasance, breach of trust, or other misconduct on the part of any member of the council or officer of the corporation, or of any person having a contract therewith in relation to the duties or obligations of the member, officer, or other person to the municipality, or in case the council of any municipality sees fit to cause inquiry to made into or concerning any matter connected with the good government of the municipality or the conduct of any part of the public business thereof; and if the council at any time passes a resolution requesting the judge to make the inquiry, the judge shall inquire into the same, and shall for that purpose have all the powers which may be conferred upon commissioners under the act respecting inquiries concerning public matters; and the judge shall, with all convenient speed, report to the council the result of the inquiry, and the evidence taken thereon."

Under this provision, the council of the city of Toronto passed resolutions reciting that one Lackie, an officer of the corporation, had been guilty of malfeasance and breach of trust in his position of inspector of materials furnished for work done for the city by contractors, and specifying instances of such malfeasance, one of them being that the plaintiff had been allowed to furnish material inferior to that called for by his

(1) R. S. O. (1887), ch. 184.

contract, and the county court judge was directed to make an inquiry with a view of ascertaining the truth of the allegations against Lackie, and also:

"2. To investigate and inquire into every matter and thing connected in any manner with the past or present relations which may have existed or do exist between the city of Toronto, contractors and officials, and other persons who are or who have been connected with this corporation, and which relations might or may tend to unduly influence the action of the said officials and persons in favor of said contractors when dealing with them on behalf of the city."

"3. To investigate and inquire into and ascertain whether contractors or other persons wrongfully obtained from the city of Toronto payment of moneys by deception, fraud or other unlawful means, and if so, who are the parties, and to what amount were such moneys obtained unlawfully."

"4. To investigate and inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts made with the city of Toronto, and to ascertain whether the present system and conduct of that part of the public business has been or is defective, and that the said county judge do report to this council on as early a day as possible the result of the inquiry into the matters and things referred, and the evidence taken therein."

The judge proceeded to hold an inquiry as directed by these resolutions, and notice was given to plaintiff that certain contracts in which he had been interested would be taken up and investigated on a day named. The plaintiff and his counsel attended the inquiry in pursuance of this notice and claimed that specific charges of misconduct should be formulated which the judge refused to direct.

Eventually the plaintiff, on being informed that the judge intended to proceed to Chicago and take evidence of a witness there who had formerly been in plaintiff's employ, applied to Mr. Justice Robertson for a writ of prohibition to restrain from further prosecuting the inquiry otherwise than as to the acts and conduct of Lackie, the officer of the corporation named in the resolution. Mr. Justice Robertson granted the writ (1), but his decision granting it was afterwards reversed by the Court of Appeal (2). From the judgment of the latter court the plaintiff appealed to the Supreme Court of Canada.

McCarthy Q.C. and *T. P. Galt* for appellant. As to prohibition generally see *Rex* v. *Justices of Dorset* (3); *Bishop of Chichester* v. *Harward* (4); Bacon's Abr. (5); Comyn's Dig. (6).

As to the powers exercised by the county court judge, see *The State* v. *Young* (7); *Chabot* v. *Lord Morpeth* (8); *Reg.* v. *Hastings Local Board* (9).

Prohibition will lie against other than courts. *Reg.* v. *Herford* (10); *South Eastern Railway Company* v. *Railway Commissioners* (11); *Reg.* v. *Local Government Board* (12); *Gould* v. *Capper* (13); *Mackonochie* v. *Lord Penzance* (14).

Biggar Q. C. for the respondent the City of Tronto and *Aylesworth* Q. C. for the respondent McDogall referred to *Coté* v. *Morgan* (15); *Rex.* v. *Justices of Dorset* (16); *Poulin* v. *Corporation of Quebec* (17); *Molson* v. *Lamb* (18).

Sir W. J. RITCHIE C.J.—I am clearly of opinion that

(1) 16 O.R. 275.
(2) 16 Ont. App. R. 452.
(3) 15 East 598.
(4) 1 T. R. 650.
(5) Title Prohibition.
(6) Prohibition A 1.
(7) 29 Minn. 474.
(8) 15 Q.B. 446.
(9) 6 B. & S. 401.
(10) 3 E. & E. 115.
(11) 6 Q.B.D. 586.
(12) 10 Q. B. D. 320.
(13) 5 East 366.
(14) 6 App. Cas. 459.
(15) 7 Can. S.C.R. 1.
(16) 15 East 589.
(17) 9 Can. S.C.R. 185.
(18) 15 Can. S.C.R. 253.

the judgment of the Court of Appeal, in reversing the judgment of Mr. Justice Robertson who had granted a writ of prohibition in this case, was right and should not be disturbed The proceeding before the county court judge was, in my opinion, in no sense a judicial proceeding. The city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case. The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially ; he was in no sense a court ; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted, and the appeal should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—By sec 477 of the Municipal Act, ch. 184, of the Revised Statutes of Ontario, it is enacted that (1)

Now, the powers thus imported into the above act from the act respecting inquiries concerning public matters, ch. 17 R. S. O., are :

The power of summoning before the judge any party or witnesses, and of requiring them to give evidence on oath, orally or in writing, or on solemn affirmation if they be parties entitled to affirm in civil matters, and to produce such documents and things as the judge shall deem requisite to the full investigation of the matters referred to him to inquire into ; and the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce documents and things as is vested in any court in civil cases ; but no party or witness shall be compelled to answer any question by his answer to which he might render himself liable to a criminal prosecution.

Now, it is to be observed that the person authorized to make whatever inquiry is authorized is designated in his official character only as "the judge of the county court of the county in which the municipality is situate," and the subjects which he is, by the statute, authorized in this very exceptionable manner to inquire into, and the powers which are vested in him in relation to such matters, are, as it seems to me, twofold; the first affecting the persons whose conduct is to be inquired into, and the second affecting the system, practice, or procedure in use in the conduct of the affairs of the municipality, with a view to the improvement of such system, practice or procedure, if necessary, for the good government of the municipality. It is with the first of these alone, namely, the powers vested in the corporation and the judge as affecting persons, that we are concerned in the present case. With reference to the persons affected by the act the resolution which the council is authorized to pass in order to put in motion against them the functions by the act vested in the judge is a resolution requesting him to investigate some matter to be mentioned in the resolution of the nature of malfeasance, breach of trust, or other misconduct supposed to have been committed either by a member of the council, or by some officer of the corporation, or by some person having a contract with the corporation. Legislation of this nature so open to abuse as, in view of the matters in contestation here, and of the construction put upon it on behalf of the respondents, it appears to me to be, should, in my judgment, be so construed as as to confine the powers proposed to be conferred by the act within the strictest construction of its letter.

(1) See p. 37.

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Now, in order to give to the judge any jurisdiction to exercise any of the powers vested in him by the act the resolution of the council must, as it appears to me, specify some act, matter or thing, either in the nature of malfeasance, breach of trust, or other named misconduct, which is charged as supposed to have been committed by some named member of council, or officer of the corporation, or person having a contract with the corporation. A resolution, for example, requesting the judge to inquire whether any malfeasance, breach of trust or other misconduct had been committed by any member of council or officer of the corporation, or any person having a contract with the corporation, would be absolutely void, and under such a resolution the judge would not become vested with any jurisdiction over any person under the act. To call into action the functions vested in the judge by the act some specific matter, act or thing of the nature of malfeasance, breach of trust, or other misconduct must, in my judgment, be mentioned in the resolution as being alleged as supposed to have been committed by some named member of council, officer of the corporation, or person having a contract with the corporation, and no other person is affected by the resolution, nor is any of the above persons, except as to such matters as are specifically stated in the resolution as being supposed to have been committed by some or one of the persons named in the resolution as and being either a member of the council, an officer of the corporation, or person having a contract with the corporation. The act does not, in my opinion, authorize any inquiry in this extraordinarily exceptionable manner into the conduct of a person who had been, but no longer was at the time of the resolution being passed, a member of the council or officer of the corporation, or into the conduct of any person who may have had, but no longer had

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when the resolution invoking the judge's jurisdiction was passed, any contract with the corporation, nor into the conduct of any person, although having then a contract with the corporation, in relation to a contract which such person previously had had, but which was then finally determined. It was not the object of the act, in my opinion, that this exceptionable jurisdiction should be invoked for the purpose of inquiry into the conduct of persons having had contracts with the corporation which were completed and finally settled, it may be for years; for if the jurisdiction extends to affect a contract which had been closed and determined six months previously, it might equally be invoked in relation to the conduct of a person who had had a contract with the corporation which had been closed five or ten years previously to the passing of the resolution of council, to put in action the jurisdiction of the judge.

Then, again, in order to exercise such jurisdiction as is vested in the judge by the act he is empowered to summon before him any party and witnesses, and to require them to give evidence on oath or affirmation, and to produce such documents as the judge shall deem necessary for the full investigation of the matters referred to him; and for that purpose, all the powers vested in any court in civil cases are vested in him, including committal for contempt, for disobedience of the summons or subpœna issued by the judge,

but no party or witness shall be compelled to answer any question by his answer to which he might render himself liable to a criminal prosecution.

The word "party," as twice used in the above sentence as applied to sec. 477 of ch. 184 R.S.O., plainly means, in my opinion, the member of council, officer of the corporation, or person having a contract with the corporation, who is charged with having committed some

malfeasance, breach of trust or misconduct "in relation to some duty or obligation," due by such party to the municipality, and whose conduct in breach of such duty or obligation is to be inquired into. The power thus vested in the judge of summoning any party before him is one which, in my opinion, it is imperative upon him to exercise before he can acquire any jurisdiction to inquire into the charge or complaint against such person referred to the judge to be inquired into, because it is contrary to the principles of natural justice, and to the course pursued "by any court in civil cases," that any person should be subjected against his will to any jurisdiction in any person to inquire into his conduct in respect of any matter, and to have evidence taken against him, unless he should be given notice of the particular nature of the charge or complaint made against him, and which he has to meet, and of the time and place of the taking of the evidence against him in relation thereto. As the statute vests in the judge the same powers as are vested "in any court in civil cases," it must be intended that these powers shall be exercised in the same manner as those powers are exercised by all courts of justice in civil cases.

Then upon the evidence given upon oath after due inquiry made the "judge" is required to report to the council the result of the inquiry, and the evidence taken thereon. Now, what possible meaning can be attached to these words, "the result of the inquiry," unless it be the opinion or judgment formed by the "judge" as to the just and legal conclusion from the evidence, which the "judge," as a person qualified by his judicial mind to give, is to report to the council, namely, whether the malfeasance, breach of trust, or other misconduct charged against the person whose conduct in relation to some duty or obligation owed by

him to the municipality has been inquired into by the "judge," has or has not been established by the evidence; in other words, whether the party accused was or was not in the opinion and judgment of the "judge," proved to have been guilty of the malfeasance, breach of trust or other misconduct whereof he was accused? If he was, although true it is that the judge was not empowered to inflict any punishment as consequential upon the opinion or judgment which he had formed as to the guilt of the accused, still the corporation, upon whose behalf the inquiry was made, had such power, as for example, by removal from office of an officer of the corporation, if the accused was an officer of the corporation, or by disqualifying a person having a contract with the corporation if such a person was the accused, from having any other contract with the corporation. So that although the judge was not himself empowered to inflict any punishment upon the accused as a consequence of his being, in his opinion and judgment, guilty of the malfeasance, breach of trust or misconduct charged, still, as the result of the conclusion so arrived at by the judge, the accused would be subjected to serious consequences affecting his reputation and his business, and to injuries of a pecuniary nature which the corporation might inflict as the result of the opinion and judgment formed by the judge upon the evidence. Now, as regards the observations of Lord Justice Brett in *The Queen* v. *The Local Government Board* (1), that learned Lord Justice did not say that the jurisdiction of the superior courts over persons vested with limited authority by parliament is confined to cases in which the limited authority is in the nature of a power to impose some obligation upon individuals, and if that was a principle that he was laying down there cannot, I think, be

(1) 10 Q. B. D. 321.

any doubt that the power to subject individuals to pecuniary loss or obligations at the hands of others as the result of the actions of the persons invested with the limited authority would be equally within the principle. But the learned Lord Justice laid down no such principle. He was dealing simply with the case then before the court, and applying his observations to it. The Penarth Local Board had power in certain circumstances to impose pecuniary obligations upon individuals and in the particular case had done so. The person affected had appealed to the Local Government Board, insisting that this Board had a right to review the action of the Penarth Board, and to bind or loose the obligation imposed by the Penarth Board, and invoked the interposition of the Local Government Board to relieve the appellant from the action of the Penarth Board. The latter Board moved for a prohibition. The Court of Queen's Bench refused the writ. The Penarth Board appealed, insisting that the Local Government Board had no jurisdiction to entertain the appeal. The Solicitor-General, on behalf of the Local Government Board, contended that the latter was not a judicial tribunal, that its functions were not of a judicial nature, and that, therefore, prohibition would not lie. It is to this contention that the Lord Justice adresses himself. After saying that it was asserted by the Solicitor-General upon behalf of the Local Government Board, among other things,

> that the Board was not a body against which a prohibition can lie, that is, if they exceed their jurisdiction they are not a tribunal or set of persons against whom prohibition will lie at all,

he says that, in the view he took of the case, it was not necessary to decide that point, such view being that the statute did give an appeal to the Local Government Board in the case, and that in entertaining the appeal, they would be acting within their jurisdiction, and he adds:

> I think I am entitled to say this, that my view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons, other than to the superior courts, the power of imposing an obligation upon individuals [that being the case then before him], the courts ought to exercise, as widely as they can, the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by act of parliament.

The learned Lord Justice, in this manner, intimated his opinion to be that whether the persons exercising limited statutory authority be a judicial tribunal or be invested with judicial functions, in which case there could be no doubt that prohibition should lie if they exceeded their jurisdiction, or be a body of persons not exercising judicial functions but having statutory power to impose an obligation upon individuals, as in the case before him, prohibition would lie against such persons if they should exceed their jurisdiction equally as it would against persons, or a tribunal, exercising judicial functions with limited authority. Now, it is impossible, in my opinion, to entertain the contention that "the judge," in exercising the functions vested in him by the act under consideration, was not acting judicially. The matter is referred to him in his official name only—"the judge of the county court." The matter authorized to be referred to him is in the nature of a complaint against a member of council, or officer of the corporation, or a person having a contract with the corporation, for some malfeasance, breach of trust or misconduct supposed to have been committed by such person in relation to some duty or obligation due from him to the municipality; the matter so referred requires a due inquiry, under oath; the judge is empowered to summon before him the party and witnesses, and to exercise all the powers vested in any court

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in civil cases for enforcing the attendance of witnesses and the production of documents, and being so empowered he is, in my judgment, bound to exercise the powers so vested in him in the same manner as they are exercised by a court of justice in civil cases. Upon the close of the inquiry, "the judge" is bound to report to the corporation the judgment or opinion formed by him as to the charge or charges referred to him upon the evidence taken before him, and the result of that judgment or opinion, if unfavorable to the accused, may injuriously affect his character, reputation and business prospects, and subject him to pecuniary losses at the hands of the corporation; under all these circumstances, I cannot for a moment entertain a doubt that the judge was, by the act, invested with judicial functions in respect of the matter to be inquired into and reported on by him, and was required to proceed in a judicial manner, and that, therefore, he is subject to prohibition if he exceeded his jurisdiction, or did not exercise his jurisdiction in accordance with the due and ordinary course of procedure in courts of justice. The language of Lord Justice Fry, in *Leeson* v. *The General Council of Medical Education* (1) is, in my judgment, precisely applicable in the present case.

What the statute under consideration authorizes, in substance, is that upon a resolution of council being passed requesting the judge of the county court to investigate some complaint of malfeasance, breach of trust or other misconduct mentioned in the resolution as having been committed by either a member of the council, an officer of the corporation, or a person having a contract with the corporation, in relation to the duties and obligations owed by such person to the municipality, the judge shall institute a due inquiry

(1) 43 Ch. D. 386.

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into such charges, upon oath, and for conducting such inquiry he is invested with the same powers as are vested in any court in civil cases to enforce the attendance of witnesses, the production of documents, &c., &c., and, upon the close of the inquiry, he is required to report to the council the result of the inquiry. That is to say, he is to report his judgment upon the evidence of the guilt or innocence of such accused person of the charges or charge alleged against him in the resolution of council. Such report, if unfavorable to the accused, cannot fail to be attended with consequences injurious to his character and to his business prospects and pecuniary interests. Moreover, the corporation would have it in their power to give effect to the judge's report by removal of the officer, if the officer of the corporation was the accused person, or by disqualifying the person from ever having another contract with the corporation, if the accused person's business was that of a contractor and if he was a person having a contract with the corporation. A person who may be so injuriously affected in his pecuniary interests, his reputation and business prospects by the judgment formed by a "judge" upon such an inquiry had before him must be entitled to have the inquiry conducted in a judicial manner, and "the judge" presiding and making the inquiry and required to report his conclusions or opinion or judgment, or whatever else the result may be called, to the council who have power to act upon it must, beyond all doubt, in my opinion, be considered to be acting in a judicial capacity.

In the particular resolution before us it was an officer of the corporation who was accused of having been guilty of malfeasance, breach of trust, gross negligence and other misconduct, specially named in relation to his duties as such officer, namely, as inspector

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of works, and the judge was required to inquire and report to the council whether these charges were true or false. The resolution of council which prescribed the jurisdiction of the judge is as follows: (1) The resolution refers to the judge.

1st. Certain specific matters charged upon, and affecting the conduct of, a named officer of the corporation; and

2nd. Requests an inquiry into the general system pursued by the corporation in relation to the letting of contracts. The personal charges which the resolution of council purports to authorize the judge to inquire into and to report upon seem to me, I confess, very plainly to involve an inquiry into matters of a criminal nature amounting to charges of larceny, or obtaining money upon false pretences, and a conspiracy between Lackie, the officer named, and Godson, and others not named but whom the judge was to identify and report their names, to defraud the corporation. If the judge should report that the charges were established before him, and such report should be well founded upon the evidence, it cannot, I think, be doubted that persons guilty of the matters charged would be liable to prosecution by indictment. Now, the Provincial Legislatures have, by their constitutions, no power whatever to legislate in any manner in relation to criminal matters otherwise than by establishing courts of criminal jurisdiction. How, then, can it be contended for a moment that when an act of a Provincial Legislature authorises the judge of a county court *eo nomine* to inquire into and to report upon matters involving charges of a criminal nature the judge can act otherwise than in his judicial capacity, and as a court of criminal jurisdiction—a court of limited jurisdiction, it is true, but as a court of criminal jurisdiction specially constituted as such for the express purpose named?

(1) See p. 38.

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The only person named in the resolution, as being subjected as a party to the inquiry required to be instituted by "the judge" is an officer of the corporation, William Lackie, into whose conduct, as inspector in relation to the particular matters specified in the resolution, the inquiry is directed. Whether all the charges made against him are made with that precision which would, under the terms of the statute, give the judge jurisdiction over him, personally, as an accused party guilty of some malfeasance, breach of trust, or misconduct in relation to the duties and obligations owed by him to the municipality, we are not concerned at present to inquire, for all that we have to deal with is the jurisdiction assumed to be exercised over Godson, the appellant in the present case, and with respect to him it is to be observed that not one of the personal charges referred to the judge to investigate and report upon is made against him as a party personally brought under the jurisdiction of the judge, and into whose conduct the statute has authorized any inquiry to be made, otherwise than in connection with the charges specified against Lackie. He is, it is true, named, and liable to be called and examined as a witness in relation to the charges secondly, fifthly, sixthly and eighthly made against Lackie, the officer of the corporation, subject to the qualification contained in the statute that he shall not be compelled to criminate himself. Lackie is the only person named in the resolution as having been guilty of any malfeasance, breach of trust, or other misconduct in relation to the duties and obligations which, as an officer of the corporation, he owed to the municipality, and the only person, therefore, into whose conduct in respect of the charges made, the "judge" is, by the express provisions of the statute, authorized to make any inquiry. Godson is neither a member of council or officer of the corpora-

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tion, nor, so far as appears, a person having a contract with the corporation. The reference with respect to Lackie, under the paragraph of the resolution numbered "1," however objectionably vague it may be in some respects, as to him is confined expressly into the truth or falsity of the charges previously recited in the resolution as made against him; it in no way affects Godson as a person whose conduct is submitted to the jurisdiction of the judge under the terms of the statute. The reference under the paragraph No. "2" is, in my judgment, altogether too vague to give the judge jurisdiction over any person. That reference does not appear to be authorized by the statute at all, for there is no allegation therein of any malfeasance, breach of trust, or other misconduct supposed to have been committed by any member of council, officer of the corporation, or a person having a contract with the corporation, such persons being the only persons whose conduct is, by the statute, submitted to and brought under the jurisdiction of "the judge." Paragraph No. 3 appears to be objectionable for the same reason, and because it professes to submit an inquiry whether frauds have been committed upon the corporation by some person or persons not named. Paragraph No. 4 relates to the system of awarding contracts, with which we are not concerned in the present case; and the result is that, in my judgment, Godson is not, by the resolution of reference, brought at all under the jurisdiction of "the judge," as a party having a contract with the corporation, or otherwise, and liable to have any conduct of his inquired into, either as being misconduct in relation to any duty or obligation owed by him to the municipality, or otherwise than as incidental to the charges against Lackie.

I am of opinion, therefore, that the learned judge of the county court erred in the conclusion arrived at by

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him in the very inception of the inquiry instituted by him under the above resolution of the council of the city of Toronto, that he was not acting in a judicial capacity in the exercise of the authority vested in him by the statute.

It appears by the affidavit of the appellant filed upon his motion for a writ of prohibition, and it is not denied, that at the opening of the investigation instituted by the judge he intimated that it was intended in the course of the investigation to inquire into different contracts and dealings which the appellant had had with the city of Toronto, and that he refused to direct any particulars of any charges of misconduct to be delivered to him. I am of opinion that the learned judge erred here also. 1st. Because no charges against Godson were within the terms of the statute as for malfeasance, breach of trust or other misconduct committed by him either as a member of council, an officer of the corporation or a person having a contract with the corporation, referred to the judge to be inquired into, and therefore the learned judge had no jurisdiction to institute the threatened investigation against Godson, and 2nd,—if he had jurisdiction it was contrary to natural justice that any charge against him should be made the subject of inquiry which was not duly notified to him to enable him to meet it. The learned counsel for the corporation appears to have taken what appears to me to be a singular view of the object and intent of the statute, for instead of regarding it as authorizing only an inquiry into some named charge against named persons of having been guilty of some malfeasance, breach of trust or other misconduct in violation of certain duties and obligations owed by such persons to the municipality, he seems to think that what the Legislature contemplated was a sort of secret fishing inquiry to be made by a judge for the

purpose of ascertaining whether, at any time, any malfeasance, breach of trust, or other misconduct had been ever committed by any person formerly, but no longer, a member of council, or by any person formerly, but no longer, an officer of the corporation, or some person who formerly had, but no longer had, a contract with the corporation, for he says, in an affidavit filed by him, that he was informed by the judge that his duties would be to assist the judge, and under his direction, so far as might be necessary, to make inquiries and ascertain what evidence could be obtained bearing upon the matters under investigation and to cause the same to be brought before the judge, and he adds :—

It has been and will be necessary in the progress of the said investigation to call witnesses whose evidence I cannot beforehand ascertain, and to inquire into matters where the facts are only partially known or even only suspected, and if I were compelled to take counsel for the parties interested in the results of this investigation into my confidence beforehand, and to disclose to them the object I had in view in making the said inquiries, and calling the said evidence, I have strong belief the result would be to defeat the object the investigation has in view.

The object of the investigation, and of the legislature in authorising the investigation authorized by it, would thus seem to be assumed to be that the judge of the county court should be empowered, with the assistance of a counsel employed by the corporation, to make inquiries whether any charge of malfeasance or misconduct can be discovered against a person who formerly had had a contract with the corporation, in relation to such contract, although such person is not charged, in the resolution of council which puts the judge in motion, with any malfeasance or misconduct in relation to such contract, instead of being simply to investigate such charges of malfeasance or misconduct as are mentioned in the resolution of council and with being guilty of which the person therein also

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mentioned is accused. I can only say that I am surprised that any person should construe the terms used in the statute as justifying such a species of investigation.

Then, we find that the first inquiry made by the learned judge was not at all into any one of the charges mentioned in the resolution as made against Lackie, and which were referred to the judge to inquire into, but for the purpose of discovering whether any complaint could be made against Godson in respect of a certain contract which he had had with the corporation in relation to what is called the Eastern Avenue Bridge. The learned judge, Mr. Justice Robertson, before whom the motion for prohibition was made, and who had before him all the evidence taken before the judge of the county court, says that in 71 pages of large foolscap type writing taken upon this inquiry there was not a tittle of evidence that Lackie had anything whatever to do with the subject then under inquiry. I entirely concur with Mr. Justice Robertson that this inquiry into the Eastern Avenue Bridge contract and work was altogether in excess of the jurisdiction vested in the judge, and that Godson was not bound to have submitted to it. He did, however, submit to it, and does not therefore now complain of it, but he does object to being exposed to any similar investigation into his conduct in respect of contracts he has had with the corporation which are not referred to the judge by the resolution of council under which he is proceeding. He appears to have been willing to have had his conduct in respect of such contracts investigated by the learned judge, although not brought within his statutory cognizance under the resolution of council, if only he should be given notice beforehand of the nature of any charge against him which is proposed to be investigated, but this having been refused,

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and because of some other extraordinary assumption of authority upon the part of the learned judge, he applied for the writ of prohibition.

After the close of the investigation, which as I have said was, in my opinion, unauthorized, into the conduct of Godson in connection with what is called the "Eastern Avenue Bridge," Godson again applied for particulars of all charges against him, if the judge should assume to investigate any, and was again refused, and, thereupon, he declined to submit to or attend upon the investigation any longer. Thereafter, in his absence, a person whom Mr. Justice Robertson, not inappropriately it would seem, judging from a letter of his to Godson dated the 10th January, 1888, terms the "Informer Cooper," is examined. With reference to this person it may be observed that this letter of his of the 10th January, 1888, seems to justify Godson's declaration on oath, that he believes it to have been written with the view of extorting blackmail from him, and further, that although from the letter itself the council of the municipality, by several of its members, appear to have been placed in possession of the information possessed, or alleged to be possessed, by this man Cooper before they passed the resolution of council of the 12th March, 1888, yet they did not make, in that resolution, any charge of malfeasance or misconduct against Godson, nor authorize any investigation into any such as having been committed by him in relation to any contract he had with the corporation. Again, after Godson had so withdrawn from attending the investigation which was instituted by the judge, and at the close of the month of May, 1888, a letter is written by the counsel acting for the corporation, under the direction of the judge, to the gentlemen who had acted as counsel for Godson on the inquiry to which he had submitted into the "Eastern Avenue Bridge" matter as follows:

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DEAR SIRS,—I hereby notify you that on Monday, at 2 p.m., I will make a special application to His Honor Judge McDougall to go on Wednesday to some place in the States to take the evidence of James Hardy in the investigation now pending in re the Board of Works. A large portion of the evidence taken is now ready and can be obtained from the reporter, Mr. Clarke, and the balance will be ready on Monday, and will, I think, sufficiently inform you of the points upon which I propose to examine Mr. Hardy. I also notify you that it is impossible to bring Mr. Hardy here, and if you desire to cross-examine him, I will ask the judge to rule that you will have to do so immediately after the examination-in-chief is concluded. Yours, ——.

And on the 1st of June, 1888, the following:

I propose to make an application to His Honor Judge McDougall to-morrow, to allow Mr. Cross to examine certain accounts in Mr. Godson's books, other than those that have been referred to in Cooper's evidence to date. By direction of His Honor, I give you notice that such application will be made. Yours, ——.

This assertion of a right to examine the books of a man in business, not for any evidence upon any specific matter as to which a contestation was pending in a court of justice, but to enable the corporation of the city of Toronto to discover whether they could find there any foundation whereon to raise a suspicion, or to rest a complaint, of some misconduct having been committed by Godson in relation to some contract he may have had with the corporation in years past, or to enable them to discover whether the information obtained from Cooper was reliable, seems to me, I must confess, to involve a most singular misapprehension of the statute in virtue of which the right was claimed. The statute invested the judge with only the same powers to compel production of documents as were possessed by courts of justice in civil cases; but it never has been heard that a court of justice exercised the right which has been here claimed over Godson's books unless in respect of some matter in contestation,

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or some litigation to which the person whose books are sought to be inspected is a party litigant, or without giving him an opportunity of stating whether he had any books in his possession containing any entries therein in relation to the matters in issue.

The Mr. Hardy referred to in the former of the above letters written by the counsel acting for the corporation, and whose evidence was proposed to be taken in Chicago against Godson, against whom no charge had been made, and in relation to some matters not specified, is another person who, as Godson swears, was in his employment formerly, and having been discharged by him, had attempted by threats to levy blackmail from him, and had written to him a threatening letter an extract from which he annexed to his affidavit.

It appears from the judgment of Mr. Justice Robertson that the evidence taken in this manner from Cooper and others extends over 143 pages of type-writing, and from the above letters from the counsel acting for the corporation, to the gentlemen who had been acting as counsel for Godson in the Eastern Avenue Bridge matter, it appears that a portion of this evidence, at least, how much we are not informed, related to charges made, not by the corporation, but by the witness Cooper and others against Godson personally. It is under these circumstances that he moved for the writ of prohibition, and I must say that I entirely concur with the able judgment of Mr. Justice Robertson, that a clear case for the interference of a court of justice by prohibition has been made out, and this, in my opinion, quite apart from the judgment in the case of *The Queen* v. *Squier* (1).

Otherwise than as a witness against Lackie the learned judge did not, in my opinion, become invested with any jurisdiction over Godson, or acquire any authority to compel an inspection of his books in the

(1) 46 U. C. Q. B. 474.

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manner asserted, which could have been for no other purpose than to fish for some ground of complaint against Godson, not to investigate one made against him for in the resolution of council none was made.

It is no answer now to the motion for the writ of prohibition to say as to the examination of Mr. Hardy in Chicago that the learned judge, after Mr. Justice Robertson had rendered his judgment, gave up the idea of taking Hardy's evidence in Chicago, and that his evidence has been otherwise obtained; this is but a portion of the grounds upon which the motion for prohibition rested, for if the investigation against Godson personally, against whom no charge has been made, is unauthorized, he surely must have a right to prevent his character from being assailed, and it may be defamed in this manner by malevolent persons with a corrupt intent. He must surely have a right also to claim relief from having his whole time occupied in watching, and that, too, it may be at very great expense, proceedings instituted, apparently, not to carry out the object expressed in the resolution of council but for the purposes of opening up all the transactions which Godson may have had with the corporation over a course of years, with the view to ascertain whether he may have been guilty of some misconduct in relation to some or one of those transactions; with the view, in short, of fishing for evidence, if any could be found, whereon to rest a charge against him. This is not, in my judgment, what the statute contemplated and has authorized, and as the learned judge has, in my judgment, clearly exceeded his jurisdiction in so instituting an inquiry into Godson's conduct, and as the counsel acting on behalf of the corporation still insist upon the right of carrying on the investigation in the manner it has been carried on, save only as to the taking of evidence outside of the Province of On-

tario, I am of opinion that the appeal should be allowed with costs, and that the writ of prohibition should be issued in accordance with the judgment of Mr. Justice Robertson, prohibiting the judge to proceed in investigating any charges against, and from reporting upon the conduct of, Godson personally otherwise than in so far as his conduct in relation to the particular matters charged against Lackie, mentioned in the resolution of council of March 12th, 1888, warrants and requires.

PATTERSON J.—I concur in the views expressed by the judges of the Court of Appeal, and am of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Beatty, Chadwick, Blackstock & Galt.*

Solicitor for respondent, City of Toronto: *C. R. W. Biggar.*

Solicitor for respondent, McDougall: *J. S. Fullerton.*

THE PHŒNIX INSURANCE COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

LEONARD J. McGHEE (PLAINTIFF) . . ..RESPONDENT.

1889
*Oct. 29.
1890
*June 12.
*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine insurance—Total loss—Evidence—Right to recover for partial loss.

A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on October 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On Nov. 2nd a tug came to the place where the vessel was, the master of which, after examining the situation, refused to try and get her off the rocks. On Nov. 16th one of the owners and the captain went to the vessel and caused a survey to be had and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters and the owners brought an action on the policy claiming a total loss. The only evidence of loss given at the trial was that of the captain who related what the tug had done and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefitted the underwriters. On appeal from a judgment refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial.

Held, per Ritchie C. J. and Strong J., that there was evidence to justify the trial judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss, being one which reasonable men might have arrived at it should not be disturbed.

Per Taschereau, Gwynne and Patterson JJ., that the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss.

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

does not comply with the rear yard requirements of the zoning by-law. The applicable requirement is:

15. RM-1 DISTRICTS

(3) REGULATIONS

. . . . .

(b) No person shall, within any RM-1 District, erect or use any building or structure permitted under paragraph (b), (c) and (d) of Subsection (2) "PERMITTED USES" . . . unless the following regulations are complied with:

. . . . .

(vii) Minimum Rear Yard depth.....25 feet.

A rear yard is defined in s. (26)(b) as follows:

Rear Yard: means a yard that extends across the full width of a lot between the rear lot line and the nearest main wall of the main building on such lot.

And in the same paragraph:

Front Yard: means a yard that extends across the full width of a lot line and the nearest main wall of any building on such lot.

And again in the same paragraph:

Side Yard: means a yard that extends from front yard to a rear yard between the side line of a lot and the nearest main wall of the main building thereon.

So it all comes back to whether or not this lot has a rear lot line, which is defined in s. 1(20)(c):

Rear Lot Line: means the lot line opposite the front lot line.

Front Lot Line: means the line that divides a lot from the street. . .

It is our view that it cannot be said that when one line intersects another line, one can be said to be opposite the other. We have been referred to dictionary meanings of the word "opposite" and they are in accord with what I have just said. It is our opinion, then, that this triangular lot has no "rear yard" because it has no rear lot line and the restriction which I have read is not applicable. This is not in accordance with what the municipal officials think was intended by the by-law, but it is the function of the Court to construe the plain words of a by-law, and not to fill in its deficiencies.

Apparently, the applicants have complied with all other requirements of the by-law and are otherwise entitled to their permit. No grounds have been shown on which we should exercise the inherent discretion of the Court to refuse the order of *mandamus*. The order will, therefore, go as asked, with costs to the applicants.

Order granted.

[COURT OF APPEAL]

Re Bortolotti et al. and Ministry of Housing et al.

ESTEY, C.J.O., HOULDEN AND HOWLAND, JJ.A. 1ST APRIL 1977.

Administrative law — Judicial review — Scope — Power of Divisional Court to review decisions of commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49 — Considerations.

The power of the Ontario Divisional Court to review the decisions of a commission appointed under the *Public Inquiries Act*, 1971 (Ont.), c. 49, is limited by s. 6(1) of the Act. The Court's power is supervisory only, *i.e.*, to ensure that the commission does not exceed its jurisdiction.

[*Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113, 64 D.L.R. (3d) 477, 27 C.C.C. (2d) 31, folld; *Re Ontario Crime Com'n, Ex p. Feeley and McDermott*, [1962] O.R. 872, 34 D.L.R. (2d) 451, 133 C.C.C. 116, distd]

Administrative law — Commission of inquiry — Admissibility of evidence — Public Inquiries Act, 1971 (Ont.), c. 49.

Evidence — Admissibility — Commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49.

A commission of inquiry appointed under the *Public Inquiries Act*, 1971 (Ont.), c. 49, has a different function to perform from that of a Court, arbitrator or administrative tribunal. It has a duty to consider, recommend and report. Accordingly, any evidence is admissible before it if the evidence is reasonably relevant to the subject-matter of the commission, and the only exclusionary rule that is applicable is that respecting privilege as required by s. 11 of the Act. In determining what is "reasonably relevant" the subject-matter of the inquiry must be scrutinized carefully.

[*Re Ontario Crime Com'n*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418; *R. v. Gaich or Gajic*, [1956] O.W.N. 616, 116 C.C.C. 34, 24 C.R. 196; *Re Huston* (1922), 52 O.L.R. 444, folld]

Administrative law — Procedure — Power of majority of commissioners of inquiry to bind minority on rulings relating to admissibility of evidence — Public Inquiries Act, 1971 (Ont.), c. 49 — Interpretation Act, R.S.O. 1970, c. 225, s. 27(c).

Although the *Public Inquiries Act*, 1971 (Ont.), c. 49, is silent as to the power of the majority of commissioners on a commission to make rulings as to the admissibility of evidence, the majority does have that power. Section 27(*c*) of the *Interpretation Act*, R.S.O. 1970, c. 225, indicates that that is the case and to hold otherwise would result in a multiplicity of records.

[*Grindley et al. v. Barker et al.* (1798), 1 Bos. & Pul. 229, 126 E.R. 875; *Atkinson v. Brown*, [1963] N.Z.L.R. 755; *Picea Holdings Ltd. v. London Rent Assessment Panel*, [1971] 2 Q.B. 216, apld; *Re Schabas et al. and Caput of University of Toronto et al.* (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, refd to]

APPEAL from an order of the Divisional Court given on a case stated by Commissioners appointed under the *Public Inquiries Act, 1971*.

J. W. Sopinka, Q.C., and *R. W. Cosman*, for appellants.
Robert P. Armstrong, for respondent, Ministry of Housing.

Ian G. Scott, Q.C., *John Collins* and *Chris G. Paliare*, for respondents, Terrence and Heather Lynn Dinsmore and other complainants.

The judgment of the Court was delivered by

HOWLAND, J.A.:—This is an appeal, pursuant to leave granted by this Court, from an order of the Divisional Court answering questions in a case stated by the Honourable J. F. Donnelly, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners appointed by the Lieutenant-Governor in Council under the *Public Inquiries Act*, 1971 (Ont.), c. 49, to conduct an inquiry into certain matters respecting land acquisitions in the North Pickering Project. The appeal raises important questions as to the admissibility of certain oral and documentary evidence which has been tendered by the respondents Terrence Dinsmore and Heather Lynn Dinsmore to the Commission, and as to the power of a majority of the Commissioners to make binding rulings respecting the admissibility of evidence.

On March 2, 1972, the Treasurer of Ontario announced in the Legislature the plans of the Government of Ontario for a satellite city called Cedarwood to be developed on 25,000 acres to the south of an airport which the federal Government simultaneously announced was to be built by it in the Township of Pickering. The land for this city was to be acquired by the Government of Ontario either voluntarily or under the *Expropriations Act*, R.S.O. 1970, c. 154. The entire project of the federal and provincial Governments was known as the North Pickering Project. With the assistance of land acquisition agents, some of whom are the appellants in this appeal, a number of residential properties were acquired by the Government of Ontario including that of the respondents Terrence and Heather Lynn Dinsmore.

Following complaints about the manner of land acquisition, an investigation was made by the Ombudsman for the Province of Ontario. He reported to the Minister of Housing with his recommendations on June 22, 1976. On July 15, 1976, a select committee of the Legislature, known as the Select Committee on the Ombudsman, was appointed to review the various reports made by the Ombudsman including his report on the North Pickering Project. While the Select Committee was reviewing the report of the Ombudsman on the North Pickering Project an agreement was reached between the Minister of Housing and the Ombudsman, concerning the disposition of the contested claims respecting the North Pickering Project. This agreement, with some modifications, was approved by the Select Committee. Under its terms some 28 complaints respecting claims placed in dispute by the reply of the Minister of Housing dated August 31, 1976, and claims handled by

the appellants, were to be submitted by Order in Council to a commission appointed under the *Public Inquiries Act, 1971*, and certain proceedings which had been instituted by the appellants before the Divisional Court were to be discontinued. The merits of the remaining complaints were to be investigated by the Ombudsman, and the Minister of Housing undertook to accept the Ombudsman's recommendation with respect to those complaints and, where appropriate, to refer any such cases to the Land Compensation Board.

In order to implement the agreement, it was provided by Order in Council 2959/76, dated October 26, 1976, as amended by Order in Council 3545/76, dated December 22, 1976, that a commission be issued under the *Public Inquiries Act, 1971*, appointing the Honourable J. F. Donnelly Chairman, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners "to consider, recommend and report in relation to":

(I) the overall merits of claims for additional compensation of

(a) cases placed in dispute by the reply of the Minister of Housing of the 31st day of August, 1976, to the report of the Ombudsman on the North Pickering Project;

(b) any other cases handled by any of the five agents, Applicants [the appellants in this appeal] in the motion instituted before the Divisional Court relative to allegations of misconduct contained in the said report of the Ombudsman;

such merits of claims shall include but not so as to limit the generality of the foregoing, all circumstances of each particular case including any misleading statements inadequate appraisals or misunderstandings based upon reasonable grounds in the circumstances of the particular case.

(II) where entitlement to additional compensation has been recommended in the discretion of the Commission, to determine the amount, if any, of such additional compensation, having regard for such merits and taking into account any benefit or profit derived from the use of compensation paid on the original sale between the date of such sale and the date hereof.

(III) The Commission shall also enquire into, consider and report in relation to what allegations of misconduct are made against

Terry Bortolotti
James Gilhespie
William Thompson
Joseph Kuzik
J. E. Spafford

in the report of the Ombudsman and as to whether or not such allegations, if any, are justified.

Order in Council 2959/76 also provided:

All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature. The Ministry of Housing, former land owners, present and former agents and officials of what now forms part of the Ministry of Housing will be entitled to be represented by counsel who shall be paid by the Ministry of Housing. The reasonable costs of counsel and of any appraisals required for the former land owners, shall be borne by the Ministry of Housing. Counsel for the former land owners will be appointed by the Ombudsman.

In addition Part III of the *Public Inquiries Act, 1971* was declared to apply to the inquiry.

On January 25, 1977, the Commission commenced to hear the claim of the respondents Terrence Dinsmore and Heather Lynn Dinsmore. Counsel for these respondents introduced as exhibits certain documents from the files of the Ministry of Housing which had been furnished to him by the Select Committee on the Ombudsman. One of these documents purported to be a memorandum dated April 18, 1975, from J. L. Forster, Director to Mr. W. Wronski, Assistant Deputy Minister, to which was attached several pages of a report said to have been prepared by Mr. W. R. Kellough, an appraiser. This document is ex. C to the stated case hereafter referred to. The majority of the Commission ruled (Commissioner Humphrey dissenting) that these documents could not be filed in evidence unless Mr. Kellough was called to give evidence.

A further document which counsel sought to introduce was a file copy of a memorandum dated June 13, 1975, entitled "Property Acquisition for the North Pickering Project" but bearing no indication as to its author. This document is ex. D to the stated case. The majority of the Commission (Commissioner Humphrey dissenting) ruled that this document was not admissible in the absence of evidence as to its authorship.

The respondents, Mr. and Mrs. Dinsmore, had dealt with a land acquisition agent, Mr. Bowles, in connection with the sale of their property. Their neighbours, Mr. and Mrs. Bayes, had dealt with the appellant Joseph Kuzik as land acquisition agent in connection with the sale of their property. The majority of the Commission (Commissioner Humphrey dissenting) ruled that Mrs. Dinsmore could not testify as to statements made to her by Mr. and Mrs. Bayes before the agreement of sale of the Dinsmore property was made, nor could Mrs. Bayes testify as to what she had told Mrs. Dinsmore concerning an alleged conversation between Mrs. Bayes and Mr. Kuzik. Commissioner Humphrey considered that the evidence which Mrs. Dinsmore wished to give, considered in the light of the evidence that Mrs. Bayes was to give, was evidence as to a fact, namely, a representation made by a Government agent to another person in similar circumstances pursuant to a common plan of acquisition, and hence was not hearsay.

On January 31, 1977, at the request of counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore, the Commission stated a case for the Divisional Court pursuant to s. 6 of the *Public Inquiries Act, 1971* upon the following questions:

Question 1

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "C" was inadmissible in evidence?

Question 2

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "D" was admissible in evidence?

Question 3

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him?

Question 4

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him?

Question 5

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that no questions could be put to the witness Dinsmore or elicit statements made to her by her neighbours, Mr. and Mrs. Bayes, prior to the execution by Dinsmore of the Agreement of Purchase and Sale wherein the Dinsmore property was sold to the Crown in right of Ontario?

Question 6

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in refusing to permit counsel for the claimant to lead evidence as to what was said by Mrs. Bayes to Mrs. Dinsmore regarding a conversation between Kuzik and Mrs. Bayes?

Question 7

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the matters referred to in Questions 5 and 6 were inadmissible, notwithstanding the conclusion of Commissioner Humphrey that the evidence was, in fact, admissible and he would have received the evidence?

By its order dated February 10, 1977, the Divisional Court answered the questions as follows:

Question 1: Subject to the answer given to Question 3, the Commission of Inquiry properly exercised its jurisdiction.

Question 2: Subject to the answer given to Question 4, the Commission of Inquiry properly exercised its jurisdiction.

Question 3: The Commission of Inquiry declined jurisdiction.

Question 4: The Commission of Inquiry declined jurisdiction.

Question 5: The Commission of Inquiry declined jurisdiction.

Question 6: The Commission of Inquiry declined jurisdiction.

Question 7: The Commission of Inquiry declined jurisdiction.

Southey, J., who delivered the judgment of himself and Rutherford, J., in the Divisional Court, considered that the admissibility of the evidence in question was a matter which properly fell within the discretion of the Commission. In his opinion the docu-

ments referred to in Qq. 1 and 2 would not be acceptable in evidence at a trial unless tendered through a witness who would prove them in accordance with the rules of evidence. On the other hand he did not consider that the testimony referred to in Qq. 5 and 6 violated the rule as to hearsay evidence. As to the remaining questions, he felt that the Commission should admit any evidence which any of the Commissioners regarded as admissible and relevant to the matters to be considered so long as it did not result in the Commission exceeding its jurisdiction.

Reid, J., on the other hand considered that the admissibility of evidence should be determined by whether it was relevant to the inquiry, and not whether it offended the rules of evidence followed by the Courts. Accordingly, he concluded that the answers to Qq. 1, 2, 5 and 6 should be that the Commission declined jurisdiction in refusing to inquire into relevant matters, facts or circumstances. However, he was of the opinion that the Chairman of the Commission was entitled and authorized to govern the proceedings of the Commission even if the other two members were opposed to his views: hence the rulings of the Chairman would decide the admissibility of evidence before the Commission.

The issues in this appeal are as follows:

1. To what extent, if any, are the rulings of the Commission reviewable by the Divisional Court on the stated case in question?
2. Are the rulings which were made by the majority of the Commissioners as to the admissibility of evidence binding on the remaining Commissioner?
3. Should the Commission have admitted the testimony referred to in Qq. 5 and 6?

The appellants are not appealing from the answers of the Divisional Court to Qq. 1 and 2 as to the inadmissibility of the documents referred to in these questions and there is no cross-appeal as to the answers to these questions. Accordingly, the answers to these questions are not in issue in this Court, except in so far as they are affected by the answers to Qq. 3 and 4.

Power of review by the Divisional Court

The first matter requiring consideration is the power of the Divisional Court to review the rulings of the Commission. The statutory basis of this power is to be found in s. 6 of the *Public Inquiries Act, 1971*, which provides in part as follows:

> 6(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.
>
> (2) If the commission refuses to state a case under subsection 1, the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

The jurisdiction conferred on the Court under s. 6(1) is much narrower than the jurisdiction conferred by its predecessor, s. 5(1) of the *Public Inquiries Act*, R.S.O. 1970, c. 379, which provided:

> 5(1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

Section 5(1) conferred both an appellate and a supervisory jurisdiction upon the Court. It permitted the Court to review decisions, orders or directions made in the exercise of the Commissioner's discretion and to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction was called into question: *Re Ontario Crime Com'n, Ex p. Feeley and McDermott*, [1962] O.R. 872 at p. 895, 34 D.L.R. (2d) 451 at p. 474, 133 C.C.C. 116.

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that the statutory powers of the Court are now "supervisory only, *i.e.*, confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the *Public Inquiries Act, 1971*, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission and whether the Commission has the power to reject evidence by the application of exclusionary rules of evidence.

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties: *Re Ontario*

Crime Com'n, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117. It is quite clear that a commission appointed under the *Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* at p. 124 O.R., p. 488 D.L.R.; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418 at p. 420. It may admit evidence which is not given under oath or affirmation (s. 10).

The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry.

As Cross points out in his text on *Evidence*, 4th ed., at p. 24:

> The admissibility of evidence . . . depends first on the concept of relevancy of a sufficiently high degree, and secondly on the fact that the evidence tendered does not infringe any of the exclusionary rules that may be applicable to it.

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*. The requirement that the evidence be reasonably relevant was applied by this Court in *R. v. Gaich or Gajic*, [1956] O.W.N. 616 at p. 617, 116 C.C.C. 34, 24 C.R. 196. Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in *McCormick on Evidence*, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value . . .". A similar test was applied by this Court in *Re Huston* (1922), 52 O.L.R. 444. There a Commissioner appointed to hold an inquiry under the *Public Inquiries Act*, R.S.O. 1914, c. 18, as amended, decided to admit certain telegrams, and refused to state a case as to their admissibility. After examining and considering the telegrams, the Court was not prepared to say that the Commissioner erred in admitting them as relevant since he considered that they would be of assistance to him in reaching a

conclusion as to the matters which were specifically referred to him.

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document. The subject-matter of the inquiry is broad and somewhat unusual in its nature. It comprises:

> (a) the overall merits of certain specified claims for additional compensation, including all circumstances of each particular case, which will embrace any misleading statements, inadequate appraisals or misunderstandings based upon reasonable grounds;
>
> (b) a determination of the amount of additional compensation which the Commission is prepared to recommend;
>
> (c) a report as to whether certain allegations of misconduct against the appellants are justified.

Its role is not only investigatory but requires a determination of the additional compensation that it sees fit to recommend.

The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendations and report.

If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts, other than the rule as to privilege which is made expressly applicable by s. 11 of the *Public Inquiries Act, 1971*. If this were not so, it would be possible, as Morden, J., points out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra*, at p. 121 O.R., p. 485 D.L.R., for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. If the Commission has refused to admit evidence which is reasonably relevant to the subject-matter of the inquiry, and is not expressly excluded by the *Public Inquiries Act, 1971*, or has admitted evidence which is not reasonably relevant to the inquiry, then the Commission is subject to the supervisory role of the Divisional Court on a stated case under s. 6(1) on the ground that the Commission has declined or exceeded its substantive jurisdiction.

An error of jurisdiction might also arise by reason of the denial of a statutory right. Under s. 5(1) of the *Public Inquiries Act, 1971* a person who satisfies the Commission that he has a substantial and direct interest in the subject-matter of the inquiry is entitled to give evidence and to call and cross-examine witnesses relevant to his interest. The exclusion of such evidence by the Commission

would be a denial of a statutory right amounting to an error of jurisdiction. The admission of evidence which is privileged under the law of evidence would fall within the same category by reason of s. 11 of the *Public Inquiries Act, 1971*.

There may also be procedural practices amounting to a denial of natural justice which raise a jurisdictional issue: see *Royal Com'n into Metropolitan Toronto Police Practices and Ashton*, at p. 121 O.R., p. 485 D.L.R. However, it is not necessary in this appeal to consider whether such procedural practices would be reviewable by the Divisional Court on a stated case under s. 6(1) of the *Public Inquiries Act, 1971*.

Apart from the supervisory role of the Divisional Court in respect of errors of jurisdiction, the Commission has very broad powers under s. 3 of the *Public Inquiries Act, 1971*, as qualified by ss. 4 and 5, to control and direct the procedure to be followed on the inquiry. The Commission has a wide discretion, which it can exercise within the framework of the jurisdiction of the Commission. However, it cannot, as I have stated, exercise its discretion so as to narrow or enlarge that jurisdiction.

Power of the majority of the Commissioners to make binding rulings

The next issue for consideration is the power of the majority of the Commissioners to make rulings which are binding on the remaining Commissioner. While the supervisory powers of the Divisional Court on a stated case are limited to determining whether there has been an error of jurisdiction, the ruling or proposed ruling of the Commission as to the admissibility of evidence must necessarily precede the request for a stated case. It is the authority of the Commission to make the ruling which is called in question in the stated case. Accordingly, it is necessary to determine whether such rulings can be made by a majority of the Commission.

It is submitted by counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore that as each Commissioner is required to make his recommendations and report, he should be entitled to determine the evidence upon which his conclusions are to be based. As has been pointed out, this submission was accepted by the majority in the Divisional Court.

The term "commission" as defined in s. 1(*a*) of the *Public Inquiries Act, 1971* means "the one or more persons appointed to conduct an inquiry under this Act". In my opinion it is significant that the Act draws a distinction between acts to be performed by the body called a Commission, and acts which may be performed by one of the Commissioners.

Under s. 3 the conduct of and the procedure to be followed on an inquiry is under the control and direction of the Commission. Section 4 gives the Commission the power in certain circumstances to hold the hearing *in camera*. Under s. 5 it is the Commission that is to accord to a person who has a substantial or direct interest in the subject-matter of the inquiry an opportunity to give evidence and to examine and cross-examine witnesses. It is the Commission which may state a case under ss. 6 and 8. The power to admit evidence not under oath or affirmation (s. 10) and the power to appoint a person to make an investigation (s. 17) are also given to the Commission.

On the other hand s. 14 provides:

> 14. Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by section 7, 12 or 13.

It was contended on the hearing of the appeal that s. 7 contemplates one Commissioner requiring the admission of evidence which he considers to be relevant.

Section 7 provides:

> 7(1) A commission may require any person by summons,
>
> (*a*) to give evidence on oath or affirmation at an inquiry; or
>
> (*b*) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.
>
> (2) A summons issued under subsection 1 shall be in Form 1 and shall be served personally on the person summoned and he shall be paid at the time of service the like fees and allowances for his attendance as a witness before the commission as are paid for the attendance of a witness summoned to attend before the Supreme Court.

In my opinion, s. 7 only empowers one of the Commissioners to perform the administrative function of issuing the necessary summons to a witness whose oral or documentary evidence is required. Similarly one Commissioner is authorized under s. 12 to release documents produced in evidence and under s. 13 to administer oaths and affirmations and to require evidence to be given under oath or affirmation. Section 7 does not authorize one Commissioner to require evidence to be admitted for his benefit which the majority has ruled to be inadmissible. Such rulings as to admissibility properly fall within the powers of the Commission under s. 3 as part of the conduct of the inquiry.

The provision in Order in Council 2959/76 that "All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature" is also of significance. An "adversary proceeding" is defined in Black's Law Dictionary, 4th ed. (1968), as "one having opposing parties". While the report of the Commission does not have to be a unanimous one, the fact that there is not only to be a hearing but a determination in proceedings of an adversarial nature contemplates, in my judgment, that if

there is not a unanimous report, there will at least be a majority and a minority report on the subject-matter of the inquiry. In my opinion the evidence which is admitted by the Commission is admitted for the benefit of all the Commissioners. It is obvious that there is to be only one hearing or series of hearings and from these proceedings will come one record. There is one body of evidence on which the Commissioners should make their recommendations and report. They may, of course, attach different weight to the various items of evidence. It would greatly complicate the task of the Government if it had to assess the recommendations and reports of the Commission based on the admission of different evidence by each Commissioner. It would also render the position of counsel submitting argument to the Commission virtually impossible as there could be an infinite multiplicity of records.

In the absence of any express statutory provisions in the *Public Inquiries Act, 1971* giving the majority of the Commissioners power to bind the minority, one must look to other relevant statutory provisions and to the decisions of the Courts.

Section 27(*c*) of the *Interpretation Act*, R.S.O. 1970, c. 225, provides that:

> 27. In every Act, unless the contrary intention appears,
>
> . . . . .
>
> (*c*) where an act or thing is required to be done by more than two persons, a majority of them may do it;

There is no express provision in the *Public Inquiries Act, 1971* which *requires* the Commission to rule on the admissibility of evidence. Its power to make such rulings is implicit in s. 3 which places the conduct of and the procedure to be followed on an inquiry under its control and direction. Unlike s. 5 which requires the Commission to accord certain rights to interested persons, s. 3 does not make the giving of rulings on the admissibility of evidence mandatory. Section 27(*c*) of the *Interpretation Act* does not, therefore, determine the matter before us.

As to the decisions of the Courts it may be regarded as having been established since *Grindley et al. v. Barker et al.* (1798), 1 Bos. & Pul. 229, 126 E.R. 875, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general (that is, public) nature, and all of them are regularly assembled, the act of the majority will bind the minority. Eyre, C.J., was, however, careful to point out in that case that this general rule of law would have to give way if a contrary intent could be ascertained from the particular statute in question. *Grindley v. Barker* was approved by the Judicial Committee of the Privy Council in its report respecting the questions raised with reference to the "Irish Boundary Commission", 59 L.J. 517 (1924). Their Lordships stated:

> (b) If three Commissioners had once been appointed, then, although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern. This was settled so long ago as 1798 in the case of *Grindley v. Baker* . . . [*sic*]. This case was followed by Lord Chancellor Cairns, Lord Selborne, and several other members of the Judicial Committee in the matter of an Arbitration between the Province of Ontario and the Province of Quebec, where the matter was referred by his Majesty to the Judicial Committee. The case is reported in 4 Cartwright's Cases on the British North America Act, p. 712. The case had to do with section 142 of the British North America Act, where a certain matter was to be referred to the arbitrament of three arbitrators, one appointed by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada. One of the arbitrators had retired. Lord Selborne says "the view which prevails that unanimity is necessary when power is given to three persons does not depend on anything peculiar to arbitrations, it surely would be a general view subject to control either by something expressed in the instrument or by something to be collected from the nature of the power and the duty to be performed under it." And then he puts the question, "Is not one reason for the distinction that in the public interest it is necessary that the thing should be decided?"; and their Lordships' answers were given in accordance with this view. These authorities seem to their Lordships conclusive. *They have no doubt that this is a matter of public interest, and not a matter of merely private concern between the parties concerned, and they, therefore, answer that though in accordance with their answer to Question 1 if no appointment is made the Commission cannot go on, yet if once the three appointments had been made, a majority would rule.*

(Emphasis added.)

The same general rule of law was applied by the Court of Appeal of New Zealand in *Atkinson v. Brown*, [1963] N.Z.L.R. 755, and by the Divisional Court in England in *Picea Holdings Ltd. v. London Rent Assessment Panel*, [1971] 2 Q.B. 216.

A careful perusal of the *Public Inquiries Act, 1971* does not disclose any contrary intention that the decision of the majority of the Commissioners should not bind the minority. I can see no reason why this general rule should not be applicable to a commission of inquiry under that Act. The powers of the Commissioners in question were of a public nature and were being exercised at a hearing where all three Commissioners were present. In my opinion, the rulings made by the majority of the Commissioners as to the admissibility of evidence were binding on the minority.

In the Divisional Court, Reid, J., in his dissenting judgment concluded that the Chairman had the power to govern the proceedings even if the other two Commissioners were opposed to his views. He relied on the decision of the Divisional Court in *Re Schabas et al. and Caput of University of Toronto et al.* (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, where the chairman of the University of Toronto Caput indicated his intention to make rulings on grounds of law. It should, however, be noted that in the *Schabas* case the Court considered that the silence of the remainder of the members of Caput was tantamount to their approval of the actions of the chairman. The Chairman of the Commission in this appeal, however, acts

merely as the spokesman through which the rulings of the Commission are made known. He has no special powers to make rulings which are binding on the other Commissioners.

Rejection of testimony in Qq. 5 and 6

The remaining issue is whether the Commission properly refused to permit the admission of the testimony referred to in Qq. 5 and 6. In discussing the role of the Divisional Court respecting errors of jurisdiction, I have already pointed out that evidence should be admitted if it is reasonably relevant to the subject-matter of the inquiry. I have also pointed out that apart from the exclusionary rule as to privilege, the Commission is not bound by the rules of evidence including the hearsay rule. Accordingly, it is not necessary, as the majority of the Divisional Court did, to consider whether the evidence in question would have constituted a violation of the rule respecting hearsay evidence.

The Commission was required to consider all the circumstances of each particular case including any misleading statements or misunderstandings based upon reasonable grounds in the circumstances of that case. In my opinion the testimony referred to in Qq. 5 and 6 was reasonably relevant in the sense that it would advance the inquiry. The fact that Mr. Kuzik, the land acquisition agent with whom Mr. and Mrs. Bayes had their dealings, made the same statement to them as Mr. Bowles made to the respondents Terrence Dinsmore and Heather Lynn Dinsmore, namely, that he could not see how they would receive any more money if they awaited expropriation, would be relevant in determining whether the Dinsmores acted on a misunderstanding based upon reasonable grounds. If the Dinsmores believed what Mrs. Bayes told them, it would be an additional consideration which the Dinsmores weighed in reaching a decision to sell their property. I have already referred to the conclusion of Commissioner Humphrey that the testimony was admissible. In my opinion the Commission declined jurisdiction in not admitting the testimony referred to in Qq. 5 and 6.

Accordingly, the appeal should be allowed in part and the order of the Divisional Court should be varied by deleting the answers to Qq. 3 and 4 and substituting the following:

> *Question 3*: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him;
>
> *Question 4*: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him.

I would make no order as to the costs of this appeal or of the application for leave to appeal.

Judgment accordingly.

[HIGH COURT OF JUSTICE]

Hanser v. Hanser

EVANS, C.J.H.C. 5TH MAY 1977.

Practice — Divorce — Petition — Application for amendment to include ground for divorce occurring after presentation of petition — Whether amendment to be allowed.

A petitioner is not entitled to an amendment alleging grounds for divorce which occurred or crystallized after presentation of the petition. Where adultery is alleged in the original petition, evidence of after-occurring acts may be allowed, but this is to be distinguished from the situation where petitioner seeks to base the entire claim on such after-occurring acts.

[*Blasco v. Blasco* (1968), 2 R.F.L. 79; *Goodman v. Goodman*, [1973] 2 O.R. 38, 32 D.L.R. (3d) 688, 9 R.F.L. 261; *Van Zant v. Van Zant* (1975), 24 R.F.L. 281, folld; *Johnson v. Johnson* (1975), 23 R.F.L. 293; *Eaton v. Eaton* (1972), 8 R.F.L. 399, distd; *Sandler v. Sandler*, [1934] P. 149; *Borham v. Borham et al.* (1870), L.R. 2 P. & D. 192, refd to]

APPLICATION for leave to amend a petition for divorce.

M. Greenglass, for petitioner, applicant.
B. G. Freesman, for respondent.

EVANS, C.J.H.C.:—On February 3, 1976, the petitioner issued a petition for divorce against the above-named respondent. The grounds for divorce are physical and mental cruelty under s. 3(*d*) of the *Divorce Act*, R.S.C. 1970, c. D-8. In para. 10 of Part B, the petitioner alleges that:

> The Respondent has engaged in a close relationship with another woman for many years, abandoning the consortium and demonstrating a greater commitment to that woman than to the petitioner and children.

Apparently this allegation forms part of the alleged physical and mental cruelty. There is no specific claim on the grounds of adultery and no co-respondent is named.

In the answer, the respondent, in para. 2(h), states that:

> The Respondent has engaged in no relationship with another woman; such allegations are a figment of the imagination of the Petitioner which the Petitioner has constantly tried to use as a wedge between herself and the Respondent.

By notice of motion dated April 25, 1977, the petitioner seeks leave to amend the petition by adding adultery as a ground for divorce under para. 1A (s. 3(*a*), *Divorce Act*). The particulars of the alleged adultery are:

> On or about the 13th, 14th, 15th and 16th days of March, 1977, at the MGM

RE COPELAND AND McDONALD et al.

Federal Court, Trial Division, Cattanach, J. *August 4, 1978.*

Administrative law — Commission of inquiry — Commission empowered to investigate certain activities of the R.C.M.P. — Whether commission required to act in judicial or quasi-judicial manner — Whether commission empowered to determine lis inter partes — Whether members of commission subject to disqualification on ground of bias.

A commission of inquiry, established pursuant to the *Inquiries Act*, R.S.C. 1970, c. I-13, to investigate and report on certain activities of the R.C.M.P. is not empowered to make any determination of a *lis inter partes*. The commission is not a *quasi*-judicial body since it decides and determines nothing, but merely reports to the Governor in Council who retains the power of decision. Accordingly, even if an allegation of bias or apprehension of bias could be made out, the commission is not subject to review on that basis. While the Commissioners are required to act fairly to the best of their ability, the remedy of a person aggrieved by any decision of the Commissioners is political rather than judicial.

[*Saulnier v. Quebec Police Com'n et al.* (1975), 57 D.L.R. 545, [1976] 1 S.C.R. 572, 6 N.R. 541, distd; *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369, 9 N.R. 115; *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055, [1949] A.C. 134; *Guay v. Lafleur* (1964), 47 D.L.R. (2d) 226; *Re Pergamon Press Ltd.*, [1970] 3 W.L.R. 792, refd to]

Practice — Actions — Class actions — Claim by individual alleging himself to have been victim of certain illegal activity — Application to review commission of inquiry empowered to investigate such illegal activity — Application brought on behalf of individual and unincorporated association of "180 progressive, socialist lawyers, law students and legal workers" — Allegations of individual claimant personal rather than common to members of whole class — Motion inappropriate as class motion — Motion to be entertained as being brought on behalf of individual claimant.

[*Naken et al. v. General Motors of Canada Ltd. et al.* (1977), 79 D.L.R. (3d) 718, 17 O.R. (2d) 193, apld]

APPLICATION by way of originating notice pursuant to the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), s. 18(*a*), for an order prohibiting the respondent members of a commission of inquiry from continuing their inquiry.

M. Mandel and *J. A. House*, for applicant.
J. J. Robinette, Q.C., for respondents.

CATTANACH, J.:—As indicated in the style of cause this is an application by way of an originating notice of motion pursuant to s. 18(*a*) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), for a writ of prohibition prohibiting the respondents, as members of a commission of inquiry for the purpose of inquiring into certain activities of the R.C.M.P., from continuing their inquiry on the ground of the bias, in the legal sense, of each Commissioner.

Immediately antecedent to the hearing of this motion the applicant moved for leave to call the respondents and two newspaper reporters to testify orally in the open Court in relation to issues of fact raised by the present application pursuant to Rule 319(4).

I declined to grant the leave requested because, in my opinion, no special reason was established for so doing.

By virtue of Rule 319, the rule is that the allegations of fact on which a motion is based shall be proved by affidavit. That a witness may be called to testify in open Court in relation to an issue of fact raised in the application, is the exception. The exception is granted only by leave when special reason is shown.

The adverse party to a motion may file an affidavit in reply and that affidavit too is to be directed to the facts. That is all an adverse party is required to do and he need not file an affidavit in reply unless he considers it expedient to do so which the respondents in this matter did not.

As I appreciated the purpose of calling the three respondents to testify orally as well as the two newspaper reporters, it was to exact an admission or denial from the Commissioners of the allegations of fact in the supporting affidavit to the principal motion, from which an inference of bias might be made, and the source of the information of the newspaper reporters for their published stories.

I failed to see the necessity for so doing. I expressed the view that there were adequate allegations of a fact in the supporting affidavit to the principle motion from which bias, in its legal sense, may be inferred, but in so stating I did not make a finding of bias and I made it clear that I did not intend to so imply.

An application by way of motion is in no way akin to the trial of a cause of action which is based on antecedent pleadings.

I did not fault the applicant in adopting the procedure which he did and as he is entitled to do but I could not refrain from expressing the view that if the applicant wished to examine the respondents (and he could not cross-examine them on their affidavits because the respondents did not consider it necessary to file such affidavits and were under no obligation to do so) then if the applicant had adopted the alternative course open to him of filing a statement of claim an examination for discovery of the respondents would have been available to him.

While I verbally rejected the application I have considered it expedient to reduce to writing at this stage the reasons I gave orally for doing so.

There is a further matter also preliminary in its nature which may be considered also at this stage.

The applicant brings this motion on his own behalf and on behalf of all members of the Law Union of Ontario.

Thus it is a class motion. For a matter to be appropriate for the institution of a class or representative action (and for the purposes of this particular subject-matter only I shall consider a class motion as synonymous with a class cause of action) the persons in the

class must have the same interest. There must be a common interest and a common grievance and the relief sought in its nature must be beneficial to all.

In *Naken et al. v. General Motors of Canada Ltd. et al.* (1977), 79 D.L.R. (3d) 718, 17 O.R. (2d) 193, Griffiths, J., speaking for the Divisional Court said at p. 720 D.L.R., p. 195 O.R.:

> The first important principle to be extracted from these cases is that a plaintiff is only permitted to sue in a representative capacity on behalf of a class when the cause of action being asserted is common to all members of the class, not similar, but identical.

In the affidavit of Paul D. Copeland in support of the motion it is alleged that the members of the Law Union of Ontario is an unincorporated association of 180 progressive and socialist lawyers, law students and legal workers. Thus the Law Union of Ontario is but a collection of individuals.

In para. 10 of Mr. Copeland's affidavit he alleges that he verily believes that he has been the victim of criminal and other illegal activity by members of the R.C.M.P. on the grounds that his clients have been the victims of such activities, that confidential telephone communications with a potential witness had been illegally intercepted, that his office has been the subject of surveillance, that he was regarded as a threat to the security of the Canadian Penitentiary Service and because his legal partner was the victim of illegal acts by the R.C.M.P. and that because of that association he was also a victim.

These allegations are personal to Mr. Copeland. They are not common to him and the members of the Law Union of Ontario nor are there such allegations with respect to all or any members of the Law Union of Ontario.

Therefore, this motion is not properly brought by Mr. Copeland in a representative capacity on behalf of all members of the Law Union of Ontario and I have entertained the motion as being brought on his own behalf exclusively.

With respect to the members of the Law Union of Ontario the motion is therefore dismissed.

Counsel for Mr. Copeland, because of the allegations in his affidavit above mentioned, contended that he was a victim of R.C.M.P. illegal activity which may well be the subject of investigation by the commission and in fact Mr. Copeland has so requested and there has been a tentative indication given that these particular matters will be investigated if deemed appropriate and at the appropriate time.

Accordingly, it is contended that Mr. Copeland is entitled to have his allegations of illegal activities by the R.C.M.P. with respect to himself investigated by a completely unbiased panel.

It was then contended Mr. Copeland could reasonably apprehend that the commission might not act in an entirely impartial manner and that is a ground for disqualification.

The supporting affidavit to the motion has many allegations and has annexed thereto numerous exhibits running through the alphabet and starting through the alphabet a second time, the gist of which may be summarized.

The allegations are that Mr. Justice McDonald, prior to his appointment, had been an active, energetic and political partisan in the Province of Alberta for the political Party which now forms the Government of Canada and which was responsible for the appointment of all three Commissioners. Similar allegations are made of political partisanship by Mr. Rickert and Mr. Gilbert. It is further alleged that Mr. Justice McDonald, after his appointment accompanied the present Prime Minister in a private DOT aircraft on an official visit to the Orient in the capacity of a news correspondent. It is also alleged that Mr. Rickert and Mr. Gilbert had close personal and business relationships with members of the Cabinet particularly the then Solicitor-General responsible for the R.C.M.P. It is alleged that the commission has expressed the view that certain alleged illegal activities by the R.C.M.P. may have been justified by the interests of national security. It is a function of the commission to determine the extent to which the members of the Government, the Cabinet and the Liberal Party were aware of, authorized or were in any way complicit in illegal activities of the R.C.M.P.

These allegations were the subject-matter of many newspaper reports, given wide distribution and prominence in the newspapers because the stories were newsworthy. The press clippings are among the exhibits to the affidavit.

Still further summarized the gist of the allegations is that these circumstances lead to the suspicion, to be reasonably entertained that the commission will serve as a whitewash of the R.C.M.P. and members of the Government and that Mr. Copeland, as a victim of these activities, cannot expect a fair shake from a commission so appointed and so comprised.

The most recent test of bias to be applied and a discussion thereof is in the reasons for judgment delivered by Laskin, C.J.C., for the majority of the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369, 9 N.R. 115, where he said at pp. 732-3:

> (The past activity of the Chairman of the Board), in my opinion, cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined on a s. 44 application.

> This Court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways (B.C.)* (1966), 56 D.L.R. (2d) 469, [1966] S.C.R. 367, 55 W.W.R. 750, and again in *Blanchette v. C.I.S. Ltd.* (1973), 36 D.L.R. (3d) 561, [1973] S.C.R. 833, [1973] 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R., pp. 842-3 S.C.R., that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand, J., said in *Szilard v. Szasz*, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

The majority held that Mr. Crowe, the Chairman of the National Energy Board, because of his previous association with a party before the Board, was the object of a reasonable apprehension of bias. Similar circumstances applied in *Szilard v. Szasz*, [1955] 1 D.L.R. 370, [1955] S.C.R. 3.

In the plethora of decided cases expressions such as "reasonable apprehension of bias", "reasonable suspicion of bias" and "real likelihood of bias" have been used interchangeably without distinction.

In his dissenting judgment in the *National Energy Board* case, de Grandpré, J., with whom Martland and Judson, JJ., concurred, applied the same test as did Laskin, C.J.C., but arrived at a different result.

de Grandpré, J., said at pp. 735-6:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

He could:

> ... see no real difference between the expressions found in the decided cases, be they "reasonable apprehension of bias", "reasonable suspicion of bias", or "real likelihood of bias". The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

I can perceive no difference in principle to the approaches between the judgment of Laskin, C.J.C., and de Grandpré, J., but it is significant that de Grandpré, J., does refer to "real likelihood of bias" whereas the majority excluded that formula.

It may be that a "real likelihood of bias" imposes a higher standard on an applicant for prerogative relief than does a "reasonable apprehension of bias" but in view of the majority's silence as to the test of a "real likelihood" such expressions of the test as to whether "a reasonable man would consider there was a likelihood of bias", which has been frequently propounded, may not be an accurate statement of the law.

Accordingly, the question immediately arises as to what issues are to be determined by the commission.

For there to be an issue to be determined there must be a *lis inter partes*, that is to say a dispute between parties to be decided by the commission.

Lord Simonds in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055, [1949] A.C. 134, said at p. 680:

> It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties ...

Thus if there is a *lis inter partes* the function is judicial in the case of Courts of law and equally so in the case of a tribunal where issues between parties are decided where the function is more properly described as *quasi*-judicial.

Conversely, if there is no issue or *lis* to be determined then the function of the tribunal is described as administrative and the principles of natural justice, particularly the common law concept of bias, do not apply with the same full force and effect to such a tribunal as they apply to a *quasi*-judicial tribunal which is required to determine a *quasi-lis*.

Incidentally, in *Committee for Justice and Liberty v. National Energy Board, supra*, there was such a *quasi-lis*. There the Board had before it the question for decision whether to issue a certificate in respect to the proposed Mackenzie Valley pipeline to an applicant therefor to which other interested parties upon whom the Board had conferred status were opposed.

In *Guay v. Lafleur* (1964), 47 D.L.R. (2d) 226, Cartwright, J. (as he then was), said that the maxim, *audi alteram partem* (one of the cardinal principles of natural justice) does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power to impose a liability or to give a decision affecting the rights of parties.

In *Re Pergamon Press Ltd.*, [1970] 3 W.L.R. 792, the English Court of Appeal held that inspectors appointed to investigate the affairs of a company under companies legislation were masters of their own procedure but were required to act fairly and, therefore, were required to give anyone whom they proposed to condemn or criticize in their report a fair opportunity to answer what was alleged against him.

In the *Federal Companies Act* as I once knew it, that right was the subject of precise statutory enactment.

But Lord Denning, M.R., in his characteristically precise and incisive language said: "They are not even quasi-judicial, for they decide nothing, they determine nothing."

Accordingly, a tribunal is to be categorized as either *quasi*-judicial or administrative by the function it performs and its powers. The category into which a tribunal falls is of paramount importance in determining what common law principles of natural justice are applicable and consideration must also be given to the legislation to which the tribunal owes its existence.

The present commission of inquiry, of which the respondents are members, owes its existence to the *Inquiries Act*, R.S.C. 1970, c. I-13, as stated in the style. Under Order in Council, P.C. 1977-1911, a commission issued appointing the respondents to be Commissioners under Part I of the *Inquiries Act*.

Their functions are therein outlined to be:

(a) to conduct such investigations as in the opinion of the Commissioners are necessary to determine the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law and, in this regard, to inquire into the relevant policies and procedures that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada;

(b) to report the facts relating to any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law as may be established before the Commission, and to advise as to any further action that the Commissioners may deem necessary and desirable in the public interest; and

(c) to advise and make such report as the Commissioners deem necessary and desirable in the interest of Canada, regarding the policies and procedures governing the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada, the means to implement such policies and procedures, as well as the adequacy of the laws of Canada as they apply to such policies and procedures, having regard to the needs of the security of Canada.

I have omitted the introductory portion and the procedure provisions.

Paragraph (a) requires the commission to "investigate" and to "determine" the extent and prevalence "of certain investigative practices" of and to "inquire into" certain policies of the R.C.M.P.

By para. (b) the commission is required to "report the facts", and to "advise as to any further action that the Commissioners deem necessary and desirable in the public interest".

By para. (c) the commission is required "to advise and make such report as the Commissioners deem necessary and desirable".

In the procedural portion of the Order in Council which I have not reproduced, the Commissioners are "directed to report to the Governor in Council".

The key words in the functions of the commission are to "investigate", "inquire", "report the facts" and "to advise" with respect thereto.

Thus at its very highest the commission is but a fact-finding, reporting and advisory body.

Paraphrasing and applying the words of Lord Denning, M.R., to the Commissioners herein, they are not even *quasi*-judicial, for they decide nothing, they determine nothing.

The commission reports to the Governor in Council and it is for him to decide what shall be done. He may implement the advice given in the report in whole or in part or he may consign the report to oblivion. The action to be taken thereon is exclusively his decision.

In contrasting the position of a Judge in Court and that of a fact-finding and advisory body which can only be classed as administrative, notwithstanding that both hold hearings, the gulf is so wide between them that the common law standards of bias are not applicable to the latter.

In my view, bias in the commission, even if it should be found to exist and I make no such finding, is irrelevant.

In so stating I have not overlooked the comment in *Re Pergamon Press, supra*, that the inspectors appointed under companies legislation to give to anyone whom they propose to condemn or criticize, "a fair opportunity to answer what was alleged against him".

In *Maxwell v. Department of Trade and Commerce*, Times Newspaper L.R. June 25, 1974, the Court of Appeal dealt with the same inquiry as that dealt with in the *Pergamon Press* case and refused to apply any requirement other than the inspectors must be "fair to the best of their ability".

If a person is aggrieved by a decision that should have been made on a *quasi*-judicial basis then that person, in my view, may resort to proceedings in the nature of *certiorari* or may invoke a review of that decision under s. 28 of the *Federal Court Act*. But if a person is aggrieved by a decision that is required to be made on the basis of it being fair to the best ability of those who decide, then the remedy is political not judicial.

That being so it applies with much greater force to a tribunal which makes no decision.

Counsel for Mr. Copeland relied strongly on the judgment of the Supreme Court in *Saulnier v. Quebec Police Com'n et al.* (1975), 57 D.L.R. 545, [1976] 1 S.C.R. 572, 6 N.R. 541, in support of his position that, even though the respondent Commissioners would not have any decision to make, their recommendations would or might form the basis for action to be taken by the Governor in Council which might prejudicially affect Mr. Copeland's interests. In that case, Pigeon, J., speaking for the Court, distinguished the case of *Guay v. Lafleur, supra*, in the following passage at pp. 549-50 D.L.R., pp. 578-9 S.C.R:

With respect, I must say that the function of the Commission is definitely not that of the investigator concerned in *Guay v. Lafleur*. That investigator was charged only with collecting information and evidence. The Minister of National Revenue could then unquestionably make use of the documentary evidence collected, but not of the investigator's conclusions. It is for this reason that it was held the Investigator could refuse to allow the taxpayer concerned to be present or be represented by counsel at the kind of investigation provided for by the *Income Tax Act*. The situation is quite different under the *Police Act*, s. 24 of which reads as follows:

> "24. The Commission shall not, in its reports, censure the conduct of a person or recommend that punitive action be taken against him unless it has heard him on the facts giving rise to such censure or recommendation. Such obligation shall cease, however, if such person has been invited to appear before the Commission within a reasonable delay and has refused or neglected to do so. Such invitation shall be served in the same manner as a summons under the Code of Civil Procedure."

This provision indicates that in this essential particular the *Police Act* differs fundamentally from the *Income Tax Act*. If this Court held that the latter Act did not require application of the *audi alteram partem* rule, this was because it had first concluded that the kind of investigation provided for by the Act involved no conclusion or finding as to the rights of the taxpayer concerned. The *Police Act*, on the other hand, besides expressly recognizing the application of the *audi alteram partem* rule, clearly indicates that the investigation report may have important effects on the rights of the persons dealt with in it. It does not appear necessary for me to labour this point, as I cannot see how it can be argued that the decison is not one which impairs the rights of appellant, when it requires that he be degraded from his position as director of the City of Montreal Police Department, and the sole purpose of subsequent proceedings is to determine the lower rank to which he should be assigned, that is the extent of the degradation.

In my opinion Casey, J.A., dissenting, properly wrote, with the concurrence of Rinfret, J.A.:

> "I believe that the *Lafleur* case is clearly distinguishable from the one now being discussed. In *Lafleur* the Supreme Court was concerned with the *Income Tax Act* — here we have a Quebec statute. In that case it had to decide whether the doctrine *audi alteram partem* applied: here it is written right into the Act by s. 24. Finally there it was said [at p. 229] that '. . . the appellant has no power to determine any of the former's [respondent's] rights or obligations.' In my opinion appellant, *i.e.*, the Commission, has done just that.
>
> . . . . . .
>
> "Appellant has rendered a decision that may well impair if not destroy respondent's reputation and future. When I read the first and fourth considerants and the conclusions of the sixth recommendation and when I recall that the whole purpose of these reports is to present facts and recommendations on which normally the Minister will act the argument that no rights have been determined and that nothing has been decided is pure sophistry."

In the *Saulnier* case the inquiry was into the conduct of Saulnier as a police officer under the applicable statutory provision. The report, from which there was no appeal, was held to have impaired his rights while in the *Lafleur* case the rights of the person investigated under the *Income Tax Act*, 1970-71-72 (Can.), c. 63, remained

intact, since he had access to the Courts by way of appeal from any assessment that might arise from information collected by the investigator.

Here the situation is that it is not even the conduct of Mr. Copeland, but that of the R.C.M.P. that is to be investigated, and while there is no appeal neither is there any report to be made on Mr. Copeland's conduct. No prejudice to any personal right or interest of his is foreseeable as a result of the inquiry or of any action that may be taken by the Governor in Council on the report of the commission when eventually submitted. At most Mr. Copeland may, and perhaps will be a witness at some stage of the inquiry, in which event he will undoubtedly be entitled to the same rights and protections as any witness.

In the event that any adverse report is to be made against him as a witness, he will also be entitled to the protection afforded by s. 13 of the *Inquiries Act*, that is to say the right to be told what is alleged against him as misconduct on his part and the right to a full opportunity to be heard in person or by counsel on his behalf. But this will be the full extent of his rights in respect of the making of such an adverse report. Though prescribed here by the statute, these rights are, in my opinion, precisely the same as those upheld by the Court of Appeal in the absence of a like statutory provision in the *Pergamon Press* case.

The application therefore fails and it will be dismissed with costs.

Application dismissed.

RE H.G. WINTON LTD. AND BOROUGH OF NORTH YORK

Ontario High Court of Justice, Divisional Court, R. E. Holland, Goodman and Robins, JJ. June 30, 1978.

Planning legislation — Zoning by-law — Discrimination — Scope of inquiry of Court — Considerations.

When a by-law is being attacked on the ground that it is arbitrary and discriminatory, it must be borne in mind that every zoning by-law is by its very nature discriminatory. However, it is still open to attack a by-law on the basis of discrimination in the sense that the by-law has been enacted in bad faith. Bad faith is not to imply or suggest any wrongdoing or personal advantage on the part of any of the members of council. Rather it is to say that the municipal council acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government. Accordingly, where a municipality rezones a particular piece of property which was contemplated for the use of a church that would have met the requirements of the pre-existing by-law, and that is the only piece of property rezoned in the municipality, and where there is no planning reason put forward for the rezoning, but rather the rezoning occurs because of a ratepayers' petition, the rezoning must be considered to be arbitrary and discriminatory and cannot stand.

p. 563 says, 'the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against of any of His Majesty's property is competent in any of His Majesty's courts.' See also the remarks of Sir Barnes Peacock at p. 626 in *Palmer v. Hutchinson* (1881), 6 App. Cas. 619."

On the subject of public policy, he notes at p. 506:

" 'Public policy' as a guide to a legal decision has been referred to as an 'unruly horse, and when once you get astride of it you never know where it will carry you': Donovan J. at p. 23 in *Hibczuk v. Minuk*, [1933] 2 W.W.R. 20 (Man.).

"Duff C.J.C. in *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, makes a careful analysis of the cases on 'public policy'. At p. 4 he states:

" ' . . . there is some lack of unanimity upon the point of jurisdiction of the courts to proceed under some new head of public policy, that is to say, some principle of public policy not already recognized by judicial decision . . .'

"He goes on to suggest, although he does not so decide, that it is not likely that at this day any new head of public policy could be discovered.

"It is clear, also, from the above case and the legal decisions reviewed, that courts should be discouraged from extending 'public policy' for fear they may be substituting their opinions or morality for the wishes of the Legislature or Parliament."

Unless and until the moneys were advanced by the Department of Indian Affairs and were deposited to the credit of the account of the defendant band, they were not subject to garnishment by the plaintiff or anyone else. To this point in time lies the inability of the court to make an order against the Crown. However, once deposited to the credit of their account, such moneys lost their identity and characteristic of being public funds or of "The Royal Purse" and were subject to attachment. The anticipated use or contemplated disbursal of such funds by the Parliament of Canada and/or the band council for the benefit and use of the members of the defendant band as a whole did not preclude the issuing of the garnishment order and the attachment of such moneys.

Since courts should be discouraged from extending "public policy" for the reasons advanced by Morrow J. and as it appears

that Parliament intended, in enacting said s. 89(1), to specifically provide that attachment was available at the instance of an Indian against the personal property of another Indian or a band, there is no justification to adjudge that the garnishment order herein be set aside on the basis of being contrary to public policy.

In the result, the motion is dismissed with costs, which are hereby fixed at $375 and disbursements.

AIBERTA SUPREME COURT

[TRIAL DIVISION]

Miller J.

Royal American Shows Inc. et al. v. Laycraft J.

References and inquiries — Application for provincial Supreme Court to supervise commission of inquiry by prerogative writ — Court not having power to supervise unless within four exceptions — The Public Inquiries Act, R.S.A. 1970, c. 296 — The B.N.A. Act, 1867, s. 91(27).

References and inquiries — Witness compellable to testify on matters involving criminal charges subject to rights under the Canada Evidence Act, R.S.C. 1970, c. E-10.

The applicants applied for an order for prohibition prohibiting the respondent in his capacity as a commissioner under The Public Inquiries Act from calling the applicants as witnesses in an inquiry, and prohibiting him from conducting any inquiries into whether the applicants had committed unlawful acts which were the subject of criminal charges already laid against them. The applicants contended that such an inquiry into the subject matter of criminal charges fell under the provisions of s. 91(27) of the B.N.A. Act and was ultra vires a provincial inquiry and that, even if the province had authority to authorize an inquiry into the areas covered by criminal charges, the Supreme Court of Alberta could exercise its inherent jurisdiction powers of supervision over inferior tribunals. The respondent made the preliminary objection that it was beyond the jurisdiction of the Supreme Court of Alberta to supervise the proceedings of a public inquiry through the use of the prerogative writs.

Held, the application was dismissed and the preliminary objection upheld.

A hearing in the nature of a public inquiry is generally not subject to supervision and control by a provincial court of superior jurisdiction except in four areas: firstly, where the report of the commission of inquiry, although in the form of recommendations that need not be accepted by and need not form the basis of a decision to be made by the higher body, does directly affect the rights of any person; secondly, where the commission in the exercise of its ancillary power, such as citing for contempt or imposing any penalties, has wrongfully impaired the liberty or goods of a person;

thirdly, where the area of investigation is not a matter within the jurisdiction of the provincial legislature; and, fourthly, where the commissioner seeks to inquire into matters outside of his terms of reference. As the present application did not fall within any of the four exceptions, the court had no power to supervise the tribunal by way of a prerogative writ. *Re Clement and Public Inquiries Act*, 27 B.C.R. 121, [1919] 3 W.W.R. 309 (sub nom. *Re Clement; Re Gartshore*), reversing [1919] 1 W.W.R. 372, 30 C.C.C. 309, 44 D.L.R. 623 (C.A.); *O'Connor v. Waldron*, [1935] A.C. 76, [1935] 1 W.W.R. 1, 63 C.C.C. 1, [1935] 1 D.L.R. 260 (P.C.); *R. v. Bd. of Broadcast Governors; Ex parte Swift Current Telecasting Co. Ltd.*, [1962] O.R. 657, 33 D.L.R. (2d) 449 (C.A.); *F. F. Ayriss & Co. v. Bd. of Indust. Rel.* (1960), 30 W.W.R. 634, 23 D.L.R. (2d) 584 (Alta.); *Samuels v. Council of College of Physicians and Surgeons (Sask.)* (1966), 57 W.W.R. 385, 58 D.L.R. (2d) 622 (sub nom. *R. v. Sask. College of Physicians and Surgeons; Ex parte Samuels*) (Sask.); *Guay v. Lafleur*, [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226; *Discipline Committee of Alta. Teachers' Assn. v. Youngberg*, [1978] 1 W.W.R. 538 (Alta. C.A.); *R. v. Elec. Commrs.; Ex parte London Elec. Joint Committee Co. (1920) Ltd.*, [1924] 1 K.B. 171 (C.A.); *Estates and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*, [1937] A.C. 898, [1937] 3 All E.R. 324 (P.C.); *Kettenbach Farms Ltd. v. Henke*, [1937] 3 W.W.R. 703, 19 C.B.R. 92, [1938] 1 D.L.R. 44 (Alta. C.A.); *Batary v. A.G. Sask.*, [1965] S.C.R. 465, 51 W.W.R. 449, 46 C.R. 34, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125; *Bell v. Ont. Human Rights Commn. (1971)*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1; *Edwards v. Alta. Assn. of Architects*, [1975] 3 W.W.R. 38 (Alta.); *Saulnier v. Que. Police Commn.*, [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545 referred to. *Re Godson and Toronto* (1889), 16 O.A.R. 452, affirmed 18 S.C.R. 36; *Di Iorio v. Warden of Common Jail of Montreal* (1976), 35 C.R.N.S. 57, 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491, 8 N.R. 361; *Orysiuk v. R.*, [1977] 6 W.W.R. 410 (Alta. C.A.) applied.

In an opinion expressed by the court on the substantive question of whether the applicants should be forced to testify before the inquiry on matters involving criminal charges while they are still outstanding, it was stated that the applicants would be compellable witnesses in the public inquiry, subject to the protection offered to them by the Canada Evidence Act. *Batary v. A.G. Sask.*, supra distinguished. *R. v. Barnes* (1921), 49 O.L.R. 374, 36 C.C.C. 40, 61 D.L.R. 623 (C.A.); *Re Regan*, 13 M.P.R. 584, 71 C.C.C. 221, [1939] 2 D.L.R. 135 (N.S. C.A.); *Re Gerson; Re Nightingale*, [1946] S.C.R. 538, affirmed as to Gerson [1946] S.C.R. 547, 3 C.R. 111, 87 C.C.C. 143; *Re Wilson; Whitelaw v. McDonald*, 66 W.W.R. 522, [1969] 3 C.C.C. 4, 2 D.L.R. (3d) 298 (sub nom. *R. v. McDonald; Ex parte Whitelaw*), reversing 63 W.W.R. 108, [1968] 4 C.C.C. 49, 67 D.L.R. (2d) 541 (sub nom. *R. v. Coroner of Langley*) (B.C. C.A.); *Re Wyshynski*, [1966] 2 C.C.C. 199 (Sask.); *R. v. Que. Mun. Commn.; Ex parte Longpre*, [1970] 4 C.C.C. 133, 11 D.L.R. (3d) 491 (Que. C.A.); *Re Inquiry Re Dept. of Manpower and Immigration in Montreal* (1974), 22 C.C.C. (2d) 176 (Que.); *Stickney v. Trusz* (1973), 2 O.R. (2d) 469, 25 C.R.N.S. 257, 16 C.C.C. (2d) 25, 45 D.L.R. (3d) 275, affirmed 3 O.R. (2d) 538, 28 C.R.N.S. 125, 17 C.C.C. (2d) 478, 46 D.L.R. (3d) 80, which was affirmed 3 O.R. (2d) at 539, 28 C.R.N.S. at 126, 17 C.C.C. (2d) at 479, 46 D.L.R. (3d) at 81 (C.A.); *Faber v. R.*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 6 N.R. 1; *R. v. Johansen*, [1976] 2 W.W.R. 113, affirming [1975] 2 W.W.R. 44, 21 C.C.C. (2d) 310, 54 D.L.R. (3d) 706 (Alta. C.A.); *Di Iorio v. Warden of Common Jail of Montreal*, supra referred to.

[Note up with 19 C.E.D. (West. 2nd) *References and Inquiries*, s. 21.]

A. G. Macdonald, Q.C., for C. Sedlmayr Jr., G. Gardiner and L. Demay.

T. Mayson, Q.C., for Laycraft J.

I. G. Whitehall, for Attorney General of Canada.

W. Henkel, Q.C., for Attorney General of Alberta.

(Edmonton No. 103649)

6th January 1977. MILLER J.:— This is an application by Messrs. Sedlmayr, Gardiner and Demay (hereinafter called "the applicants") for an order prohibiting Laycraft J., in his capacity as a commissioner under The Public Inquiries Act of this province, R.S.A. 1970, c. 296 (hereinafter called "the commissioner"), from attempting to call the applicants as witnesses in the said inquiry, and for a further order prohibiting the commissioner from conducting any inquiries into whether the applicants, or any of them, have committed wrongful or unlawful acts which are alleged in outstanding criminal charges that have been laid against them.

In addition the applicants seek to attack the right of the commissioner under the order in council to conduct any inquiry in respect of the matters referred to in certain outstanding criminal charges preferred against the applicants on the grounds that such matters are ultra vires of the constitutional jurisdiction of the province of Alberta and fall under the provisions of s. 91(27) of the B.N.A. Act, 1867, as amended, which area is reserved to the federal jurisdiction.

This matter first came before me on 30th November 1977 by way of an application for an interim order of prohibition pending the full argument on the matter, scheduled originally for 9th December. The interim application came up on short notice and was heard quickly because the hearings of the commission were then in progress and the commissioner proposed to inquire into some of the matters objected to by this application. The points raised on the interim application were not, because of the time factor, capable of being fully argued and researched, and in the course of giving my decision the following morning I mentioned that it was not possible to fully explore the law on the various points raised as would be done in the later application for a more permanent order of prohibition. At the opening of the full application I advised all counsel that, even though I had heard the interim application, I was treating this application as a new hearing to be decided on a review of all the relevant arguments and authorities. In addition, the constitu-

tional argument now advanced by the applicants was not even before the court on the interim application and so was not argued or dealt with in any way.

I should also mention that the required notice of the raising of the constitutional issue was given to the Attorney General for Canada and Alberta and they were represented at this application by counsel, who made submissions on this aspect of the matter.

At the hearing on the interim injunction and on this application counsel for the commissioner raised preliminary objections to this court entertaining and considering the prohibitions and the declaration of ultra vires sought by the applicants. As I understood his submission he took the following positions:

(a) Because of the nature of an inquiry under The Public Inquiries Act, it was beyond the jurisdiction of the Supreme Court of Alberta to supervise or control the proceedings of a public inquiry through the use of any of the prerogative writs so long as three conditions were met, namely, (i) the order in council setting out the terms of reference of the inquiry covered an area within the constitutional authority of the province of Alberta; (ii) the commissioner was confining his investigations within the parameters of the order in council, and (iii) he had not exceeded or abused his jurisdiction in the exercise of his ancillary powers;

(b) The terms of reference of this particular commission of inquiry did come within the constitutional authority of the province of Alberta;

(c) The particular areas which the commissioner sought to investigate involving the applicants were squarely within the terms of reference as set out in O.C. 396/77, as amended by O.C. 440/77; and

(d) At this point in time the commissioner had not exceeded or abused his jurisdiction in the exercise of his ancillary powers.

In response, counsel for the applicants submits:

(a) While the province of Alberta may have authority to call a public inquiry to investigate certain transactions which allegedly occurred within the province to see if they were unlawful or wrongful, they cannot authorize such investigations where the transactions to be examined are the same ones which are the subject of certain outstanding criminal charges still

pending before a court of competent criminal jurisdiction in the province of Alberta, for to attempt to give such authorization would be infringing upon the area of criminal law reserved to the federal jurisdiction under s. 91(27) of the B.N.A. Act and therefore ultra vires of the powers of the province of Alberta; and

(b) Even if the province has authority to authorize a public inquiry into the areas covered by the criminal charges, the Supreme Court of Alberta under its inherent jurisdiction powers of supervision over inferior tribunals should be entitled to exercise such powers of supervision and should exercise the same when criminal charges are outstanding by prohibiting the commissioner from compelling the applicants to appear and give sworn evidence before the commission and, further, by prohibiting the commissioner from receiving any evidence which involves the said charges.

It seems logical to me that I should first deal with the preliminary objection as to jurisdiction before considering the substantive merits of the application as the decision on this aspect may have a bearing on the application itself.

By way of background to the argument on jurisdiction it is perhaps useful to outline the sequence of events to this point in time.

As a result of certain police investigations carried on in 1975 involving the operations of Royal American Shows Inc., an American company that supplied certain entertainment facilities to summer fairs and exhibitions in the provinces of Alberta, Saskatchewan and Manitoba, Royal American Shows Inc., Sedlmayr, Gardiner and one Otto Weiss were jointly charged on 26th September 1975 with six counts of defrauding the Edmonton Exhibition Association of certain sums of money in 1972. These charges were subsequently stayed by the Attorney General of Alberta as against Royal American Shows Inc. but are still pending against the three individuals. In addition, Sedlmayr and Demay, along with one Andrews, were jointly charged on 31st July 1975 with giving benefits to a municipal official, namely, Albert J. Anderson, formerly General Manager of the Edmonton Exhibition Association, and these charges are still pending. Further, on 9th March 1976 Royal American Shows Inc., Sedlmayr and Gardiner were charged in Regina, Saskatchewan, with alleged offences under the Income Tax Act, R.S.C. 1952, c. 148 [am. 1970-71-72, c. 63], and these charges are still pending. On all of the above charges neither the pre-

liminary hearings nor the trials has been held to this date, but bail has been posted by the applicants on the charges against them personally.

On 22nd April 1977, by O.C. 396/77 as amended by O.C. 440/77, the Lieutenant-Governor in Council appointed Laycraft J., a member of the Trial Division of the Supreme Court of Alberta, to act as a commissioner under The Public Inquiries Act to inquire into the following matters:

"1. The affairs and activities in the Province of Alberta of Royal American Shows Inc., its agents, servants, employees and associates and in particular whether any person committed any unlawful act in connection with the affairs and activities of Royal American Shows Inc., its agents, servants, employees and associates.

"2. Whether any person committed any unlawful act in connection with any and all investigations or proceedings relating to the affairs and activities of Royal American Shows Inc., its agents, servants, employees and associates, and any and all matters arising out of or touching upon those investigations or proceedings.

"3. Such other matters as may be considered relevant by the Commissioner to ensure a full and fair inquiry to enable him to make his report, except that, if in the opinion of the Commissioner any matters arising in the inquiry will be dealt with in any other proceeding and the inquiry by the Commissioner would interfere with, prejudice or duplicate that proceeding, in his discretion he need not inquire into such matters but may, if he considers it advisable, report on any aspect of that proceeding."

The commissioner commenced his inquiry some time ago and has been hearing evidence from several witnesses dealing largely with para. 2 of the terms of reference of the inquiry.

On 3rd November 1977 the commissioner issued subpoenas to Sedlmayr and Demay instructing them to appear before the inquiry on 21st November 1977 and to bring with them any documents or writings in their possession or control concerning matters touching upon the inquiry. On 29th November 1977 the commissioner informed counsel for the applicants that he intended to inquire into the same matters as were the subject of the charges outstanding against the applicants.

With this background in mind, I now turn to examine the arguments for and against the question of this court's jurisdiction to grant the remedies sought by the applicants.

The earliest Canadian case of significance is *Re Godson and Toronto* (1889), 16 O.A.R. 452, affirmed 18 S.C.R. 36. In that case the council of the city of Toronto, acting under an Ontario provincial statute, appointed a judge of the County Court to conduct a public inquiry into allegations of malfeasance against an employee of the city. Godson, upon learning that evidence implicating him might be produced at the inquiry, sought to have specific complaints enumerated and, when the commissioner refused, he obtained a writ of prohibition from a High Court Judge prohibiting the commissioner from proceeding further with any inquiry involving him.

The granting of the prohibition order was appealed to the Ontario Court of Appeal on the ground that the Superior Court had no jurisdiction over the commissioner conducting the inquiry. In allowing the appeal, Hagarty C.J.O. says at p. 456:

"The exercise of a delegated authority to investigate matters which, in the opinion of the council, require investigation, as to their members, officers, or contractors, and to report to them 'the result of the enquiry and the evidence taken therein,' imposes no obligation of any kind recognizable by law on any individual whose conduct may be thus enquired into."

And further at p. 456:

"It seems to me, and I think I may add to all the members of this Court, that the writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a Court, or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual."

On appeal to the Supreme Court of Canada, Sir W. J. Ritchie C.J. had this to say at p. 40:

"The proceeding before the county court judge was, in my opinion, in no sense a judicial proceeding. The city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case. The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially; he was in no sense a court; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the

applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted, and the appeal should be dismissed with costs."

It is, however, noteworthy that in the Supreme Court of Canada decision in the *Godson* case Gwynne J. wrote an extensive dissenting opinion in which he expressed the view that courts of superior jurisdiction should maintain their supervisory functions over public inquiries to ensure that the rules of natural justice were followed, and that the report of the commissioner could and did indeed have very serious consequences affecting persons named even if the commissioner only reported to another body and was not himself empowered to inflict any direct punishment or sanction.

Following the *Godson* case the same area came under review by the courts of British Columbia in *Re Clement and Public Inquiries Act*, 27 B.C.R. 121, [1919] 3 W.W.R. 309 (sub nom. *Re Clement; Re Gartshore*), reversing [1919] 1 W.W.R. 372, 30 C.C.C. 309, 44 D.L.R. 623 (C.A.). In that case a justice of the Supreme Court of British Columbia was appointed a commissioner to conduct an inquiry by way of Royal Commission under The Public Inquiries Act, R.S.B.C. 1911, c. 110, involving alleged unlawful importation and sales of liquor into British Columbia. Hunter C.J.B.C. granted an order prohibiting the commissioner from continuing with the inquiry and this order was appealed to the British Columbia Court of Appeal. Martin J.A., speaking for the court, said at pp. 309-10 [W.W.R.]:

"In view of the decision of the Supreme Court of Canada in *Re Godson and Toronto* [supra], which is binding upon us and is, I think, in principle directly in point, I see no other course open to us than to sustain the objection taken by Mr. Craig, that this is a case wherein prohibition does not lie because the learned commissioner 'was in no way acting judicially; he was in no sense a Court,' as it is put in *Godson's* case, supra."

More recently the proposition that a public inquiry is not subject to prerogative writ control by a court of superior jurisdiction was examined, although collateral to the central issue, by the Supreme Court of Canada in the case of *Di Iorio v. Warden of Common Jail of Montreal* (1976), 35 C.R.N.S. 57, 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491, 8 N.R. 361, and Dickson J., in what must be considered as the majority judgment on this point, said at p. 76:

"The Inquiry does not act as a criminal court or exercise criminal jurisdiction. The conduct of the Inquiry is not part

of a criminal prosecution under the Criminal Code, R.S.C. 1970, c. C-34, nor is it an investigation into a particular crime or transaction which later might be the subject of a criminal charge. We are not here concerned with a criminal trial, structured as a dispute between two sides, the Crown and the accused. The function of the Inquiry is merely to investigate and report; no person is accused; those who appear do so as witnesses; there is no lis; there is no attempt to alter criminal procedure."

In further support of the proposition that a public inquiry is not subject to prerogative writ control because it is not an inferior tribunal with decision making powers, it is argued by analogy that there are many investigative bodies who only report or recommend and who have been declared by our courts not to be generally subject to the superior courts' supervisory control. In this regard I would refer to a commissioner conducting an investigation under the Combines Investigation Act, R.S.C. 1927, c. 26 (*O'Connor v. Waldron*, [1935] A.C. 76, [1935] 1 W.W.R. 1, 63 C.C.C. 1, [1935] 1 D.L.R. 260 (P.C.)); an investigation by the Board of Broadcast Governors (*R. v. Bd. of Broadcast Governors; Ex parte Swift Current Telecasting Co. Ltd.*, [1962] O.R. 657, 33 D.L.R. (2d) 449 (C.A.)); a conciliation board reporting under The Alberta Labour Act, R.S.A. 1955, c. 167 (*F. F. Ayriss & Co. v. Bd. of Indust. Rel.* (1960), 30 W.W.R. 634, 23 D.L.R. (2d) 584 (Alta.)); a preliminary inquiry committee and disciplinary matter involving the Saskatchewan College of Physicians and Surgeons (*Samuels v. Council of College of Physicians and Surgeons (Sask.)* (1966), 57 W.W.R. 385, 58 D.L.R. (2d) 622 (sub nom. *R. v. Sask. College of Physicians and Surgeons; Ex parte Samuels*) (Sask.)); an investigator under the Income Tax Act (*Guay v. Lafleur*, [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226).

Very recently the Alberta Supreme Court, Appellate Division, in a decision released on 16th December 1977, in the case of *Discipline Committee of Alta. Teachers' Assn. v. Youngberg*, [1978] 1 W.W.R. 538, had to consider whether a writ of prohibition granted by my brother Hope prohibiting the disciplinary committee of the Alberta Teachers' Association from embarking on a hearing was a valid order. Moir J.A. said at p. 548:

"There is a second reason for refusing the order in this case. The function of Dr. Hrynyk was to investigate, report and recommend. He was to gather the facts. He had no power to

hear and determine at all. He could proceed in any manner he saw fit because he was not carrying out a judicial or quasi-judicial function. The actions of Dr. Hrynyk were purely fact finding, reporting and recommending. Accordingly his actions are not controllable by prerogative writ. This is the effect of *Samuels v. Council of College of Physicians and Surgeons (Sask.)* [supra]; *Calgary Power Ltd. v. Copithorne,* [1959] S.C.R. 24, 16 D.L.R. (2d) 241; *Re Howarth and Nat. Parole Bd.*, [1976] 1 S.C.R. 453, 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 349."

If these cases were all of the authorities to be considered the answer would appear to be obvious, but the matter seems to be more complicated, as will be seen from some of the following decisions.

In 1924 the English Court of Appeal, in a leading decision, considered this general area in the case of *R. v. Elec. Commrs.; Ex parte London Elec. Joint Committee Co. (1920) Ltd.*, [1924] 1 K.B. 171. This was a case where the court prohibited the electricity commissioners from considering a proposal, despite the fact that any order or decision they made had to be approved by the minister and adopted by the Houses of Parliament. Atkin L.J. said at p. 205:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In 1937 the Judicial Committee of the Privy Council in *Estates and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*, [1937] A.C. 898, [1937] 3 All E.R. 324, dealt with the question of whether a writ of prohibition could be issued against an administrative body whose report had to be accepted by the Governor in Council before any final determination was made. Lord McNaughten said at p. 917:

"A proceeding is none the less a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval by some other authority . . . ."

In 1937 Harvey C.J.A. in *Kettenbach Farms Ltd. v. Henke*, [1937] 3 W.W.R. 703 at 704, 19 C.B.R. 92, [1938] 1 D.L.R. 44 (Alta. C.A.), said:

"In *Board v. Board*, [1919] A.C. 956, [1919] 2 W.W.R. 940, 48 D.L.R. 13, the Privy Council, dealing with an appeal from this Court, at p. 946, said:

" 'Nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.'

"A Superior Court exercising the powers of the former Court of King's Bench as this Court does has a supervisory authority over inferior Courts and over tribunals which are not judicial for the purpose of seeing that they do not go beyond their jurisdiction unless such authority is taken away by competent legal authority."

In 1965 the Supreme Court of Canada, in a case which I will refer to later, *Batary v. A.G. Sask.*, [1965] S.C.R. 465, 51 W.W.R. 449, 46 C.R. 34, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125, dealt with a situation where Batary was under charge for murder but before the criminal proceedings had gone to the preliminary hearing stage a coroner's inquest was commenced and Batary was summoned to appear before it as a witness. A writ of prohibition against Batary's having to appear was refused by the courts of Saskatchewan, but the Supreme Court of Canada found the relevant section of the Saskatchewan Coroners Act, R.S.S. 1953, c. 106, to be ultra vires of the province insofar as it affected a person under charge for the death being investigated, and refused to allow Batary to be compelled to testify before the inquest.

In Canada in 1971 the Supreme Court of Canada in the case of *Bell v. Ont. Human Rights Commn. (1971)*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, granted an order prohibiting a board of inquiry appointed under The Ontario Human Rights Code, 1961-62 (Ont.), c. 93, from carrying out its investigation even though the end result of its inquiry was only to make recommendations.

In 1975 my brother D. C. McDonald in the case of *Edwards v. Alta. Assn. of Architects*, [1975] 3 W.W.R. 38, granted an order of prohibition against the professional guidance committee of the Alberta Association of Architects preventing it from holding a formal hearing into a complaint against a member when the final decision rested with the council of the association.

In 1976 the Supreme Court of Canada in *Saulnier v. Que. Police Commn.*, [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545, granted a writ of evocation, which I understand to be similar to a writ of prohibition and certiorari in our jurisdiction, against the Quebec Police Commission preventing it from proceeding with a hearing or making recommendations to the Director of the Montreal Police Department which would affect the rank and status of a member of the force.

It can thus be readily observed from some of the situations and cases already referred to that it is not a simple matter to determine from the decided cases when a superior court has or has not supervisory jurisdiction and will or will not decide to exercise powers of supervision by the use of prerogative writs.

D. C. McDonald J. more or less summed up the situation up to 1975 when he stated the following at p. 53 of *Edwards*, supra:

"Reference may also be made to the four [sic] additional cases cited by De Smith (3rd ed., p. 343, n. 47) — two English, one Judicial Committee and two Australian — to the same effect where prohibition lay, and to the five cases cited by him — three English, one New Zealand and one Canadian — to the effect that certiorari also lies even though the decision of the body in question is not final (n. 48). It is only proper to note that De Smith also cites a number of English, Irish, Canadian and Australian decisions to the effect that prohibition and certiorari will not issue to bodies that are merely empowered to make recommendations or offer advice (2nd ed., pp. 392-93, n. 39-45; 3rd ed., pp. 342-43, n. 39-44.)

"De Smith's conclusions as to the state of the authorities are as follows (2nd ed., p. 394):

" 'It is difficult to construct a coherent body of legal principles out of these materials. It may perhaps be said that certiorari will rarely issue to quash reports or recommendations, but that the courts show a greater readiness to award prohibition (and even certiorari) against bodies which have no power to make binding determinations provided that the recommendation or decision of the body forms part of a statutory scheme in which explicit provision is made for its findings to acquire finality upon the taking of consequential action by another authority.'

"(This passage has been deleted from the third edition, apparently only in the interests of brevity.)"

On 9th December 1977 Hugessen A.C.J. of Quebec Superior Court had occasion to again review this whole area of our jurisprudence in *A.G. Can. v. Keable* (not yet reported), and I have found his reasons for judgment to be most helpful. He also reviewed many of the cases hereinabove referred to on the question of jurisdiction and, as I have understood his decision, based on an unofficial English translation of the original, which was delivered in the French language, he came to the conclusion that a hearing in the nature of a public inquiry was generally not subject to supervision and control by a provincial court of superior jurisdiction except in two areas. These he identified as follows:

(a) When the report of the commission of inquiry is susceptible of affecting the rights of a person; and,

(b) When the commission in the exercise of its ancillary power wrongfully impairs the liberty or goods of a person.

As an example of the first class of exception to the general rule, Hugessen A.C.J. cites the *Bell* and *Saulnier* decisions, supra, and I would add the *Edwards* case, supra, from this province. The key consideration in these cases seems to be whether the report of the investigative tribunal, although subject to the approval of a higher authority, does, by statute, form the basis of the decision to be made by the higher authority. He then goes on to observe that in the case of an inquiry under The Public Inquiry Commission Act, R.S.Q. 1964, c. 11, it is clear that the executive power is never obligated to follow the recommendations of a commission of inquiry and no sanction is foreseen where the Lieutenant-Governor in Council neglects or refuses to act upon any or all of the recommendations. Section 2 of The Public Inquiries Act of Alberta is, if anything, less compelling upon the Lieutenant-Governor in Council to act upon a commission report than its equivalent, s. 6 of the Quebec Act.

I have, therefore, come to the conclusion that the report which will eventually be submitted by the commissioner in this inquiry falls clearly within the category of decisions such as the *Godson* case, supra, and is not one of those covered by the first exception to the general rule identified by Hugessen A.C.J.

With reference to the second exception, Hugessen A.C.J. observes that commissions of inquiry are habitually granted the right to subpoena witnesses and to force the production of relevant documents and exhibits. He goes on to point out that, in cases of refusal, the recalcitrant witness can be found in contempt and fines or incarceration can be imposed so that, while the inquiry itself is not a litigation and its report is not a judgment, an accusation of contempt is very close to a penal prosecution and a finding of contempt directly affects the rights of the offender. In those situations courts of superior jurisdiction have not hesitated to intervene if convinced that a commission of inquiry has exceeded or abused its jurisdiction in the exercise of its authority in these areas, which he describes

as ancillary powers. As examples of the court exercising supervision in this area, the recent unreported decisions of the Supreme Court of Canada in *Cotroni v. Que. Police Commn.*, 30th November 1977, and the decision of Deschenes C.J. of the Quebec Superior Court in *A.G. Can. v. Human Rights Commn.*, 22nd March 1977, were cited in the decision. However, Hugessen A.C.J. goes on to point out that until the commissioner actually attempts to impose sanctions in the exercise of his ancillary powers it is not possible for a superior court to rule on whether the particular exercise is outside of his ancillary powers. I have, therefore, concluded that at this particular point in the commission's proceedings the second exception identified by Hugessen A.C.J. has not yet arisen as the commissioner has not cited any applicants in contempt or attempted to impose any penalties and, in view of the fact that they are American residents and located outside of the province of Alberta, they may never be cited or penalized.

Accordingly, there is now nothing before this court under this exception to the general rule upon which to take any supervisory position.

With great respect to Hugessen A.C.J., I believe there are two other areas in which I would think a superior court could and would exercise control over a commission of inquiry. Perhaps his not mentioning them is because they are so fundamental to our concept of law and justice that everyone would assume their existence. One is that the area of investigation given to the commission of inquiry must be a matter within the jurisdiction of the provincial legislature. In this particular inquiry I am of the opinion that the *Di Iorio* case, supra, has settled that areas involving the administration of criminal justice within a province are matters within the jurisdiction of a provincial legislature and, as the specific areas covered by the terms of reference in this inquiry relate to the administration of justice within the province of Alberta, I have concluded that the terms of reference of this commission do not fall within this particular exception.

The other exception would be if the commissioner, in the course of conducting his inquiry, sought to inquire into matters outside of his terms of reference. While I am aware that there are all sorts of grey areas in trying to be precise as to what is or is not relevant, I am completely satisfied that the attempt by the commissioner to obtain evidence pertaining to the operations of Royal American Shows in the province of Alberta

from these applicants clearly falls within the four corners of his terms of reference and so this exception does not apply to this application.

In considering an application of this sort I believe it is important not only to review the decided cases on the subject but also to keep in mind the essential nature and thrust of a public inquiry. In this respect I am guided and assisted by the observations of Hugessen A.C.J. when he points out that the goal of a public inquiry is to inform the government which created it as to the truth of the matter and also to inform the public by holding its hearings largely in public and by making available to the public the report of the commission. In addition to this goal, I think it is important to recognize that in Canada most commissions of inquiry are presided over by a member of the judiciary, either sitting alone or with other judges and laymen. The comments of Morrow J.A. of the Alberta Appellate Division in *Orysiuk v. R.*, [1977] 6 W.W.R. 410, are pertinent when he says at pp. 415-16:

"The second general area in which the inquiry is used most frequently is what I choose to describe as the type where the fears and suspicions of the public that there has been corruption or dishonesty, usually by persons in public office, are, in the public interest, to be allayed by a full disclosure. While there has to be a highly political interest here as well, the overwhelming consideration of the government or municipal body setting up such an inquiry should of necessity be to seek to appoint a commissioner or commissioners of unimpeachable character, known to be as neutral as any person can be. In the result, as was the present case, a member of the judiciary is most often called upon to serve. This is not because judges are supermen or women but because, by the very nature of their appointment, they have publicly foresworn an interest in taking sides. And there is a further reason for such choice. By his training the judge is experienced in presiding over hearings and in making rulings as to what is and is not relevant to the issue. It is true that there is more latitude allowed in taking testimony in inquiries, but even here some control is desirable unless the matter is to be allowed to get out of control. A judge, I think, can be expected to be able to exercise this overriding control better, as a rule."

In summary, I find that the public inquiry presided over by Laycraft J. under O.C. 396/77 is one of investigation and report only. I further find that up to this point in the proceed-

ings the commissioner has not inquired into matters outside of his terms of reference nor has he exceeded or abused any of his ancillary powers. Insofar as the constitutionality of the inquiry is concerned, neither The Public Inquiries Act nor the order in council purports to create a criminal offence or to set up a procedure relating to the disposition of a provincial offence or a criminal offence. In this inquiry there are no charges, no parties and no lis. The *Di Iorio* case and others give the provinces the authority under s. 92(14) to conduct inquiries into the areas covered by the terms of reference of this inquiry under the broad umbrella of the administration of justice and seem to negate the argument that they are infringing upon the rights of the federal jurisdiction under s. 91(27).

Having come to these conclusions on both the law and the present status of the inquiry, I am of the view that there is nothing currently before this court to raise any of the exceptions to the general rule and that I should not interfere with the expeditious conduct of the inquiry by the commissioner by way of a writ of prohibition or by way of a declaratory judgment.

As previously stated, counsel for the commissioner, in the course of his argument, invited the court, even if it was found that this court did not have supervisory jurisdiction over the public inquiry, at this time, to express an opinion on the substantive question of whether the applicants should be forced to testify before the inquiry on matters involving the criminal charges while they are still outstanding. In most circumstances, I would be unwilling to follow this course, for obvious reasons. However, in this instance, because of the fact that the commissioner has scheduled hearings in the immediate future and has subpoenaed other witnesses, plus the possibility that another court may decide that I was wrong in my conclusions that I have no jurisdiction, at this time, to supervise the conduct of this inquiry, I am of the view that it might be helpful and useful to express an opinion on the merit of the application to prohibit the applicants from being compelled to give evidence before the inquiry.

The history of the original common law rule against self-incrimination was fully reviewed by Cartwright J. (as he then was) in *Batary v. A.G. Sask.*, supra, when he pointed out that prior to 1870 a person accused of a crime, and his spouse, were incompetent to testify at a trial of the offence either for or against the accused. Later Acts changed this position and made

the accused a competent witness at a trial, but not a compellable witness. He then went on to consider the effect of s. 5 of the Canada Evidence Act, R.S.C. 1952, c. 307, and came to the conclusion that if an accused person would not have been a compellable witness at an inquest prior to 1870 the wording of s. 5 was insufficient to change the common law in Canada and compel the person to give testimony at a coroner's inquest when under charge for the event being investigated. By analogy, it is the *Batary* decision that is principally relied upon by counsel for the applicants to support his contention in this application. He submits that in a coroner's inquest there are no charges, no accused, and no lis and that no penalty can be inflicted upon anyone arising directly from the decision of the inquest, which is the same situation that applies to a public inquiry. On the face of it this argument seems to have strong merit and, at least for the purposes of the interim application, I felt was worthy of serious consideration. Having now had the opportunity of full argument and consideration, I have come to the conclusion that the *Batary* case does not govern the situation presented by the case at bar. In support of this conclusion I would refer to several decisions which have come from various courts both before and since the *Batary* decision.

In point of time, the first case to note is *R. v. Barnes* (1921), 49 O.L.R. 374, 36 C.C.C. 40, 61 D.L.R. 623, where the Ontario Court of Appeal held that Barnes, who had been charged with manslaughter in the death of one Rosseter, was a compellable witness at the coroner's inquest inquiring into the death of Rosseter.

The next case to note is one referred to by Cartwright J. in the *Batary* case, namely, *Re Regan*, 13 M.P.R. 584, 71 C.C.C. 221, [1939] 2 D.L.R. 135 (N.S. C.A.), where he says at p. 473 of the *Batary* decision:

"It seems equally clear that where two or more persons are, either jointly or separately, indicted for one offence and are tried separately, one of those indicted who is not on trial is a compellable witness, for either the prosecution or the defence, at the trial of any of his co-accused. On this point it is sufficient to refer to *Re Regan* [supra] where the history and reasons of the rule are fully covered in the arguments of counsel and in the judgments."

From the *Regan* case itself, Archibald J. of the Nova Scotia Court of Appeal says at p. 144:

"If they (co-conspirators) are proceeded against separately, neither of them is a party to the proceeding instituted against the other. Regan is not an *accused person* in the proceedings against Tanner, and the provisions of the common law and statute rendering an accused person on his trial not compellable as a witness for the prosecution against himself are therefore not applicable to him. Insofar as any prosecution against Regan himself is concerned, he can avail himself of the Provisions of s. 5 of the *Canada Evidence Act*, R.S.C. 1927, c. 59, and thus any evidence given by him on the proceedings against Tanner cannot be used against him in the proceedings against himself."

In 1946 Rinfret C.J., speaking for the Supreme Court of Canada in *Re Gerson; Re Nightingale*, [1946] S.C.R. 538, affirmed as to Gerson [1946] S.C.R. 547, 3 C.R. 111, 87 C.C.C. 143, where the parties had been jailed for contempt for refusing to answer questions, said at p. 544:

". . . the contempt itself was the violation of section 5 of the *Canada Evidence Act*, which clearly states that the so-called explanation, put forward by the petitioners of their refusal to be sworn at all, constituted no lawful excuse."

In 1969 the British Columbia Court of Appeal in *Re Wilson; Whitelaw v. McDonald*, 66 W.W.R. 522, [1969] 3 C.C.C. 4, 2 D.L.R. (3d) 298 (sub nom. *R. v. McDonald; Ex parte Whitelaw*), reversing 63 W.W.R. 108, [1968] 4 C.C.C. 49, 67 D.L.R. (2d) 541 (sub nom. *R. v. Coroner of Langley*), held that a person is a compellable witness at a coroner's inquest even though there is a strong likelihood that he will be charged in the future with a criminal offence arising out of the death being investigated. Leave to appeal this decision to the Supreme Court of Canada was refused.

A similar conclusion was reached by Sirois J. of the Saskatchewan Queen's Bench in 1965 in the case of *Re Wyshynski*, [1966] 2 C.C.C. 199, where he also distinguished the *Batary* case on the basis that the witness had not yet been charged.

In 1970, the Quebec Court of Appeal in *R. v. Que. Mun. Commn.; Ex parte Longpre*, [1970] 4 C.C.C. 133, 11 D.L.R. (3d) 491, considered the position of a person charged with a criminal offence and who had already been committed for trial following a preliminary hearing being compelled to testify before a public inquiry into the same area as the criminal charge. The court declined to follow the *Batary* decision. Brossard J.A. said at pp. 137-38:

"Accordingly, the only real problem is this: can a person against whom criminal proceedings are pending be compelled to testify at any trial, inquiry, or proceeding other than one whose outcome may involve his conviction, where such testimony concerns facts relating to the criminal offences with which he has been charged, and where the answers which he might give to the questions which might be put to him for these purposes could, in his opinion, constitute a confession of his guilt with respect to the offences with which he has been charged?

"The answer to this question must be in the affirmative, if ss. (2) of s. 5 of the *Canada Evidence Act*, which is, as we have seen, in part a criminal matter (s. 2), confines to the protection assured by s. 5(2) the protection to which an accused is entitled where he has been subpoenaed as a witness in a proceeding, the outcome of which cannot in any way be a conviction against him . . .

"But does the *Batary* case, as the appellant suggests, go so far as to permit us to conclude that s. 4 and the two subsections of s. 5 of the *Evidence Act*, when read together, preclude the calling, as a witness, of a person already accused of an offence, to testify with respect to this offence, in a proceeding, the outcome of which cannot involve his own conviction?

"With respect to those who hold to the contrary, I cannot accept this proposition."

And at p. 139:

"In the case at bar, the circumstances differ substantially from those in the *Batary* case. We are not dealing with the Coroner's inquest, but with an inquiry in an administrative area, instituted pursuant to the provisions of a provincial statute; at the time of the inquiry before the provincial commission, the preliminary inquiry in the trial before the Court of Queen's Bench had been completed, whereas in the *Batary* case, it had been suspended; the appellant's testimony for the provincial commission of inquiry could not affect the outcome of the preliminary inquiry; hence, the protection accorded by s. 5 of the *Evidence Act* would operate effectively in his favour at the time of his trial, whether he did or did not testify."

It is to be noted that this decision was based, in part, on the fact that the preliminary hearing had already been held, which differs from the case at bar. Leave to appeal this decision to the Supreme Court of Canada was refused.

In 1974 in *Re Inquiry Re Dept. of Manpower and Immigration in Montreal* (1974), 22 C.C.C. (2d) 176, L'Heureux-Dubé J., a

justice of Quebec Superior Court, sitting as a commissioner in a public inquiry involving alleged wrongdoing in the Department of Manpower and Immigration, faced a situation where a person was charged with offering a bribe to a government official, had a preliminary inquiry and was committed for trial, but before the trial had been held was subpoenaed to appear before the public inquiry. On the question of compellability she said at pp. 178-79:

"10. The basic rule in Canada is that every person is competent as a witness: 'compellability is a consequence of competency'. (McWilliams, *Canadian Criminal Evidence* (1974), p. 548). There are four exceptions to this rule:

"(a) inability to understand the nature or accept the obligation of an oath (i.e., very young child, insanity, mental illness);

"(b) the spouse of the accused is not a competent nor is he a compellable witness for the prosecution, except as provided for in s. 4(2) and (4) of the *Canada Evidence Act*;

"(c) a co-accused jointly charged and tried is not a competent nor is he a compellable witness for the prosecution against his co-accused (*Winsor v. R.* (1866), L.R. 1 Q.B. 390) although an accomplice is competent and compellable in the separate trial of his accomplice: *Re Regan* [supra];

"(d) an accused, although competent, is not a compellable witness for the prosecution at his own trial: s. 4(1), *Canada Evidence Act*.

"We are not dealing here with any of these exceptions. The first three exceptions are obviously inapplicable. As for the fourth, this Commission is not a trial and that [sic] there is no accused. Accordingly, witness Stephen Byer is a compellable witness before this Commission.

"In arguing that he is not a competent witness because he is not a compellable witness at his trial, Mr. Byer, the witness, invokes a principle that does not exist in Canadian Law."

And at p. 183:

"14. Dealing more specifically with the issue of privilege or right against self-incrimination, Mr. Ratushny concludes, after putting the question 'Is there a right against self-incrimination in Canada?', that there is no general principle or right against self-incrimination in Canada, but rather limited decisions on particular subjects which have achieved a specific result in particular cases. McWilliams writes (p. 556):

" 'In Canada, the common law privilege of a witness to refuse to answer a question where the answer may tend to criminate him has been abolished by s. 5 of the Canada Evidence Act, and in its place there has been substituted a statutory protection so that, though the witness is compelled to answer the question, if he claims the protection under the Act the answer cannot be used against him in any subsequent criminal proceeding.'

"Consequently, a witness can no longer refuse to answer a question on the ground of self-incrimination: *R. v. Tass*, 54 Man. R. 1, [1946] 2 W.W.R. 97, 1 C.R. 378, 86 C.C.C. 97, [1946] 3 D.L.R. 804, affirmed [1947] S.C.R. 103, 2 C.R. 503, 87 C.C.C. 97, [1947] 1 D.L.R. 497. He does not incriminate himself if he is testifying under protection of the Act, since his answer cannot be used against him."

In 1974 Zuber J. then of the Ontario Supreme Court, in the case of *Stickney v. Trusz* (1973), 2 O.R. (2d) 469, 25 C.R.N.S. 257, 16 C.C.C. (2d) 25, 45 D.L.R. (3d) 275, affirmed 3 O.R. (2d) 538, 28 C.R.N.S. 125, 17 C.C.C. (2d) 478, 46 D.L.R. (3d) 80, which was affirmed 3 O.R. (2d) at 539, 28 C.R.N.S. at 126, 17 C.C.C. (2d) at 479, 46 D.L.R. (3d) at 81 (C.A.), examined a situation which arose when a person was being sued in a civil action to recover moneys alleged to have been taken by fraud, and was under criminal charges for the same set of facts. The accused sought a stay of proceedings of the civil action until the criminal charges had been determined. One of the arguments advanced was that the accused should not be subjected to pleadings and an examination for discovery prior to the hearings on the criminal charges as this might prejudice the defence in the criminal proceedings. Zuber J. says at p. 260:

"Implicit in Mr. Greenspan's affidavit is the theory that the defendant Trusz enjoys a general right against self-incrimination which would be violated by her being obliged to disclose the nature of her defence in a civil pleading or by having to produce documents or by being subject to oral examination-for-discovery (and he might have added, 'or by being a compellable witness in the civil trial'). I am not persuaded that such a general right exists in this country. There are a number of specific rules whose purpose is to protect an accused from self-incrimination (the rule in s. 5(2) of the Canada Evidence Act, R.S.C. 1970, c. E-10, the voluntariness rule in confessions, non-compellability of an accused in a criminal trial) but a broad principle has not been accepted by our courts. In reaching this conclusion I rely on, and am indebted to a scholarly review of the subject by Professor Ratushny:

'Is there a right against self-incrimination in Canada?', McGill Law Journal, 1973, vol. 19, p. 1. There is nothing in any of the specific rules which protects the accused against the obligation to file a pleading or produce documents in a civil action. The fact that she may be obliged to testify on discovery or at a civil trial does not put the defendant in a position where she will be obliged to make a statement which can be used against her at a criminal trial. She is entitled to the benefit of s. 5(2) of the Canada Evidence Act. Beyond these general propositions the defendant has shown no specific prejudice."

This decision was upheld by the Ontario Court of Appeal, and leave to appeal to the Supreme Court of Canada was refused without written reasons.

In 1976 the Supreme Court of Canada had to consider the question from another point of view in *Faber v. R.*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 6 N.R. 1, and de Grandpré J., speaking for the majority, said in respect of the *Batary* decision the following at pp. 433-34:

"In the case at bar appellant, at the time he was required to testify, had not been charged with any offence as a result of the death of Csoman, and as a matter of fact no charge has been brought against him to date. In my view, the effect of this fundamental difference is that *Batary* has no application to the case at bar."

In 1976 the Supreme Court of Alberta, Appellate Division, considered the same matters in the case of *R. v. Johansen*, [1976] 2 W.W.R. 113, affirming [1975] 2 W.W.R. 44, 21 C.C.C. (2d) 310, 54 D.L.R. (3d) 706. This was a case where my brother Cavanagh refused to prohibit the coroner from proceeding with an inquest into the death of an infant on the grounds that the mother of the deceased child and one Johansen, who had been subpoenaed as a witness, were likely to be charged with a criminal offence arising out of the death. The Appellate Division dismissed the appeal, and McGillivray C.J.A. said at pp. 115-16:

"A decision of the Supreme Court of Canada in *Batary v. A.G. Sask.* is very much in point. In this case Batary was charged with murder. An inquest was called, and Batary was, under subpoena, ordered to give evidence, pursuant to provisions of The Coroners Act, R.S.S. 1953, c. 106 [now R.S.S. 1965, c. 113]. In my view, *Batary* decided these matters:

"(1) That at common law a person charged with an offence could not be forced to incriminate himself;

"(2) That as a change of this criminal law — common law rule would be a matter of criminal law procedure, a change could only be made by the Parliament of Canada, and that the provincial legislation (The Coroners Act) requiring a person charged with a criminal offence to testify before a coroner's court is ultra vires the province;

"(3) That while, by the Canada Evidence Act, R.S.C. 1970, c. E-10, the Parliament of Canada could have made a person who is suspected of causing death, or who has been charged, or who is likely to be charged with an offence relating to the death, a compellable witness against himself, the wording of s. 5 of the Canada Evidence Act was not such as to change the common law rule that a person charged with an offence could not be required to incriminate himself.

"It is urged that *Batary* should not be limited in its reasoning to the situation where a person has actually been charged with an offence. It is urged that a principle of no self-incrimination should apply where a person is likely to be charged with an offence.

"Ignoring for the moment the decision of the Supreme Court of Canada in *Faber v. R.* [supra], this argument has, at first blush, some appeal; but on consideration, it seems to me that, carried to a logical conclusion, this sort of reasoning would completely nullify s. 5(1) of the Canada Evidence Act. That section reads as follows:

" '5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.'

"If any witness could take the position that he or she was suspected of a crime, or likely to be charged, then if *Batary* were extended beyond the facts of that case, that is, where a person was actually charged, the result would be that no witness could give evidence where he might admit to the commission of an offence in so doing. *Batary* specifically accepts *Re Regan*, in which it was held that where two or more persons are jointly or separately indicted for one offence, and are tried separately, one of those indicted who is not on trial is a compellable witness for either the prosecution or the

defence at the trial of his co-accused; and I think *Batary* must be regarded as a decision limited specifically to the situation where an accused is charged."

This then brings us to the *Di Iorio* decision, supra, where Dickson J., speaking for the majority, says that there were only two questions before the court, the second of which he sets out at p. 82 as follows:

"(2) Are the constitutional rights against self-incrimination of any witness appearing before the inquiry infringed or likely to be infringed."

At p. 91 he says:

"By s. 5(1) of the Canada Evidence Act, the common law right of a witness to refuse to answer a question on the ground that his answer might incriminate him was abolished. Section 5(2) was enacted to protect the witness against the use of his statements in subsequent legal proceedings."

At p. 92 he says:

"The provisions in s. 5 prohibit the use of incriminating statements by a witness in proceedings subsequent to that in which the evidence is given. Section (sic) 2 has the effect of preventing the use of the statements in all criminal proceedings and in all civil proceedings and other matters subject to the legislative authority of the federal Parliament. The protections provided by the Act do not affect the provincial inquiry's operation, but subsequent proceedings."

At p. 93 he says:

"A person appearing before a provincial inquiry and testifying under oath or on affirmation is a witness, for he or she is presenting evidence to the inquiry. Therefore, I am of the view that a person subpoenaed by the Commission can claim the protection of s. 5(2)."

Then, further, at p. 93:

"Whether or not one agrees with a result which may force a person to assist in an investigation of his criminal activity, the provisions of s. 5 of the Canada Evidence Act and both federal and provincial Inquiries Acts compel such a result. Quebec's Crime Inquiry introduces no new and insidious form of investigation into our judicial system and there is no evidence before the Court that it is a colourable attempt to evade the procedural provisions of the Criminal Code."

As a result of the *Di Iorio* decision, I suspect that legal writers will have the opportunity of presenting various points of view as to whether this case now specifically overrules the *Batary* decision. No doubt there will be conflicting opinions which will not finally be settled until the Supreme Court of Canada gets the opportunity to re-examine the *Batary* decision on a set of facts similar to or almost identical to the *Batary* situation. In the meantime the lower courts will have to struggle with what may appear on the face to be a series of decisions that conflict with *Batary*.

In attempting to sort my way through the various decisions, I have been greatly assisted by the thorough analysis of the whole area of self-incrimination originally covered by Professor E. Ratushny in his article "Is there a Right against Self-Incrimination in Canada?," portions of which have been quoted with approval in several of the cases to which I have earlier referred. In November 1977 Professor Ratushny prepared an update on his earlier article, which he entitled "Self-Incrimination: Nailing the Coffin Shut" (not yet published), and I have had the opportunity of reviewing his comments on the position of the *Batary* case in the light of recent decisions. The following are some of his observations and conclusions:

"The *Batary* case, therefore, provided the basis for a broad and dynamic privilege against self-incrimination. Rules of procedure and evidence could be interpreted in a manner consistent with an underlying policy of not compelling a person to give testimony against himself. However, the Supreme Court of Canada has clearly chosen not to follow this earlier path it had opened for itself in *Batary* . . .

"It seems clear, therefore, that the *Batary* case has been confined to its narrow factual situation and does not reflect any broader privilege against self-incrimination. Moreover, in practice, there would be nothing to prevent the Crown from simply postponing the laying of charges until the inquest has been completed . . .

"The *Batary* decision can be interpreted as having turned on the historical fact that at Common Law, a person charged with an offence related to a death could not be compelled to testify at an inquest inquiring into the circumstances of that death. If the Supreme Court of Canada wished to restrict the application of *Batary* even further, it could do so on the basis that the historical situation related only to coroner's inquests and should not be extended to other inquiries . . .

"Canadian judicial decisions over the last five years have tended to define more precisely and to narrow the scope of the concept of self-incrimination in Canada. In *Marcoux* [*R. v. Marcoux*, [1976] 1 S.C.R. 763, 29 C.R.N.S. 211, 24 C.C.C. (2d) 1, 60 D.L.R. (3d) 119], the Supreme Court of Canada pointed out that the concept, 'often incorrectly advanced in favour of a much broader proposition' [p. 122], meant no more than the non-compellability of the accused and the section 5 (2) protection of a witness. The Bill of Rights provision has been interpreted as being coterminous with the situation established by the previous case law. The *Batary* case has been restricted to its narrow factual situation. Frequent attempts at resuscitation in cases like *Trusz, Sweeney* [*R. v. Sweeney* (No. 2) (1977), 40 C.R.N.S. 37, 76 D.L.R. (3d) 211 (Ont. C.A.)] and *Di Iorio* have met with the same negative results. Moreover there have been specific judicial statements adopting the view that no general principle exists.

"In sum, it now appears that, in Canadian Criminal Law, the emotive phrases 'nemo tenetur seipsum prodere' and 'right against self-incrimination' can be laid to rest once and for all."

I can add only that my careful reading of the aforementioned cases has led me to the same conclusion as that of Professor Ratushny and, accordingly, if I had to decide the question of whether the applicants, while still under charge and before any preliminary hearing or trial was held, were compellable witnesses in the public inquiry being presided over by Laycraft J., my answer would be in the affirmative, subject, of course, to the protection afforded to them by the Canada Evidence Act. Similarly, I would hold that any persons not under charge who are subpoenaed to appear before the commission to be asked to testify on any matters pertaining to the terms of reference of the inquiry are compellable witnesses, subject, again, to the protection afforded them by statute.

No representations were made to me by any counsel appearing as to the matter of costs on this application. My inclination, in view of the nature of the application, would not be to award costs to any of the parties represented, but I would be prepared to meet with counsel if any of them feel otherwise.

SASKATCHEWAN QUEEN'S BENCH

Johnson C.J.Q.B.

Legare v. Clark

Divorce and other matrimonial causes — Criminal conversation — Breakdown of marriage as result — Amount of damages.

Two thousand dollars compensatory damages were awarded a husband in an action for criminal conversation where, as a result of the defendant's adultery with the plaintiff's wife, the plaintiff's already unhappy marriage broke down and the plaintiff suffered injury to his health.

[Note up with 9 C.E.D. (West. 2nd) *Divorce and Other Matrimonial Causes*, s. 57.]

N. B. Yeo, for plaintiff.

J. D. Cooper, for defendant.

(Moose Jaw Q.B. No. 72)

11th January 1978. JOHNSON C.J.Q.B.:— This is an action for criminal conversation and in all likelihood it will be the last such action to be dealt with in Saskatchewan, since a bill is presently before the legislature which would have the effect of abolishing this cause of action. However, this is not yet the law and I must deal with the case as the law presently stands.

There is no doubt that the defendant committed adultery with the plaintiff's wife after being introduced to her by the husband in the course of a normal business transaction. The plaintiff's wife was the mother of four children; as a result of the defendant's acts of intercourse with her, the plaintiff's home was broken up and his wife has custody of the four children. The evidence satisfies me that the marriage between the plaintiff and his wife was not a very happy one, especially in recent years, and there was every likelihood that even without the intervention of the defendant the marriage would have ended in a break-up.

The defendant is somewhat older than the plaintiff and his wife, and it is my opinion that the defendant became involved with the plaintiff's wife because they met when the defendant was at a stage in his life when he was naturally disposed to be a little foolish and tempted by a younger woman. Nevertheless, the defendant has caused the plaintiff some injury; but this is not a case where punitive damages can be awarded and I am limited to awarding compensatory damages. Neither of

RE ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

Ontario Supreme Court [Divisional Court],
Callon, J. Holland and Linden JJ.

Heard—January 25 and 26, 1983.
Judgment—February 14, 1983.

Administrative law — Investigations and inquiries — Standing at inquiry — Right of interested parties to participate in inquiry — Determination of substantial and direct interest — Public Inquiries Act, S.O. 1971, c. 49, s. 5(1).

An application was brought to determine the right of individuals to participate fully by presenting evidence, calling witnesses, and cross-examining witnesses before a Commission of Inquiry under the Public Inquiries Act and in particular, to determine whether the Grand Council of Treaty No. 9 Bands and Chamber of Commerce of Red Lake have the right to participate fully in the Royal Commission on the Northern Environment.

Held—The Grand Council as official spokesman for 400 bands of Ojibway and Cree people of Northern Ontario has a substantial and direct interest in the work of the commission within the meaning of s. 5(1) of the Public Inquiries Act, S.O. 1971, c. 49, as the Grand Council represents the majority of the population in the region, a different culture and lifestyle and a totally different attitude towards the use of land and resources.

Generally, the legislation does not grant full participation rights to every single individual who happens to be interested in an inquiry. In making a determination as to who has a substantial and direct interest, the subject-matter of the inquiry is significant together with the potential importance of the findings and recommendations to the individual involved, particularly where an individual may have property interests affected by the findings of the inquiry.

As to the standing of other individuals and the extent of participation of those individuals appearing before the commission, the commissioner has jurisdiction to make an initial determination of the standing to be accorded to other individuals, and has discretion in relation to the day-to-day operation of the inquiry regarding examination of witnesses, the witnesses to be called and the issues to be investigated and has complete discretion to limit abusive examination by parties given standing before the commission.

Cases considered

Borowski v. Min. of Justice, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 12 Sask. R. 420, 24 C.P.C. 62, 24 C.R. (3d) 352, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 39 N.R. 331 — referred to.

Bortolotti and Min. of Housing, Re (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A.) — referred to.

Brown and Patterson, Re (1974), 6 O.R. (2d) 441, 21 C.C.C. (2d) 373, 53 D.L.R. (3d) 64 (Div. Ct.) — referred to.

Children's Aid. Soc. of County of York, Re, [1934] O.W.N. 418 (C.A.) — referred to.

Inmates Ctee. of Prison for Women and Meyer, Re (1980), 55 C.C.C. (2d) 308 (Ont. H.C.) — followed.

N.S. Bd. of Censors v. McNeil, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632, 5 N.R. 43 — referred to.

Rauca, Re, Ontario Court of Appeal, January 18, 1983 (unreported) — referred to.

Royal Comm. into Metro. Toronto Police Practices and Ashton, Re (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 (Div. Ct.) — referred to.

Royal Comm. on Conduct of Waste Mgmt., Re (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.) — referred to.

Shulman, Re, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.) — referred to.

Thorson v. A.G. Can. (No. 2), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 — referred to.

Statutes considered

Coroners Act, S.O. 1972, c. 98 [now R.S.O. 1980, c. 93].
Public Inquiries Act, S.O. 1971, c. 49, s. 5(1).

Canadian Abridgment (2nd) Classification

Administrative Law, VI.

APPLICATION to determine rights of participation under s 5(1) of the Public Inquiries Act.

G. Watkins and *R. Cotton*, for the Commission.
S.T. Goudge and *C. Beamish*, for Grand Council Treaty No. 9
S.W. Mercer, for Attorney General of Ontario.

February 14, 1983. The judgment of the Court was delivered by

LINDEN J. (orally):—The issue raised by this application is the right of individuals to participate fully, that is, to present evidence, call witnesses and to cross-examine witnesses, before a commission of inquiry under the Public Inquiries Act, S.O. 1971, c 49 and, in particular, before the Royal Commission on the Northern Environment which was appointed pursuant to Orders-in Council 1900/77, 2316/78 and 3679/81.

There were two questions put to us by the commissioner, Mr J. E. J. Fahlgren, who replaced the Honourable Mr. Justice Hartt in 1978. Those questions are as follows:

> "1. Did I exceed my authority by denying the application of the Grand Council which, in effect, requested the opportunity to cross-examine persons making submissions to me during my inquiry on evidence relevant to its interests?

2. Did I exceed my authority by, in effect, denying the application of the Red Lake Chamber of Commerce for an opportunity to cross-examine a person scheduled to make a submission to me during my inquiry on evidence relevant to its interest?"

It is agreed by counsel that implicit in the wording of these questions is whether s. 5(1) of the Public Inquiries Act allows the two applicants to participate fully in the proceedings of the inquiry. Neither counsel wishes to raise technicalities as to the exact wording of the questions but wish us to confront the issue squarely, which we have.

The section of the Public Inquiries Act which must be interpreted by this Court reads as follows:

"5. (1) A commission shall accord to any person who satisfies it that he has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his counsel on evidence relevant to his interest."

It is also common ground that the Divisional Court serves a "supervisory" function in cases like these but that, if there is an error made by the commissioner in the interpretation of s. 5(1), then that error amounts to a jurisdictional error: see *Re Bortolotti and Min. of Housing* (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A.); and *Re Royal Comm. into Metro. Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 (Div. Ct.).

Our Courts have rightly sought, in supervising public inquiries in this province over the years, to foster full and open discussion: see *Re Children's Aid Soc. of County of York*, [1934] O.W.N. 418 (C.A.). In recent years this policy has led to a marked liberalization of the rules of standing in the Courts of this country: see, for example, *Thorson v. A.G. of Can. (No. 2)*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632; 5 N.R. 43, *Borowski v. Min. of Justice*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 12 Sask. R. 420, 24 C.P.C. 62, 24 C.R. (3d) 352, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 39 N.R. 331, and *Re Rauca*, Ont. C.A., January 18, 1983 (unreported). The decision dealing with the Coroners Act, S.O. 1972, c. 98, investigation is

consistent with this notion: *Brown and Patterson, Re* (1974), 60 O.R. (2d) 441, 21 C.C.C. (2d) 373, 53 D.L.R. (3d) 64 (Div. Ct.).

The first question before us then is simply — Does the Grand Council of the Treaty 9 Bands have a "substantial and direct interest" in the subject-matter of this inquiry? It is clear that this legislation does not grant full participation rights to every single individual in the province who happens to be interested in an inquiry. The persons entitled to full participation are only those who have a "substantial and direct interest", not just anyone who has a mere academic interest which is neither substantial nor direct. It is not enough merely to be as interested as any other member of the public in this inquiry: see *Re Inmates Ctee. of Prison for Women and Meyer* (1980), 55 C.C.C. (2d) 308 (Ont. H.C.).

There is very little guidance in the authorities as to the factors to be examined by the Court (or a commissioner) in determining this question. It does seem as though the subject-matter of the inquiry is of significance. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest. The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest. Obviously, individual property interests have to be taken into account: see *Re Royal Comm. on Conduct of Waste Mgmt.* (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.). If a person has vital information to give or has made the charges that the Commission is inquiring into, then that person may be considered to have a substantial and direct interest, whereas others might not: see *Re Shulman*, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.). It seems to us that the value of the potential interest that is being affected would have to be considered in arriving at its conclusion. Similarly, if one person is potentially affected, that might be viewed differently than if 100 or 1,000 or more persons may be affected. None of these specific items would be controlling; it is necessary to look at all of these factors as well as any others in the context of each inquiry. The decision must be made after examining all of the circumstances. Essentially, what is

required is evidence that the subject-matter of the inquiry may seriously affect an individual. If that is the case, then that individual is entitled to full participation rights pursuant to s. 5(1).

Looking at the facts in this particular situation, the matters that are still being inquired into are items (ii) and (iii) which reads as follows:

> "(ii) to inquire into methods that should be used in the future to assess, evaluate and make decisions concerning the effects on the environment of such major enterprises;
>
> (iii) to investigate the feasibility and desirability of alternative undertakings north or generally north of the 50th parallel of north latitude, for the benefit of the environment as defined in Schedule A."

It appears, on the evidence, that the commissioner wishes to conduct an informal and relaxed inquiry. It seems that many of the recommendations will be theoretical and long-term. However, it must be noted, in particular, that one of the important matters that is being looked into is the method or procedure whereby decisions concerning the environment will be made. The use of the land north of the 50th parallel and its effect on the environment and the resources will also be dealt with.

The Grand Council, Treaty No. 9, is a corporation representing the democratically elected representative of 40 different bands of Ojibway and Cree people of Northern Ontario, comprising some 20,000 individuals. This corporation, therefore, represents approximately two-thirds of the population in the area in question. These people call themselves the Nishnawbe-Aski, which means the people and the land. Theirs is a unique way of life, one which they have lived for centuries. They fear their culture and lifestyle is being threatened by developmental activities in the north. They feel they have not shared fully in the decision-making in the past and wish to do so in the future. This group also claims, although this has not been established legally, the right to ownership of vast areas of the land mass that is being considered by this commission. Hence, the Grand Council is not the spokesman for a few citizens who are vaguely interested in the outcome of the commission's inquiry, but rather it represents the majority of the population in the region, a different culture and lifestyle, and a totally different attitude towards the use of land and resources. It is significant to note that the commissioner, in opening his hearings, stated: ". . . a central theme of my inquiry is the necessity to address the position of Native

People north of the 50th parallel". This exercise by necessity must profoundly affect the people represented by the Grand Council. We are, therefore, convinced that the Grand Council, as official spokesman of the Nishnawbe-Aski, has a substantial and direct interest in the work of the commission.

The commissioner, in his reasons, was unduly influenced by his concern that, if he gave the Grand Council participation rights, he would be unable to prevent all of the other people of the North who might conceivably feel they have an interest from participating. This was not a proper factor to consider in determining whether an applicant has standing pursuant to s. 5(1). If participation rights are given to individuals by the statute, then they are entitled to exercise those rights, even though it may slow down the work of the commission. This is not to say that every person who wishes to participate fully may do so. Each person must establish to the satisfaction of the commissioner (reviewable by this Court) that he has more than just a general interest; that he has a direct and substantial interest.

Further, holding that the council has standing, in general, does not mean that every single time the council wishes to produce a witness or ask a question in cross-examination that they have the right to do so indiscriminately. The commissioner remains in charge of the inquiry. He is in control of its process, thus he is obligated to rule on the relevance of any questions to the interest of the council (or such other individuals as are given standing).

Counsel for the Grand Council indicated that the premier of the province had promised them full participation in the inquiry. He also indicated that there were statements of the commissioner on the record to the effect that he thought the applicants had a "substantial and direct interest" in the inquiry. We feel that those facts are totally irrelevant to the decision of this Court and to the rulings of the commissioner on s. 5 applications.

There are three caveats: (1) First, nothing in these reasons should prevent the commissioner from deciding, in the first instance at least, whether individuals have standing under s. 5(1). In other words, he need not state a case to the Divisional Court every time someone appears and wishes to have full participation rights. It is within his jurisdiction to make an initial determination, subject, of course, to review by this Court.

(2) Second, there is nothing in these reasons that is meant to limit the exercise of the discretion of the commissioner in relation to the day-to-day operation of the inquiry, such as the questions to

be asked, the witnesses to be called, the issues to be investigated, nor the research undertaken. All that is decided here is that the council (and any others who are granted standing pursuant to s. 5(1)) may, in appropriate circumstances, call witnesses and cross-examine in accordance with the rules that are generally followed in these matters. Hence, questions that may be asked are those that would assist the commissioner in his work. Questions that are irrelevant or are merely part of a fishing expedition or are found to be politically motivated might not be permitted. In other words, each of these matters must be dealt with by the commissioner on a situational basis as they arise in the course of his continuing inquiry.

(3) The third caveat is that there is nothing in this decision which is meant to influence the commissioners or others in relation to the question of funding of the participants with regard to this cross-examination feature. Merely because funding is provided for the presentation of briefs does not necessarily mean that funding would be provided for full participation. That is a distinct question that will be determined by those responsible for those matters.

In conclusion, our answer to Q. 1 is yes. As for Q. 2, although we would have preferred more facts than are set out, counsel for the commission has invited us to treat both groups in the same way. Since we heard no objection from Mr. Goudge, we answer Q. 2 in the same way.

No order as to costs.

Order accordingly.

LIGHTFOOT v. SOUTHON

Ontario Supreme Court [High Court of Justice],
Fitzgerald L.J.S.C.

Judgment—January 26, 1983.

Defamation — Pleadings — Defamatory words — Innuendo and allegation of meaning — Pleadings alleging libel in the ordinary meaning of words used — Particulars not ordered where entire defamatory article reproduced and where document short and uncomplicated — Innuendo required to be specifically pleaded — Slanderous words require precise pleading.

The plaintiff commenced an action for libel and slander arising from a written brief read orally by the defendant to a meeting of the town council. A copy of the brief was attached to the statement of claim. The plaintiff also pleaded the brief was defamatory in meaning and innuendo and that oral comments in addition to the brief were slanderous, in meaning and innuendo. The defendant applied to strike the pleadings of libel and slander and in the alternative for particulars.

The application was allowed in part. Particulars ought not to be ordered where the entire alleged defamatory article is set out in the statement of claim and where the document is short and uncomplicated; however, the innuendo pleaded could not be cured by particulars and the pleading of innuendo was struck out with leave to amend to plead the extended meaning and set out the specific innuendo contended. With respect to the pleadings of slander, the precise words of slander were to be pleaded together with all facts relevant to the plea.

Cases considered

Churchill Forest Indust. (Man.) Ltd. v. Finkel, [1971] 1 W.W.R. 745 (Man. C.A.) — referred to.

D.D.S.A. Pharmaceuticals Ltd. v. Times Newspapers Ltd., [1973] Q.B. 21, [1972] 3 All E.R. 417 (C.A.) — distinguished.

Dennison v. Sanderson, [1944] O.W.N. 264 (M.C.) — referred to.

Fairbairn v. Sage (1925), 29 O.W.N. 48 (H.C.) — referred to.

Gouzenko v. Doubleday Can. Ltd. (1981), 32 O.R. (2d) 216 (H.C.) — distinguished.

Gouzenko v. Rasky, [1959] O.W.N. 185 — distinguished.

Hay v. Bingham (1902), 5 O.L.R. 244 (H.C.) — referred to.

Killingsworth v. Scott Knitting Co., [1943] O.W.N. 520 (M.C.) — referred to.

Lewis v. Daily Telegraph Ltd.; Lewis v. Associated Newspapers Ltd., [1962] 2 All E.R. 698 (C.A.) — followed.

Thomson v. Chain Libraries, [1954] 1 W.L.R. 999, [1954] 2 All E.R. 616 — referred to.

Unterberger v. Prospectors Airways Co., [1962] O.W.N. 212 (M.C.) — referred to.

Vulcan Indust. Packaging Ltd. v. C.B.C. (1979), 23 O.R. (2d) 213, 94 D.L.R. (3d) 729 (M.C.) — followed.

Wall v. Lalonde (1974), 7 O.R. (2d) 129, 54 D.L.R. (3d) 493 (H.C.) — referred to.