[COURT OF APPEAL]

Re The Ontario Crime Commission, Ex parte Feeley and McDermott

LAIDLAW, AYLESWORTH AND SCHROEDER, JJ.A. 30TH MAY 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 man-

ner 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 legislation. 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 —
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> (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 con-

sidered 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 frequently 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 character-

ized 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.

nor is it sufficient to rebut the inference that what, in fact, was intended here was a security transaction. It was argued that para. 6 of the debenture excepted from its operation the right to purchase the vehicles as that right only arose on the last day of the term. Paragraph 6 is inapplicable to exs. 5, 6 and 7 as the rights accruing thereunder were, in fact, obtained prior to the last day of the term of each of those agreements, as those agreements were nothing more than security transactions.

The agreed statement of facts propounds the following questions:

(a) Is the interest of Bramalea in the vehicles a "security interest" within the meaning of the PPSA requiring registration under the Act?

(b) If the answer to question (a) is in the affirmative, does the property secured by the debenture of the FBDB include Bevan's interest in the vehicles?

In result, therefore, the questions asked will be answered in the affirmative in accordance with the foregoing reasons.

The parties have agreed that the applicant, in view of the aforesaid answers, is entitled to judgment in the sum of $43,500 together with accrued interest thereon, being the proceeds of the various sales. The applicant will also be entitled to its party-and-party costs of this application.

Order accordingly.

RE ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

Ontario High Court of Justice, Divisional Court, Callon, J. Holland and Linden JJ. January 26, 1983.

Public inquiries — Standing — Commission to grant participation rights to any person with substantial and direct interest in subject-matter of inquiry — Inquiry into environment and land use in the North — Whether native council should have standing — Public Inquiries Act, 1971 (Ont.), c. 49, s. 5(1).

Section 5(1) of the *Public Inquiries Act*, 1971 (Ont.), c. 49, provides that a commission shall accord standing to call evidence and cross-examine witnesses to any person who satisfies it that he has a substantial and direct interest in the subject-matter of the inquiry. The more specific, practical and concrete the subject of an inquiry, the more likely it would be that the property or individual rights of a person would be affected and, hence, that he would have a substantial and direct interest. The potential importance of the finding and recommendations to the individual and the number of people potentially affected would also have to be considered. Therefore, in an inquiry into the northern environment and land and resource use in the north, a council representing native people from the area and representing a majority of the population and a chamber of commerce from the area should be granted participation rights.

Cases referred to

Re Bortolotti et al. and Ministry of Housing et al. (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408; *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; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418; *Thorson v. A.-G. Can. et al.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376, 12 N.S.R. (2d) 85, 5 N.R. 43; *Minister of Justice of Canada et al. v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, 64 C.C.C. (2d) 97, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 12 Sask. R. 420, 39 N.R. 331; *Re Federal Republic of Germany and Rauca* (1983), 9 W.C.B. 325; affg 38 O.R. (2d) 705, 141 D.L.R. (3d) 412, 70 C.C.C. (2d) 416, 30 C.R. (3d) 97, 2 C.R.R. 131; *Re Brown et al. and Patterson* (1974), 6 O.R. (2d) 441, 53 D.L.R. (3d) 64, 21 C.C.C. (2d) 373; *Re Inmates Committee of Prison for Women et al. and Meyer* (1980), 55 C.C.C. (2d) 308; *Royal Com'n on Conduct of Waste Management Inc. et al.* (1977), 17 O.R. (2d) 207, 80 D.L.R. (3d) 76, 4 C.P.C. 166; *Re Public Inquiries Act and Shulman*, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578

Statutes referred to

Public Inquiries Act, 1971 (Ont.), c. 49, s. 5(1) (now R.S.O. 1980, c. 411)

STATED CASE to determine questions of standing before a royal commission.

C. G. Watkins and *R. Cotton*, for Royal Commission on Northern Environment.

S. T. Goudge, Q.C., and *C. Beamish*, for Grand Council, Treaty No. 9.

S. W. Mercer, for Attorney-General of Ontario.

The judgment of the court was delivered orally by

LINDEN J.:—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*, 1971 (Ont.), 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 interest?

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, 1971* allows the two applicants to participate fully in the proceedings of the inquiry. Neither counsel wish 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, 1971* 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 et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408, and *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.

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 Society of County of York*, [1934] O.W.N. 418. 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. Can. et al.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376; *Minister of Justice of Canada et al. v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, 64 C.C.C. (2d) 97, 39 N.R. 331; *Re Federal Republic of Germany and Rauca*, Court of Appeal, January 18, 1983 [9 W.C.B. 325], affirming 38 O.R. (2d) 705, 141 D.L.R. (3d) 412, 70 C.C.C. (2d) 416. The decision dealing with the *Coroners Act* investigation is consistent with this notion: *Re Brown et al. and Patterson* (1974), 6 O.R. (2d) 441, 53 D.L.R. (3d) 64, 21 C.C.C. (2d) 373.

The first question before us then is simply — Does the Grand Council of the Treaty No. 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 Committee of Prison for Women et al. and Meyer* (1980), 55 C.C.C. (2d) 308.

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 Com'n on Conduct of Waste Management Inc. et al.* (1977), 17 O.R. (2d) 207, 80 D.L.R. (3d) 76, 4 C.P.C. 166. 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 Public Inquiries Act and Shulman*, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578. 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 read 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, but 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 has 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 needed 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 irrel-

evant 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.

Judgment accordingly.

RE MILLS AND THE QUEEN

Ontario High Court of Justice, Osborne J. January 10, 1983.

Constitutional law — Charter of Rights — Trial within reasonable time — Prior to proclamation of Charter warrants taken out for accused's arrest on several offences — Accused dealt with in respect of certain charges but warrant remaining outstanding in respect of robbery charge — After 19 months when accused due for release from prison warrant executed with respect to robbery charge — Whether court entitled to consider pre-Charter delay in determining whether right to trial within reasonable time contravened — Whether accused's right to trial within reasonable time violated in circumstances — Canadian Charter of Rights and Freedoms, ss. 11(b), 24.

Courts — Abuse of process — Delay by Crown — Warrants taken out with respect to number of offences against accused — Accused dealt with in respect of certain offences but warrant remaining outstanding on robbery charge — Warrant with respect to robbery charge executed 19 months later when accused due to be released from prison — Whether constitutes abuse of process in circumstances — Whether provincial court judge presiding at preliminary inquiry has power to stay proceedings as abuse of process.

The accused applied for an order in the nature of prohibition to prevent the provincial court from proceeding with his preliminary inquiry on a charge of robbery. The accused, while serving a sentence, had escaped from prison and was alleged to have committed several offences in different cities while at large.

Warrants were taken out in different cities, and in particular a warrant was taken out for his arrest on a charge of robbery allegedly committed in London. When the accused was finally apprehended other warrants were executed but the London warrant was not, apparently due to a failure of communication between different police forces. The accused was returned to prison to complete his sentence and the warrant for the London robbery was not executed until he was due to be released on mandatory supervision. A period of approximately 19 months had elapsed. All of this period of delay occurred prior to proclamation of the *Canadian Charter of Rights and Freedoms*. In May, 1982, following the proclamation of the Charter, the accused brought an application pursuant to the Charter on the basis that his right to trial within a reasonable time as guaranteed by s. 11(*b*) of the Charter had been infringed, and he also brought an application for a stay of proceedings on the basis of an abuse of process. The provincial court judge dismissed both applications. On application by the accused for prohibition, **held**, the application should be dismissed.

The right to trial within a reasonable time as guaranteed by s. 11(*b*) of the Charter is a substantive right which creates an obligation on the authorities to see that he is tried within a reasonable time. The right is a new one which is not equated with nor a repetition of any common law right to trial within a reasonable time. Where the alleged violation of s. 11(*b*) is raised at the time of the preliminary inquiry, the provincial court judge presiding at the preliminary inquiry should hear the accused's application for relief under s. 24(1) of the Charter. An accused who is still before the courts after proclamation of the Charter may claim the benefit of the trial within a reasonable time provision. However, any pre-Charter delay is relevant only to the extent that it is to be assessed with post-Charter delay and weighed in the light of that delay on the general issue of whether the accused has been denied his right to trial within a reasonable time. A pre-Charter delay standing alone is not, however, sufficient to trigger the application of s. 11(*b*) of the Charter in favour of the accused. The accused's right under s. 11(*b*) cannot impose a retrospective obligation on the authorities. A delay prior to the proclamation of the Charter must, however, be considered as a very significant factor in the overall determination of trial within a reasonable time, having in mind a delay which has occurred following the coming into force of the Charter. The longer the pre-Charter delay has been, the more quickly the accused should be brought to trial after the Charter came into force. The length of the period of delay is just one of the number of factors to be taken into account when the issue of trial within a reasonable time is considered. Thus, other factors would include the reason for the delay, the accused's assertion of his right to a speedy trial and prejudice to the accused occasioned by the delay. In the circumstances of this case, considering the cumulative effect of the delay before and after the Charter, it could not be said that the accused's right to a trial within a reasonable time had been violated.

Nor could it be said that the circumstances constituted an abuse of process requiring that the proceedings be stayed. While a judge presiding at a preliminary inquiry does have the power to stay proceedings as an abuse of process, the facts of this case did not involve oppressive conduct or conduct that was wilfully vexatious to the accused. The delay attributable to the authorities was merely the product of negligence. In considering whether there has been an abuse of the court's process as a result of delay, it is only delay after the laying of the charges which is relevant and there must be, in addition to the delay, some wilful or oppressive behaviour on the part of the authorities to trigger an abuse of process response.

COURT OF APPEAL.

JUNE 20TH, 1934.

RE THE CHILDREN'S AID SOCIETY OF THE COUNTY OF YORK.

Public Inquiries—Commissioner appointed pursuant to The Public Inquiries Act, R.S.O. 1927, ch. 20—Scope of enquiry—Method of examination of witnesses—Right of cross-examination of witnesses by solicitor for petitioners—Stated 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, ch. 279, in a negligent and incompetent manner, the Lieutenant-Governor in Council pursuant to the provisions of The Public Inquiries Act, R.S.O. 1927, ch. 20, by letters patent 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 these questions. The Commissioner refused to state a case. Subsequently, by an order of The Court of Appeal, the Commissioner was directed to state a case upon the following questions, namely:—

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?

The stated case was heard by **Mulock, C.J.O., Riddell** and **Middleton, JJ.A.**

R. L. Kellock, for the petitioners.

J. D. Lucas, for G. B. Little, Superintendent of The Children's Aid Society of the County of York.

K. V. Stratton, K.C., appeared for the Commissioner but the Court was of the opinion that the Commissioner, having stated the questions for the opinion of the Court, was not entitled to be represented on the argument and that it could not hear counsel on his behalf.

Mulock, C.J.O., in an oral judgment delivered at the conclusion of the argument, said 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. It is not a question between one person and another. There is no issue referred to the Commissioner to determine, and the rules of evidence have no application to such an inquiry. 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. There are no parties or sides to the proceedings. 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.

Certain books or papers of the Society are said to be in the possession of the Superintendent of the Society. Should such be the case, when in his possession they are in the possession of the Society; and it would be not only

highly improper, but illegal, for the Superintendent to refuse to hand over these papers to the Society when required so to do; and if the Society requires them to be produced before the Commissioner, the Superintendent has no right to withhold them.

During the argument, it was said that the Commissioner held that, until some prima facie case was made, he would not require the Superintendent to produce those papers. This is an incorrect view of the position of the matter. In an inquiry such as this no question of a prima facie case arises. There being no parties to the proceedings, there is no one against whom a prima facie case can be made.

As to the questions submitted they must all be answered in the affirmative except number 5 which is answered in the negative.

Riddell, J.A., in an oral judgment, said that he entirely agreed with Mulock, C.J.O. 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. The learned Justice of Appeal said that he had had considerable experience on Royal Commissions; in the last instance an article appeared in an important newspaper saying or suggesting that the Commission had not all the facts before it. Thereupon the Commissioners caused a letter to be written to the paper asking it to give any facts not brought out, and inviting information from any source whatever.

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.

The object of a Royal Commission is to determine facts, not to try individuals or institutions, and this consideration is sufficient to guide the Commissioner in the performance of his duty.

Middleton, J.A., in an oral judgment, said that he entirely agreed with Mulock, C.J.O., and Riddell, J.A.

It must not be forgotten that this is an inquiry directed by the government into the affairs of its own creature, a Children's Aid Society, with the view of ascertaining if it is discharging its true function in the public service. Suspicion of wrong-doing and maladministration exist. Is there any foundation? It is in no sense a trial of any one. 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. It would have been wise, and would have saved much time, if the documents and records had in the first instance been examined before taking oral evidence, but this does not seem to have been appreciated by anyone.

Questions 1, 2, 3 and 4 answered in the affirmative; question 5 answered in the negative.

RE PUBLIC INQUIRIES ACT AND SHULMAN

Ontario Court of Appeal, Aylesworth, Schroeder and McLennan, JJ.A. June 27, 1967.

Public inquiries — Inquiry into allegations against Government officials by former Government employee — Role of counsel for Commission — Procedure to be adopted — Public Inquiries Act (Ont.).

A public inquiry under the provisions of the *Public Inquiries Act*, R.S.O. 1960, c. 323, the essential object of which is to inquire into allegations made by a former Government employee of misconduct in office on the part of certain senior Government officials is one in which the former employee stands in jeopardy of being discredited in the eyes of the public if his allegations should prove unfounded. Unlike the case of an inquiry directed to the gathering of information for the purposes of reporting to a Government as to the desirability of enacting legislation on a given subject or as to other corrective measures, the procedure to be adopted by the Commissioner at such an inquiry should be a procedure that takes into account the possible consequences to the former employee. Accordingly, the former employee should be accorded the privilege of having his evidence-in-chief on any allegation made by him elicited by his counsel, as opposed to counsel for the Commission, and he should be subject to cross-examination by counsel for the Commission as well as by any person affected by his evidence. Furthermore, cross-examination should be a cross-examination on all matters relevant to eliciting the truth or accuracy of the allegations or statements made and a similar procedure ought to be applied to any person affected by allegations made before the Commissioner.

[*Re Children's Aid Society of the County of York*, [1934] O.W.N. 418; *Re Ontario Crime Commission, Ex p. Feeley and McDermott*, [1962] O.R. 872, 34 D.L.R. (2d) 451, 133 C.C.C. 116, refd to]

CASE STATED by Parker, J., as Commissioner appointed by Order in Council under the *Public Inquiries Act* (Ont.).

W. B. Williston, Q.C., and *John Sopinka*, for applicant, Dr. M. Shulman.

F. W. Callaghan, Q.C., for Attorney-General of Ontario.

P. B. C. Pepper, Q.C., for Dr. Cotnam.

C. L. Dubin, Q.C., for the Commissioner.

The judgment of the Court was delivered orally by

AYLESWORTH, J.A.:—This is a case stated to this Court by Parker, J., Commissioner under the *Public Inquiries Act*, R.S.O. 1960, c. 323, and so appointed by Order in Council dated April 13, 1967. The case stated is dated May 30, 1967. The object of the inquiry directed to the learned Commissioner is in essence, if not altogether, concerned with allegations of misconduct in office on the part of certain senior Government officials, allegations made by one Dr. Shulman, formerly a Chief Coroner of the Province in Metropolitan Toronto.

In this Court counsel appeared for the applicant, Dr. Shulman, for the Attorney-General, for Dr. Cotnam, one of the persons against whom allegations were made, and at the request of the Court Commission counsel also was present during the argument of the stated case. In order to appreciate the extent and subject-matter of the questions specifically addressed to this Court by the learned Commissioner, it is necessary to quote from the stated case the general ruling or rulings made by him at the outset of his inquiry and those rulings as they appear in the stated case, are as follows:

> Since this is not a trial, all witnesses will be examined by the Commission counsel. Any person being examined, may be accompanied by his own counsel. If any evidence is given, which alleges any misconduct on the part of any person which could form the basis of civil or criminal proceedings, that person's counsel may request the Commission counsel to further examine the witness in regard to such allegations, or request the Commission to accord him the right to examine the witness with respect to such allegations. When the Commission counsel has examined all the witnesses, whom he proposes to call, the Commission will hear and examine any further witness or witnesses who wish to testify or whose testimony is requested by any person, and whose testimony the Commission believes to be relevant.
>
> After all witnesses have been examined, an opportunity will be afforded to any witness or counsel whose right to attend has been recognized to make representations with respect to any matter under investigation.

The specific questions addressed to this Court in the case stated are as follows:

(1). Are the orders or directions that I gave as hereinbefore set forth as to the mode of the conduct of the inquiry valid?

(2). If the answer to question (1) is no then (a) was I right in ruling that all witnesses will be examined by the Commission counsel? (b) was I right in ruling that any person being examined may be accompanied by his own counsel and if any evidence is given which alleges any misconduct on the part of any person which could form the basis of civil or criminal proceedings that person's counsel may request the Commission counsel to further examine the witness in regard to such allegations or request the Commission to accord him the right to examine the witness with respect to such allegations? (c) was I right in ruling when the Commission counsel has examined all the witnesses whom he proposes to call the Commission will hear and examine any further witness or witnesses who wish to testify or whose testimony the Commission believes to be relevant?

(3). Am I entitled under the terms of the Commission to inquire into allegations made by Dr. Shulman at a time when he was

not serving as chief coroner if they relate to allegations that the Government of Ontario and certain senior civil servants of the Department of the Attorney General for Ontario or any of them unlawfully or improperly (1) suppressed investigations or inquests, (2) interfered with investigations or inquests, (3) suppressed evidence relating to investigations or inquests conducted in the office of the chief coroner for Metropolitan Toronto during the period when Dr. Shulman served as chief coroner?

Before answering the questions it is desirable to state the views of this Court with respect to one aspect of s. 5 of the *Public Inquiries Act*. That section is the well-known section which confers a jurisdiction on this Court, a supervisory jurisdiction, if I may so term it, by way of stated case to this Court respecting the validity of any decision, order, direction or other act of the Commissioner called into question by any person affected. The meaning of that section is not at large. It has been passed upon more than once or at least once in a very exhaustive manner by this Court.

In the instant Commission it is our view that Dr. Shulman is a person affected within the meaning of the section. It is to be observed that that phrase "any person affected" occurs in the very first subsection of s. 5 in reference to any order, direction, decision or other act of the Commission so that if Dr. Shulman, for example, receives what he considers an adverse ruling upon some matter with respect to the inquiry of the learned Commissioner, he, in our view, is a person affected by that ruling and clearly within the section. That is sufficient to bring him within the section. It is also said, and we think with substantial justification, that (in an inquiry of the sort being pursued by the learned Commissioner) Dr. Shulman, who has made substantial allegations against persons in office, really is liable to be discredited in the eyes of the public if those allegations upon proper inquiry should prove to be unfounded and in that aspect of the matter he may well be considered to be a person affected. Having said so much I now address myself to the answers to be given to the specific questions addressed to this Court.

We think the answer to Q. (1) is "No" and that will be the answer of this Court. The answer to Q. 2(a) is "No". The answer to Q. 2(b) is "Yes". The answer to Q. 2(c) is "Yes". The answer to Q. (3) is "Yes". The precise framework of Qq. 1 and 2, however, is such that in deference to the learned Commissioner and for purposes of clarity in reference to further hearings by the Commissioner and for the assistance

not only of him but of counsel engaged on the inquiry, we feel it desirable to elaborate on the answers given.

In our view, the present inquiry is decidedly of the type with which this Court was called upon to deal in *Re Children's Aid Society of the County of York*, [1934] O.W.N. 418, and again in *Re Ontario Crime Commission, Ex p. Feeley and McDermott*, [1962] O.R. 872, 34 D.L.R. (2d) 451, 133 C.C.C. 116, and a type of inquiry, therefore, to be distinguished from an inquiry directed to the gathering of information for the purposes of reporting, for example, to a Government department as to the desirability or otherwise of enacting legislation upon a given subject, or as to other corrective measures. Accordingly, and within the principles enunciated in the two authorities to which reference has been made, Dr. Shulman should be accorded the privilege, if he so requests, of having his evidence-in-chief upon any allegation which he has made brought out through his own counsel and he should be subject to cross-examination not only by counsel for the Commission but by any person affected by his evidence. Cross-examination, wherever it is permitted, is not to be a limited cross-examination but is to be cross-examination upon all matters relevant to eliciting the truth or accuracy of the allegations or statements made. Similarly, any person affected by allegations made before the learned Commissioner should be accorded the privilege of examination as a witness by his own counsel and should be subject to a right of cross-examination, not only by counsel for the Commission but by any person affected by the evidence of that witness.

All these privileges of examination-in-chief and cross-examination, and particularly with respect to cross-examination, are, of course, subject to the discretion of the learned Commissioner as to relevancy, the avoidance of repetition and like matters. This Court is not under any apprehension that competent counsel appearing before the Commission will abuse the privileges which are to be accorded to them. They, as well as the learned Commissioner himself and the learned counsel for the Commission are, of course, engaged in furthering the very object, if not the sole object of the inquiry itself which is to elicit in the fullest and fairest manner all relevant information on the subject-matter thereof. It goes without saying that counsel for the Commission has a heavy responsibility in these matters and will be the proper person to call witnesses and to examine them in chief where those witnesses are not represented before the Commission by their own counsel.

One part of the ruling by the learned Commissioner should be mentioned. The last paragraph thereof refers to a right which may be termed a right of summing up or making representations to the Commissioner after all witnesses have been examined. That, of course, is a right which the learned Commissioner manifestly intends should be accorded, and we agree it should be, and although we have been compelled to answer the first question "no" it should be made plain that that answer does not in any way impugn the ruling lastly mentioned.

Because of the very nature of an inquiry of this character and of the duties of the learned Commissioner, much must be left to his discretion and to the common sense of competent counsel appearing before him. If proper co-operation is observed in seeing that all legitimate means are employed to bring out the very truth as to allegations made and being inquired into, there would appear at present, at least, to be but slight ground, if any, remaining for addressing further requests for stated cases to this Court with their consequent delays in the completion of the subject-matter of the inquiry.

It is, of course, for the Commissioner in his wisdom and the Commissioner alone to decide whether he will permit Dr. Shulman through his counsel to pursue without interruption the whole series of his allegations before any cross-examination takes place or whether, on the contrary, each allegation should be exhausted by examination and cross-examination before another allegation is investigated. Dr. Shulman's counsel should be permitted to examine in chief any witnesses whom he may call and any such witnesses, as has been more than amply demonstrated in what has been said, are subject to the fullest rights of cross-examination by other counsel participating in the inquiry.

Order accordingly.

ROYAL BANK OF CANADA v. KISKA

Ontario Court of Appeal, Kelly, McLennan and Laskin, JJ.A.
June 28, 1967.

Contracts — Consideration — Guarantee of debts of another — No specific promise to give additional time to other — Time and forbearance in fact given — Whether valuable consideration for guarantee.

Contracts — Offer and acceptance — Unsealed form of guarantee — No specific agreement to give additional time to debtor — Whether form an "offer" to guarantee capable of being "accepted" by actual forbearance — Whether parties showed necessary contractual intent.

It is not necessary that a creditor promise to give additional time to the principal debtor in order to render a guarantor liable upon the promises in an unsealed standard bank form of guarantee where the document may be construed as an offer to become liable for the debts of the other for which the creditor then provides a valuable consideration running to the guarantor by "accepting" and granting additional time to the principal debtor.

Per Laskin, J.A. (dissenting): The parties never intended the document to have any contractual effect other than as a written guarantee. As such it is unenforceable, being not sealed and supported by no valuable consideration. In the absence of a statutory provision, the words "seal" (or the initials "L.S."), "given under seal" and "Signed, Sealed and Delivered" are merely anticipatory of the significant formality of sealing and not substitutes for it.

Contracts — Formality — Guarantee within meaning of Statute of Frauds — Memorandum signed by party to be charged — Signature later torn off and eaten by party to be charged — Memorandum replaced by new and signed under duress of police constable — Whether enforceable.

[*Re Barker's Estate* (1875), 44 L.J. Ch. 487; *Alliance Bank Ltd. v. Broom* (1864), 2 Dr. & Sm. 289, 62 E.R. 631, 143 R.R. 120, 34 L.J. Ch. 256; *Fullerton et al. v. Provincial Bank of Ireland*, [1903] A.C. 309; *Morley et al. v. Boothby* (1825), 3 Bing. 107, 130 E.R. 455, apld]

APPEAL from a dismissal of plaintiff's action upon an unsealed form of guarantee.

S. G. Fisher, for appellant.
Dennis F. O'Leary, Q.C., for respondent.

KELLY, J.A.:—Although the question of law involved in this case is not uncommon, the facts are sufficiently unusual to warrant recounting in detail.

The defendant is a young man who attained his majority on March 16, 1963. At and prior to this time he, along with two partners, had been engaged in business under the name of Pee-Wee Pizzeria. His brother John, who is older by 15 years, conducted a hairdressing business, of which the plaintiff was the banker; in connection with credit extended by the plaintiff to the brother the plaintiff held a demand note for $6,000 and certain securities which had been pledged to the plaintiff by the brother.

As a result of continued importuning of his brother, the defendant, sometime shortly after March 16, 1963, went to the plaintiff's Gage and Mohawk Branch in the City of Hamilton and there signed a document in the form of a guarantee to the extent of $3,000 of the brother's indebted-

T-2205-72

Léo A. Landreville (*Plaintiff*)

v.

The Queen (*Defendant*)

Trial Division, Collier J.—Ottawa, February 2, 3 and 4 and April 7, 1977.

Jurisdiction — Royal Commission inquiry into activities of plaintiff, a former superior court judge — Whether appointment of Commissioner to investigate a judge is ultra vires the Governor in Council — Whether Commissioner exceeded jurisdiction — Whether plaintiff given opportunity to be heard re allegations of misconduct — Inquiries Act, R.S.C. 1952, c. 154, ss. 2, 3, 13 — The British North America Act, 1867, ss. 92(14), 96, 99(1) — Judges Act, R.S.C. 1952, c. 159, ss. 31, 33; R.S.C. 1970, c. J-1, ss. 31, 32, 32.2.

The plaintiff, a Judge of the Supreme Court of Ontario from 1956 to 1967, was the subject, in 1966, of a Royal Commission inquiry into his relationship with Northern Ontario Natural Gas Limited. In 1967 the Commissioner rendered an unfavourable Report, and the plaintiff resigned. He brought an action for a declaration (1) that the appointment of the Commissioner was null and void, (2) that the Commissioner lost jurisdiction by exceeding his terms of reference, and (3) that the plaintiff was not given notice or an opportunity to be heard concerning allegations of misconduct, as required by section 13 of the *Inquiries Act*. With respect to the first issue the defendant submitted that the Commission was validly constituted, that the plaintiff had consented to it and could not now challenge it, and that plaintiff did not challenge the appointment of the Commissioner or his jurisdiction at the inquiry itself. With respect to the third issue defendant maintained that the allegations or charges were set out in the Order in Council and Letters Patent establishing the Royal Commission. In addition, the defendant (4) put forth the equitable defence of laches, and (5) challenged the jurisdiction of the Court to make a declaration on the ground that the matter is now academic.

Held, the plaintiff will have a declaration limited to the section 13 issue, with costs.

(1) The procedure for removal of judges by joint address of the House of Commons and the Senate, as set out in section 99 of *The British North America Act, 1867*, is not, as plaintiff contends, a code of its own. The Governor in Council, as distinguished from the Governor General or Parliament, can authorize an inquiry into the conduct of a superior court judge. The conduct of judges is a "... matter connected with the good government of Canada ..." (section 2 of the *Inquiries Act*). However, if there was no constitutional power in the Governor in Council to initiate the inquiry, then the plaintiff's consent or request for it, and the agreement not to object to it, could not cure the defect.

(2) The terms of reference of the Commission were wide enough to embrace the portions of the Report and the conclusions attacked by plaintiff. The plaintiff's credibility was in issue, and the Commissioner's method of dealing with the question did not amount to going beyond the terms of reference and so losing jurisdiction.

(3) Section 13 of the *Inquiries Act* requires that a person against whom a charge of misconduct is alleged be given reasonable notice of, and an opportunity to reply to, such allegation. The Commissioner found that the plaintiff had been guilty of gross contempt before three other tribunals. This matter was not within the terms of reference of the Commission and the plaintiff was not given an opportunity to meet the specific charges. The Commissioner thus failed to comply with the mandatory requirements of section 13. The Commission should have been reconvened, and notice of the "charge" of misconduct given; the plaintiff should then have been allowed to call witnesses and answer the charges.

(4) There is no compelling or equitable reason to invoke the defence of laches. The defendant has not been induced to alter any position.

(5) Although the declaration will have no legal effect it may serve some practical purpose in other pending litigation involving the plaintiff, and in that it will be a matter of public record that the plaintiff did not have a full opportunity to be heard.

Crabbe v. Minister of Transport [1972] F.C. 863, applied. *Landreville v. The Queen* [1973] F.C. 1223 and *Merricks v. Nott-Bower* [1964] 1 All E.R. 717, followed.

ACTION for declaratory judgment.

COUNSEL:

G. Henderson, Q.C., and *Y. A. G. Hynna* for plaintiff.
G. Ainslie, Q.C., and *L. Holland* for defendant.

SOLICITORS:

Gowling & Henderson, Ottawa, for plaintiff.

Deputy Attorney General of Canada for defendant.

The following are the reasons for judgment rendered in English by

COLLIER J.: The plaintiff is a solicitor now practising in Ottawa. In 1933 he went to Sudbury, Ontario. He eventually established a substantial law practice. Over a number of years he held, while still carrying on his legal business, public offices in the Sudbury area, "... such as School

T-2205-72

Léo A. Landreville (*Demandeur*)

c.

La Reine (*Défenderesse*)

Division de première instance, le juge Collier—Ottawa, les 2, 3 et 4 février et 7 avril 1977.

Compétence — Enquête d'une commission royale sur les activités du demandeur, ancien juge d'une cour supérieure — La nomination d'un commissaire aux fins d'enquêter sur un juge est-elle ultra vires du gouverneur en conseil? — Le commissaire a-t-il outrepassé sa compétence? — Le demandeur a-t-il eu la possibilité de se faire entendre relativement aux allégations de mauvaise conduite? — Loi sur les enquêtes, S.R.C. 1952, c. 154, art. 2, 3, 13 — Acte de l'Amérique du Nord britannique, 1867, art. 92(14), 96, 99(1) — Loi sur les juges, S.R.C. 1952, c. 159, art. 31, 33; S.R.C. 1970, c. J-1, art. 31, 32, 32.2.

Le demandeur, qui fut juge de la Cour suprême de l'Ontario de 1956 à 1967, a fait l'objet, en 1966, d'une enquête menée par une commission royale sur ses rapports avec Northern Ontario Natural Gas Limited. En 1967 le commissaire a déposé un rapport défavorable et le demandeur a donné sa démission. Il a intenté une action aux fins d'obtenir un jugement déclaratoire portant (1) que la nomination du commissaire est nulle et de nul effet, (2) que le commissaire a perdu sa compétence en outrepassant son mandat, et (3) que le demandeur n'a pas reçu d'avis ou n'a pas eu la possibilité de se faire entendre relativement aux allégations de mauvaise conduite, comme l'exige l'article 13 de la *Loi sur les enquêtes*. Quant au premier point, la défenderesse prétend que la Commission a été valablement constituée, que le demandeur y a consenti et ne peut pas maintenant la contester, et que le demandeur n'a pas attaqué à l'enquête la nomination du commissaire ou sa compétence. Quant au troisième point, la défenderesse soutient que les allégations ou accusations sont énoncées dans le décret du conseil et dans les lettres patentes qui créent la Commission royale; de plus (4) elle invoque un moyen d'*equity*, le retard indu, et (5) conteste la compétence de la Cour à rendre un jugement déclaratoire au motif qu'il s'agit maintenant d'une question purement théorique.

Arrêt: le demandeur aura un jugement déclaratoire limité à la question de l'article 13, avec dépens.

(1) La procédure de révocation des juges par une adresse conjointe de la Chambre des communes et du Sénat, exposée à l'article 99 de l'*Acte de l'Amérique du Nord britannique, 1867*, n'est pas un code en soi, comme le prétend le demandeur. Le gouverneur en conseil (qu'il convient de distinguer du gouverneur général ou du Parlement) peut autoriser une enquête sur la conduite d'un juge d'une cour supérieure. La conduite des juges est une «... question touchant le bon gouvernement du Canada ...» (article 2 de la *Loi sur les enquêtes*). Cependant, si le gouverneur en conseil n'a pas le pouvoir constitutionnel d'instituer l'enquête, ni le consentement ni la requête ni l'accord du demandeur de ne pas faire opposition à l'enquête ne peuvent remédier à ce défaut.

(2) Le mandat de la Commission est assez large pour englober les parties du rapport et des conclusions que le demandeur conteste. La crédibilité du demandeur était en cause et la manière dont le commissaire a procédé avec la question ne lui a pas fait outrepasser son mandat ni perdre sa compétence.

(3) L'article 13 de la *Loi sur les enquêtes* porte qu'une personne contre qui est portée une accusation de mauvaise conduite doit en recevoir un avis raisonnable et avoir la possibilité de répondre à cette accusation. Le commissaire a conclu que le demandeur s'était rendu coupable d'outrage flagrant devant trois autres tribunaux. Ce point ne fait pas partie du mandat de la Commission et on n'a pas donné au demandeur la possibilité de répondre à ces accusations précises. Le commissaire ne s'est pas conformé aux exigences de l'article 13. Le commissaire aurait dû reconvoquer la Commission et donner avis au demandeur de l'«accusation» de mauvaise conduite; ce dernier aurait alors eu la possibilité de citer des témoins et de répondre aux accusations.

(4) Il n'y a aucune raison équitable ou impérative pour invoquer la défense basée sur le retard indu. La défenderesse n'a pas été poussée à altérer sa position.

(5) Le jugement déclaratoire, bien que dénué de tout effet juridique, pourra servir quelque objet utile dans une autre poursuite à laquelle le demandeur est partie; et il sera de notoriété publique que le demandeur n'a pas eu pleine possibilité de se faire entendre.

Arrêt appliqué: *Crabbe c. Le ministre des Transports* [1972] C.F. 863. Arrêts suivis: *Landreville c. La Reine* [1973] C.F. 1223 et *Merricks c. Nott-Bower* [1964] 1 All E.R. 717.

ACTION visant à obtenir un jugement déclaratoire.

AVOCATS:

G. Henderson, c.r., et *Y. A. G. Hynna* pour le demandeur.
G. Ainslie, c.r., et *L. Holland* pour la défenderesse.

PROCUREURS:

Gowling & Henderson, Ottawa, pour le demandeur.
Le sous-procureur général du Canada pour la défenderesse.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE COLLIER: Le demandeur est un avocat qui exerce actuellement sa profession à Ottawa. En 1933, il a habité Sudbury (Ontario) et y a longuement pratiqué le droit. Pendant plusieurs années, tout en poursuivant ses activités juridiques, il a occupé des fonctions publiques dans la ré-

Trustee, Alderman, Member and Chairman of the Sudbury Hydro Commission." He became mayor of Sudbury on January 1, 1955.

While he was mayor, the Sudbury council approved a franchise to Northern Ontario Natural Gas Limited ("NONG"), to distribute natural gas to Sudbury by laterals and distributing pipe systems. The main system or trunk line was that of TransCanada PipeLine Company.

On September 13, 1956 he was appointed a Judge of the Supreme Court of Ontario[1]. His appointment was effective October 10, 1956. On October 12, he was sworn in.

In February of 1957 the plaintiff was sent a letter from a Vancouver brokerage company enclosing shares of NONG. I shall later set out more detail. I merely refer, at this point, to NONG shares in order to make clear what the plaintiff seeks in this action.

On January 19, 1966, the Governor in Council appointed the Honourable Ivan C. Rand, a retired Judge of the Supreme Court of Canada, a Commissioner under Part I of the *Inquiries Act*[2]. His terms of reference were:

> (a) to inquire into the dealings of the Honourable Mr. Justice Leo A. Landreville with Northern Ontario Natural Gas Limited or any of its officers, employees or representatives, or in the shares of the said Company; and,
>
> (b) to advise whether, in the opinion of the Commissioner,
>
> (i) anything done by Mr. Justice Landreville in the course of such dealings constituted misbehaviour in his official capacity as a Judge of the Supreme Court of Ontario, or
>
> (ii) whether the Honourable Mr. Justice Landreville has by such dealings proved himself unfit for the proper exercise of his judicial duties.[3]

After 11 days of hearings at various Canadian cities in March and April, 1966, the Commissioner issued a report. It was dated August 11, 1966. It was not made public until tabled in the House of Commons on August 29 of that year.

A special Joint Committee of the Senate and House of Commons was appointed in late 1966. Its purpose was:

> ... to enquire into and report upon the expediency of presenting an address to His Excellency praying for the removal of Mr. Justice Leo Landreville from the Supreme Court of Ontario, in view of the facts, considerations and conclusions contained in the report of the Honourable Ivan C. Rand ....

The Committee held 19 meetings in February and March of 1967. The plaintiff appeared as a witness. He testified at 11 of the meetings.

The material portions of the Joint Committee's final report, dated April 13, 1967, were:

> 2. In accordance with its terms of reference, during the course of nineteen (19) meetings, the Committee applied itself to, and carefully examined the facts, considerations and conclusions contained in the said report.
>
> 3. The Committee invited Mr. Justice Landreville to appear before it as a witness. He testified at eleven (11) meetings of the Committee and answered questions from Members of and Counsel to the Committee.
>
> 4. The report of the Honourable Ivan C. Rand states:
>
> No question is raised of misbehaviour in the discharge of judicial duty; the inquiry goes to conduct outside that function.
>
> 5. The reflections of the Honourable Ivan C. Rand on Mr. Justice Landreville's character were not considered pertinent and thus played no part in the Committee's decision.
>
> 6. After hearing the testimony of Mr. Justice Landreville and considering the report of the Honourable Ivan C. Rand, the Committee finds that Mr. Justice Landreville has proven himself unfit for the proper exercise of his judicial functions and, with great regret, recommends the expediency of presenting an address to His Excellency for the removal of Mr. Justice Landreville from the Supreme Court of Ontario.

By letter dated June 7, 1967, (Ex. 35), the plaintiff tendered, effective June 30, his resignation as a Judge. It was accepted.

This suit is an attack against the validity of the appointment of the Commissioner to hold the inquiry of 1966, the manner in which certain aspects of the inquiry were carried out, and against the report itself.

The remedies sought are as follows:

[1] The appointment was by Order in Council passed pursuant to section 96 of *The British North America Act, 1867*. The plaintiff was appointed a member of the High Court of Justice for Ontario, and *ex officio* a member of the Court of Appeal for Ontario.

[2] R.S.C. 1952, c. 154. The Letters Patent (Ex. 28) were issued March 2, 1966.

[3] I have quoted almost exactly the terms of reference but have sub-numbered them for convenience and clarity.

de Sudbury telles que «. . . administrateur scolaire, magistrat municipal, membre et président de la commission hydro de Sudbury.» Le 1er janvier 1955, il est devenu maire de Sudbury.

Pendant son mandat, le conseil municipal a approuvé l'octroi d'une concession à Northern Ontario Natural Gas Limited («NONG») visant la distribution du gaz naturel à Sudbury par latéraux et canalisations, les principaux appartenant à TransCanada PipeLine Company.

Le 13 septembre 1956, il a été nommé juge de la Cour suprême de l'Ontario[1]. Sa nomination est entrée en vigueur le 10 octobre 1956 et il a été assermenté le 12 octobre 1956.

En février 1957, le demandeur a reçu une lettre d'un courtier de Vancouver, qui contenait des actions de NONG. Je donnerai plus de détails à ce sujet ultérieurement. A ce stade, je me contenterai de mentionner lesdites actions, afin d'indiquer clairement ce que le demandeur réclame dans la présente action.

Le 19 janvier 1966, le gouverneur en conseil a nommé commissaire l'honorable Ivan C. Rand, juge retraité de la Cour suprême du Canada, en vertu de la Partie I de la *Loi sur les enquêtes*[2]. Son mandat consistait à:

> [TRADUCTION] a) faire enquête sur les transactions de M. le juge Léo A. Landreville avec la Northern Ontario Natural Gas Limited ou ses administrateurs, employés ou représentants, ou sur toute autre transaction portant sur les actions de ladite compagnie; et
>
> b) faire savoir si, d'après le commissaire,
>
> (i) les actes posés par M. le juge Landreville à l'occasion de ses transactions constituent une mauvaise conduite de la part d'un juge de la Cour suprême de l'Ontario, ou
>
> (ii) si M. le juge Landreville a démontré par ces transactions son inaptitude à s'acquitter honorablement de ses fonctions judiciaires.[3]

Après 11 jours d'audiences tenues en mars et en avril 1966 dans plusieurs villes du Canada, le commissaire a rédigé un rapport, qui est daté du 11 août 1966, mais n'a été déposé devant la Chambre des communes que le 29 août 1966.

A la fin de 1966, la Chambre des communes et le Sénat ont nommé un comité spécial mixte:

> ... pour enquêter et faire rapport sur l'opportunité de présenter une adresse à Son Excellence la priant de démettre le juge Léo Landreville de sa charge à la Cour suprême d'Ontario, en raison des faits, des considérations et des conclusions que signale ou renferme le rapport de l'honorable juge Ivan C. Rand ....

Le comité a tenu 19 séances en février et en mars 1967. Le demandeur a comparu comme témoin à 11 d'entre elles.

Les principales parties du rapport final du comité mixte daté du 13 avril 1967, sont les suivantes:

> 2. En conformité de son mandat, le Comité, au cours de dix-neuf (19) séances, s'est attaché à étudier les faits, les considérations et les conclusions contenus dans ledit rapport.
>
> 3. Le Comité a invité le juge Landreville à comparaître devant lui comme témoin. Ce dernier a témoigné au cours de onze (11) séances du Comité et a répondu aux questions des Membres et du Conseiller juridique du Comité.
>
> 4. Dans son rapport, l'honorable juge Ivan C. Rand dit:
>
> Il n'est pas question d'inconduite dans l'exercice de fonctions judiciaires; l'enquête porte sur la conduite de l'intéressé en dehors de ce cadre.
>
> 5. Les remarques de l'honorable juge Ivan C. Rand sur le caractère du juge Landreville n'ont pas été considérées comme pertinentes et n'ont donc joué aucun rôle dans la décision du Comité.
>
> 6. Après avoir entendu le témoignage du juge Landreville et étudié le rapport de l'honorable juge Ivan C. Rand, le Comité conclut que le juge Landreville s'est révélé incapable d'exercer comme il convient ses fonctions judiciaires et, à son grand regret, recommande qu'il est opportun de présenter une adresse à Son Excellence la priant de démettre le juge Landreville de sa charge à la Cour suprême d'Ontario.

Par lettre du 7 juin 1967, (pièce 35), le demandeur a donné sa démission en tant que juge, qui a été acceptée et est entrée en vigueur le 30 juin.

La présente action attaque la validité de la nomination du commissaire à la conduite de l'enquête de 1966, certains aspects de cette enquête et le rapport lui-même.

Les redressements demandés sont les suivants:

[1] La nomination a été effectuée par décret du conseil rendu en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*. Le demandeur a été nommé membre de la Haute Cour de justice de l'Ontario et membre *ex officio* de la Cour d'appel de l'Ontario.

[2] S.R.C. 1952, c. 154. Les lettres patentes (pièce 28) ont été émises le 2 mars 1966.

[3] J'ai cité presque littéralement les termes du mandat, mais je les ai subdivisés pour plus de convenance et de clarté.

(a) A Declaration that the appointment of the said Commissioner was not authorized by the *Inquiries Act* and that consequently the said Report is null and void;

(b) A Declaration that, if the said Commissioner was validly appointed to hold an Inquiry and make a Report, which the Plaintiff denies, the said Report made by the Commissioner on August 11, 1966, should be removed into this Court to be quashed by reason of the matters set out in paragraph 7 of this Declaration;

(c) That a Writ of Certiorari be issued removing into this Court the said Report and all records, proceedings, papers and transcripts of evidence relating to the said Inquiry and to quash the said Report;

Three questions of law were argued some time before trial.[4] The questions came on before Pratte J. In respect of the relief claimed in paragraph (b) of the declaration, he assumed [at page 1226]:

. . . that in subparagraph (b) the plaintiff claims a declaration that the Commissioner, for the reasons set out in paragraph 7 of the Declaration, conducted his inquiry irregularly and that his report should be quashed.

The questions of law submitted were:

1. Whether this Honourable Court has jurisdiction to issue a Writ of Certiorari against Her Majesty the Queen;

2. Whether this Honourable Court has jurisdiction to quash the report of the Royal Commission appointed by letters patent bearing date the 2nd day of March, 1966;

3. Whether this Honourable Court has jurisdiction to grant a declaration in the circumstances alleged in the Statement of Claim herein;

In respect of the first question, the formal ruling was:

1. That it is not expedient to give an answer to the first question since, even if the action were not brought against Her Majesty, *certiorari* would not lie in this case.

The second question was answered "No" and the third "Yes". Reasons were given. In dealing with the third question, Pratte J. said [at page 1228]:

The plaintiff, according to my interpretation of his Declaration, seeks two declarations: first, that the appointment of the Commissioner was *ultra vires* and, second, that the Commissioner did not conduct the inquiry as he should.

He went on [at page 1229]:

These contradictory submissions can be briefly summarized. Counsel for the defendant argued that the declarations sought could not be made because they would not have any legal effect. Counsel for the plaintiff contended that these declarations could be made because they would, from a purely practical point of view, be beneficial to the plaintiff.

The question to be answered is therefore whether this Court has jurisdiction to make a declaration on a legal issue in a case where the declaration would be devoid of legal effects but would likely have some practical effects. . . .

He answered the question affirmatively, adopting the reasoning of the English Court of Appeal in *Merricks v. Nott-Bower*[5], and holding [at page 1230]:

From this, I infer that the Court has the jurisdiction to make a declaration which, though devoid of any legal effect, would, from a practical point of view, serve some useful purpose.

At the trial, Mr. Henderson for the plaintiff, put forward three main submissions:

1. The Commission was not validly constituted. The only procedure to be followed is set out in s. 99 of the *British North America Act*.

2. If the Commission was indeed validly constituted, the Commissioner lost jurisdiction by exceeding the terms of reference.

3. Again, assuming the legality of the Commission, the Commissioner did not comply with the requirements of s. 13 of the *Inquiries Act*.

In order to deal with these contentions and the submissions on behalf of the defendant, it is necessary to recount the background and facts leading to the appointment of the Commissioner.

In 1958 the Ontario Securities Commission directed an investigation into the trading in shares of NONG from its incorporation to the date when its units (one debenture and one common share) were qualified for sale in Ontario, June 4, 1957. A report was issued on August 18, 1958. At that time certain information available in British Columbia had not come to light. For that reason, neither the plaintiff nor any involvement by him in shares of NONG was investigated. In 1962, on the basis of certain information supplied by the Attorney General for British Columbia another investigation, or perhaps a further investigation, was directed.

It appeared that 14,000 shares of NONG had been, on January 17, 1957, allotted to Convesto, a nominee name used by Continental Investment Corporation Limited (brokers) of Vancouver. An

[4] [1973] F.C. 1223.

[5] [1964] 1 All E.R. 717.

[TRADUCTION] a) Un jugement déclarant que la *Loi sur les enquêtes* ne permettait pas de nommer ce commissaire et que, par conséquent, son rapport est nul et de nul effet;

b) Un jugement déclarant que, si le commissaire a été régulièrement nommé pour faire enquête et rapport, ce que le demandeur nie, son rapport déposé le 11 août 1966 doit être évoqué devant cette cour et annulé aux motifs énoncés au paragraphe 7 de la déclaration;

c) La délivrance d'un bref de certiorari plaçant devant cette cour le rapport, les dossiers, comptes rendus, documents et transcriptions des témoignages se rapportant à cette enquête, afin qu'elle annule ledit rapport;

Quelque temps avant l'audience[4], trois questions de droit ont été débattues et portées devant le juge Pratte. En ce qui concerne le redressement réclamé dans le paragraphe b) de la déclaration, ce dernier tient pour acquis [à la page 1226]:

. . . que le demandeur réclame dans l'alinéa b) une déclaration portant que le commissaire a mené son enquête illégalement, pour les motifs énoncés au paragraphe 7 de la déclaration, et que son rapport est annulé.

Voici quelles ont été ces questions de droit:

[TRADUCTION] 1. La présente Cour a-t-elle compétence pour délivrer un bref de *certiorari* contre Sa Majesté la Reine?

2. La présente Cour a-t-elle compétence pour annuler le rapport de la Commission royale nommée en vertu de lettres patentes datées du 2 mars 1966?

3. La présente Cour a-t-elle compétence pour rendre un jugement déclaratoire compte tenu des circonstances mentionnées dans la déclaration en la présente instance?

Pour la première question, il a statué:

1. Il n'est pas opportun de trancher la première question, puisque, même si l'action n'était pas intentée contre Sa Majesté, on ne pourrait dans ce cas délivrer un bref de *certiorari*.

Il a répondu «non» à la seconde question et «oui» à la troisième en indiquant ses motifs. A propos de cette dernière, il a déclaré [à la page 1228]:

Si j'ai bien compris la déclaration du demandeur, celui-ci demande deux choses: premièrement, une déclaration que la nomination du commissaire est *ultra vires* et, deuxièmement, une déclaration portant que le commissaire n'a pas conduit son enquête comme il le devait.

Il continue [à la page 1229]:

L'on peut résumer ainsi ces arguments contradictoires. L'avocat de la défenderesse soutient que la Cour ne peut rendre ces jugements déclaratoires parce qu'ils n'auraient aucun effet juridique. L'avocat du demandeur soutient de son côté que ces jugements peuvent être rendus parce qu'ils constitueraient, sur un plan purement pratique, un avantage pour le demandeur.

La question à résoudre est donc la suivante: la présente Cour a-t-elle compétence pour rendre un jugement déclaratoire sur une question de droit dans un cas où ce jugement n'aurait aucun effet juridique tout en ayant vraisemblablement des effets pratiques? . . .

Il a répondu à la question par l'affirmative, en adoptant le raisonnement que la Cour d'appel britannique a tenu dans *Merricks c. Nott-Bower*[5], et a conclu dans ces termes [à la page 1230]:

Je conclus de ce qui précède que la Cour a compétence pour rendre un jugement déclaratoire qui, bien que dénué d'effet juridique, pourrait avoir quelque utilité d'un point de vue pratique.

A l'instance, Me Henderson, au nom du demandeur, a présenté trois principaux arguments:

[TRADUCTION] 1. La Commission n'a pas été valablement constituée. Il n'y a qu'une procédure à suivre: celle énoncée dans l'art. 99 de l'*Acte de l'Amérique du Nord britannique*.

2. En admettant que la Commission ait été valablement constituée, le commissaire a perdu sa compétence en outrepassant son mandat.

3. Là encore, même si on admet que la Commission est juridiquement valable, le commissaire n'a pas satisfait aux exigences de l'art. 13 de la *Loi sur les enquêtes*.

Pour apprécier ces prétentions et arguments formulés par la défenderesse, il est nécessaire de relater les faits passés et contemporains, qui ont conduit à la nomination du commissaire.

En 1958, l'Ontario Securities Commission a ordonné une enquête sur le commerce des actions de NONG, depuis sa constitution jusqu'à la date où ses unités (une débenture et une action ordinaire) ont été admises pour vente en Ontario soit le 4 juin 1957. Un rapport a été publié le 18 août 1958. A ce moment-là, certains renseignements disponibles en Colombie-Britannique n'avaient pas été encore divulgués. Pour cette raison, il n'a été procédé à aucune enquête sur la personne du demandeur ni sur sa participation dans les actions de NONG. En 1962, à partir de certains renseignements fournis par le procureur général de la Colombie-Britannique, une autre enquête ou peut être une enquête complémentaire, a été ordonnée.

Il en est ressorti que le 17 janvier 1957, 14,000 actions de NONG ont été attribuées à Convesto, nom interposé utilisé par Continental Investment Corporation Limited (courtiers), de Vancouver

[4] [1973] C.F. 1223.

[5] [1964] 1 All E.R. 717.

investigation in British Columbia revealed that 4,000 of those shares had then been transmitted to J. Stewart Smith, the former British Columbia superintendent of brokers and 10,000 to the plaintiff.

Ralph K. Farris was at all relevant times the President of NONG. He gave evidence before the Ontario Securities Commission both in 1958 and 1962. The plaintiff gave evidence in 1962 as to how he had acquired the 10,000 shares in NONG.

A perjury charge was laid against Ralph K. Farris. It arose out of the testimony, in respect of the Convesto share transaction, he had given the Securities Commission. His preliminary hearing was in the latter part of 1963 and the early part of 1964. The plaintiff gave evidence.

Farris was committed for trial. The trial was before a Supreme Court Judge and jury in 1964. Once more, the plaintiff was called as a witness and gave evidence in respect of the share transactions referred to. Farris was convicted.

On June 12, 1964 the plaintiff wrote the Honourable Guy Favreau, the Minister of Justice for Canada. He pointed out that since 1962 there had been insinuations in the Ontario Legislature that NONG and he ". . . have been guilty of corrupt practices." He requested an inquiry should take place at his own request; that a special commissioner be appointed; and:

> The terms of reference would be broad but simple: whether or not there has been any conflict of interest, bribery, undue influence or any corrupt practices in the award of the Sudbury Gas Franchise.

He added that the only alternative to his request would be the Ontario Attorney General laying some charge against him ". . . to provide me with similar opportunity" [to prove his innocence].

The Minister of Justice indicated he would study the matter.

Before his request was further dealt with, the Attorney General for Ontario, in August, 1964, laid charges against the plaintiff. In essence, the accusation was that while he was mayor of Sudbury, he offered or agreed to accept stock in

Une enquête effectuée en Colombie-Britannique a révélé que 4,000 de ces actions ont été remises à J. Stewart Smith, ancien surintendant des courtiers en Colombie-Britannique, et 10,000 au demandeur.

A tous les moments pertinents, Ralph K. Farris était président de NONG. Il a témoigné devant l'Ontario Securities Commission en 1958 et en 1962. Le demandeur, lui, a témoigné en 1962 sur la manière dont il avait acquis les 10,000 actions de NONG.

Ralph K. Farris a fait l'objet d'une accusation de parjure, en raison de la déposition qu'il a faite à la Securities Commission sur les transactions d'actions avec la Convesto. Son audition préalable a eu lieu à la fin de 1963 et au début de 1964. Le demandeur y a fait une déposition.

Farris a été renvoyé pour subir son procès. Celui-ci a eu lieu, en 1964, devant un juge de la Cour suprême et un jury. Une fois de plus, le demandeur a été cité comme témoin et a fait une déposition sur les transactions en question. Farris a été déclaré coupable.

Le 12 juin 1964, le demandeur a écrit à Guy Favreau, ministre de la Justice du Canada. Il l'a informé que depuis 1962, on insinuait à la législature de l'Ontario que NONG et lui-même [TRADUCTION] «. . . s'étaient rendus coupables de pratiques de corruption.» Il a réclamé une enquête et la nomination d'un commissaire spécial; il a ajouté:

> [TRADUCTION] Le mandat devrait être large, mais simple, à savoir: y a-t-il eu conflit d'intérêt, vénalité, influence indue ou pratiques de corruption dans l'octroi de la concession de gaz à Sudbury?

Il a ajouté que la seule autre solution serait que le procureur général de l'Ontario dépose une accusation contre lui [TRADUCTION] «. . . pour me fournir une occasion semblable» [de prouver son innocence].

Le ministre de la Justice a répondu qu'il étudierait la question.

Avant que sa demande aille plus loin, en août 1964, le procureur général de l'Ontario a déposé contre lui une accusation portant en substance que lorsqu'il était maire de Sudbury, il a offert ou accepté des actions de NONG en échange de son

NONG in return for his influence in seeing that NONG obtained a franchise agreement in Sudbury. There was also a charge of conspiracy, to the same effect, with Farris. Similar charges, in respect of granting of franchises, were laid against the mayors of Orillia, Gravenhurst and Bracebridge.

The plaintiff's preliminary hearing was in September or October of 1964, presided over by Magistrate Albert Marck. The Magistrate discharged the accused, expressing the view a properly charged jury could not find him guilty. Two of the other mayors were discharged on their preliminary hearings; the third was committed for trial, but acquitted by a county court jury.

The Attorney General for Ontario, shortly after, issued a press release in which it was stated[6]:

> The Attorney General today announced that he will not prefer a Bill of Indictment before a Grand Jury in respect of Mr. Justice Landreville. In so far as the Department of the Attorney General is concerned, the matter of the prosecution of Mr. Justice Landreville is concluded.

The next event, in the evidence before me, was a report by a special committee of The Law Society of Upper Canada. The Society, in January of 1965, had struck a special committee to consider and report on what action, if any, should be taken by it ". . . as a result of Mr. Justice Landreville's decision to continue to sit as a Judge of the Supreme Court of Ontario". The report of the special committee was made on March 17, 1965. It was adopted by Convocation, with one dissent, on April 23, 1965. The report contained what was termed a "statement of facts" and certain "conclusions" on those facts. One was ". . . there is no doubt that the Magistrate was correct in dismissing the charges against Landreville".

The report went on to set out certain ". . . matters which are unexplained, and upon which your committee can only speculate". Following those speculations the committee stated, ". . . the following inference . . . can be drawn from the foregoing questions which remain unanswered . . . [the speculative matters]":

[6] Exhibit 169 at the Rand Commission.

influence pour l'octroi à NONG d'une concession à Sudbury. Il a aussi porté contre lui une accusation de conspiration avec Farris au même effet. En ce qui concerne l'octroi de concessions, les maires de Orillia, Gravenhurst et Bracebridge ont fait l'objet d'accusations analogues.

Le demandeur a subi son enquête préliminaire en septembre ou octobre 1964, sous la présidence du magistrat Albert Marck, qui l'a acquitté en déclarant qu'un jury correctement instruit ne pouvait pas le juger coupable. Deux des autres maires ont été acquittés au stade de l'enquête préliminaire, et le troisième renvoyé pour subir son procès. Un jury de cour de comté l'a ensuite acquitté.

Peu après, le procureur général de l'Ontario a publié un communiqué de presse, où il déclarait[6]:

> [TRADUCTION] Aujourd'hui, le procureur général a annoncé qu'il ne portera pas d'accusation devant un grand jury contre le juge Landreville. Donc, en ce qui concerne son Département, les poursuites contre le juge Landreville sont terminées.

Dans la preuve dont je suis saisi, le fait suivant consisté en un rapport rédigé par un comité spéci de The Law Society of Upper Canada. En janvi 1965, cette dernière a donc chargé un comi spécial d'examiner les mesures (s'il y a lieu) qu conviendrait de prendre [TRADUCTION] «. . . à suite de la décision du juge Landreville de con nuer à siéger comme juge de la Cour suprême l'Ontario», et de faire rapport. Le comité spécial publié son rapport le 17 mars 1965, qui a é adopté en assemblée (à une dissidence près), le avril 1965. Il contenait ce qu'il appelait un «expo des faits» et certaines «conclusions» sur ces fai L'une d'elles était: [TRADUCTION] «. . . sans auc doute, le magistrat a eu raison de rejeter accusations portées contre Landreville».

Le rapport continuait en mentionnant certai [TRADUCTION] «. . . questions qui restent inex quées et sur lesquelles votre comité peut seulem spéculer». A la suite de ces spéculations, le com a déclaré: [TRADUCTION] «. . . la déduction vante . . . peut être tirée des questions précéde qui restent sans réponse . . . [les questi spéculatives]»:

[6] Pièce 169 produite devant la Commission Rand.

YOUR COMMITTEE REPORTS THE FOLLOWING INFERENCE THAT CAN BE DRAWN FROM THE FOREGOING QUESTIONS WHICH REMAIN UNANSWERED:

The fact that Landreville was given an opportunity to acquire shares at the same price as the original promoters of the Company and that the option was given immediately following the passing of the third reading of the by-law and for no apparent consideration, and that subsequently without any exercise of such option by Landreville he received 7500 shares free and clear, which he subsequently sold for $117,000, and that when Farris was first questioned about the matter he deliberately lied, support the inference that the acquisition of shares by Landreville was tainted with impropriety.

The report went on:

THE FOLLOWING ARE THE OPINIONS AND RECOMMENDATIONS OF YOUR COMMITTEE:

The above recited facts are matters of public knowledge and are, in the opinion of your Committee, inconsistent with the reputation for probity required of one of Her Majesty's Judges for the due administration of justice in this Province.

As a consequence of these facts, the questions unanswered, and the inference which your Committee has drawn and which it believes the public has also drawn, YOUR COMMITTEE RECOMMENDS—

1. That the Benchers of The Law Society of Upper Canada in Convocation deplore the continuance of the Honourable Mr. Justice Landreville as one of Her Majesty's Judges of the Supreme Court of Ontario.

On the evidence before me, the plaintiff knew absolutely nothing of this special committee and its activities. He was never invited to appear before them to answer their unexplained matters or speculations. A copy of the report was sent to the Federal Minister of Justice,[7] and to the plaintiff.

I think I ought to say, at this point, that I characterize the action and report of the Society as puzzling, and, in retrospect, probably unwarranted.

Although the evidence before me is unclear, the contents of the report were not made public at that time. The Commissioner annexed it as "Appendix A" to his report.[8]

[7] The Law Society report concluded:

2. That the Secretary of the Society be authorized and directed forthwith to forward a certified copy of this report to the Honourable the Minister of Justice and Attorney General of Canada, the Honourable the Chief Justice of Ontario, the Honourable the Chief Justice of the High Court, the Honourable Mr. Justice Landreville, and the Attorney General for the Province of Ontario.

3. That the Treasurer of the Society be authorized to issue copies of this report to the press at such time thereafter as he may in his discretion deem fit.

[TRADUCTION] VOTRE COMITÉ RAPPORTE LA DÉDUCTION SUIVANTE QUI PEUT ÊTRE TIRÉE DES QUESTIONS PRÉCÉDENTES QUI RESTENT SANS RÉPONSE:

Le fait que Landreville a eu l'occasion d'acquérir des actions au même prix que les promoteurs de la compagnie et que l'option lui a été accordée immédiatement après l'adoption du règlement en troisième lecture et pour aucune raison apparente, et qu'ensuite, sans s'être aucunement prévalu de cette option, il a reçu 7,500 actions franches et quittes de toutes dettes et charges, qu'il a ensuite vendues $117,000, et le fait que Farris, lorsqu'il a été questionné à ce sujet, a délibérément menti, étayent la déduction selon laquelle l'achat des actions de Landreville a été entaché d'indélicatesse.

Le rapport continue:

[TRADUCTION] VOICI LES OPINIONS ET LES RECOMMANDATIONS DE VOTRE COMITÉ:

Les faits relatés ci-dessus sont de notoriété publique et sont, de l'avis de votre comité, incompatibles avec la réputation de probité qu'on exige des juges de Sa Majesté pour administrer la justice dans cette province.

En conséquence, vu les questions restées sans réponse et la déduction qu'il a tirée (et que, selon lui, le public a aussi tiré), VOTRE COMITÉ RECOMMANDE—

1. Que les membres du Conseil de The Law Society of Upper Canada en assemblée déplorent que le juge Landreville continue à occuper la charge de juge de Sa Majesté pour la Cour suprême de l'Ontario.

Au vu de la preuve produite devant moi, le demandeur n'était nullement au courant de l'existence de ce comité spécial ni de ses activités. Il n'a jamais été invité à y comparaître ni à répondre aux questions ou spéculations inexpliquées. Une copie du rapport a été envoyée au ministre de la Justice fédéral[7] et une autre au demandeur.

A ce stade, je dois dire que les actes et le rapport de la Society me paraissent troublants et, avec le recul, probablement injustifiés.

Bien que la preuve produite devant moi ne soit pas claire, le contenu du rapport n'a pas été rendu public à ce moment-là. Le commissaire l'a joint à

[7] Le rapport de la Law Society conclut:

[TRADUCTION] 2. Que le secrétaire de la Society soit autorisé et enjoint d'envoyer immédiatement une copie certifiée conforme de ce rapport au ministre de la Justice, au procureur général du Canada, au juge en chef de l'Ontario, au juge en chef de la Haute Cour, au juge Landreville et au procureur général de la province de l'Ontario.

3. Que le trésorier de la Society soit autorisé à communiquer à la presse des copies de ce rapport lorsqu'il le jugera opportun.

son rapport en tant qu'«annexe A».[8]

On April 30, 1965, the plaintiff wrote to the Minister of Justice in connection with this report. Some question had apparently been raised about it in the House of Commons. He wrote also the Secretary of the Law Society. He complained the special committee had not seen fit to call on him to answer any of the questions it had raised. He pointed out he had, during the three previous years, made repeated requests to provincial and federal authorities "... to have the matter fully aired".

I should digress at this stage to say that the plaintiff had, when the criminal charges where laid against him, retained a well known counsel, Mr. John J. Robinette, Q.C. Mr. Robinette was a bencher. He had taken no part in the investigation and report of the Law Society. As I understand the evidence, the plaintiff was still, at this stage, receiving advice from Mr. Robinette.

On May 7, 1965, the plaintiff telegraphed the Minister of Justice withdrawing his previous request for an inquiry. He asked Mr. Favreau to make no decision on a course of action until the Minister had read his (the plaintiff's) report.

On May 13, 1965, he wrote the Minister. He commented on the Law Society report. He went on to say:

Am I being attacked as a Judge? If so, of what unbecoming conduct?

What am I accused of specifically? I have no intention of dealing with the facts. As you are well aware, I have on more than one occasion and particularly immediately after my acquittal requested that a Public Enquiry be held to vindicate my name on all possible grounds. I attach a copy of your letter and a news item. I strongly feel I have done all possible

[8] The Commissioner stated on page 95:

It is perhaps unnecessary to say that the resolution of the Benchers of the Law Society of Upper Canada submitted to the Minister of Justice has played no part whatever in arriving at the conclusions of fact set out in this report. Its only relevance is that that governing body has seen fit to seek an inquiry into matters for several years the subject of wide public concern: no challenge to the propriety of such a request from a body having such an interest in the administration of Justice has been or could be made. A copy of that resolution is annexed as Appendix A of this report.

Le 30 avril 1965, le demandeur a écrit a ministre de la Justice à propos de ce rapport, qui apparemment donné lieu à la Chambre des com munes à quelques questions. Il a aussi écrit a secrétaire de la Law Society. Il s'est plaint que comité spécial n'ait pas jugé bon de lui donner parole pour répondre aux questions qu'il a soul vées. Il a souligné qu'au cours des trois anné précédentes, il a adressé des demandes réitéré aux autorités fédérales et provinciales pour q [TRADUCTION] «... l'affaire soit étalée au gra jour».

A ce stade, je me permets une digression po mentionner que le demandeur, en présence d accusations criminelles déposées contre lui, retenu les services d'un avocat bien connu, John J. Robinette, c.r., membre du conseil barreau. Il n'a pris part ni à l'enquête ni rapport de la Law Society. Si j'en juge par preuve, à ce moment-là, le demandeur recev encore les conseils de Me Robinette.

Le 7 mai 1965, le demandeur a télégraphié ministre de la Justice pour retirer sa dema d'enquête. Il a demandé à M. Favreau de n'arrê aucune ligne de conduite avant d'avoir lu rapport.

Le 13 mai 1965, il a écrit au Ministre formulant des commentaires sur le rapport de Law Society. Il y déclare notamment:

[TRADUCTION] M'attaque-t-on en tant que juge? Et si pour quelle indélicatesse?

De quoi m'accuse-t-on exactement? Je n'ai pas l'inte d'examiner les faits. Comme vous le savez fort bien, j'ai eu d'une fois l'occasion, spécialement après mon acquittemen demander la tenue d'une enquête publique pour me justifie tous les points. Je joins sous ce pli une copie de votre lett un article de presse. Je pense avoir fait tout ce qui était en

[8] Le commissaire déclare à la page 95:

[TRADUCTION] Il paraît superflu de dire que la résol du conseil de la Law Society of Upper Canada soumis ministre de la Justice, n'a joué aucun rôle dans les co sions de fait énoncées dans le présent rapport. Elle a eu unique effet que ce conseil de direction a jugé bo demander la tenue d'une enquête dans une affaire pendant des années, a grandement préoccupé le p L'à-propos de cette demande émanant d'un organisme, un tel intérêt dans l'administration de la justice, n'a pa contesté et ne pouvait pas l'être. Une copie de cette r tion est jointe comme annexe A du présent rapport.

including keeping dignified silence in the face of unfounded gossip.

I now withdraw from that position for the following reasons:

(a) The subject matter was deemed closed six months ago. I have returned to my functions. The Bar and the Public have shown usual courtesy and co-operation.

(b) An Enquiry would re-open, deal with and review facts which are strictly *res judicata*. The Attorney General has made such review and closed his files.

(c) The Report of the Law Society, making as it does unfounded findings, prejudices me and is defamatory.

(d) Regardless of the most favourable decision, an Enquiry and proceedings with pertaining publicity, would be conclusively detrimental and final to my reputation.

(e) I am advised by my counsel J. J. Robinette, Q.C. and others, that a judge does not come under the Enquiry Act, the Civil Servants Act or any other statute and an enquiry is illegal.

(f) I am advised that it is inimical to the interest of the Bench that I create the precedent of requesting and submitting to an Enquiry because of the criticism of person or association.

. . .

Again, Sir, I submit the Report of the Society does not accuse me specifically of serious breach of Law or Ethics.

If so, it then becomes a question whether or not, in my sole discretion, I deem fit to invite further proceedings and publicity to vindicate my name to the mind of some people who prefer gossip to facts. To the sound person, unmoved by publicity-allergy, my past is pure and proven so to be.

Should you adhere to your previous decision and base it anew on the opinion of those who know the facts (Magistrate Marck, Mr. Justice D. Wells, the Attorney-General) the matter may be closed by your statement in the House after recital of facts.

Of course, if you are satisfied there are reasonable and probable grounds to justify impeachment proceedings, it is your duty so to do. Those proceedings I must meet in both Houses. In the light of present events, I have no intention of resigning. During my entire career as a solicitor, a member of Boards, Commissions and Councils, as a Judge, I have conducted myself in strict conformity to the highest concept of Ethics. Of this, others may speak, others who know me.

On June 12, 1965, Magistrate Marck wrote the Law Society. He had been shown a copy of its report. He characterized it as a grave injustice. He said there was a total absence of any evidence the plaintiff had been guilty of any corruption. He suggested the Benchers might see fit to reconsider their report. He indicated his willingness to appear before them.

pouvoir, y compris garder un silence digne face à des cancans non fondés.

Je change maintenant d'attitude pour les raisons suivantes:

a) L'affaire est réputée close depuis six mois. J'ai repris mes fonctions. Le barreau et le public ont fait preuve de leur courtoisie et coopération habituelles.

b) Une enquête serait rouverte pour traiter de faits déjà examinés, qui sont strictement chose jugée. Le procureur général a déjà procédé à cet examen et a fermé ses dossiers.

c) Le rapport de la Law Society, en formulant des observations mal fondées, m'est préjudiciable et a un caractère diffamatoire.

d) Même si la décision était des plus favorables, une enquête et les procédures y afférentes avec la publicité qu'elles comportent, nuirait à ma réputation de façon péremptoire et définitive.

e) Mon avocat, J. J. Robinette, c.r., et d'autres personnes m'ont informé qu'un juge ne tombe pas sous le coup de la Loi sur les enquêtes ou de la Loi sur les fonctionnaires publics ou de toute autre loi et qu'une enquête est illégale.

f) J'ai été également informé qu'il serait contraire aux intérêts de la magistrature que je crée un précédent en demandant une enquête ou en m'y soumettant à cause des critiques d'une personne ou d'une association.

. . .

Je soutiens à nouveau, Monsieur, que le rapport de la Society ne m'accuse pas de façon spécifique d'une violation sérieuse au droit ou à la morale.

Cela étant, il se pose la question suivante: me paraît-il souhaitable d'engager de nouvelles procédures et publicité pour me justifier aux yeux de gens qui préfèrent les cancans aux faits? Je suis parfaitement libre d'en décider. Pour une personne saine d'esprit, insensible à la publicité, mon passé est pur; cela a été prouvé.

Si vous vous en tenez à votre décision précédente et vous basez à nouveau sur l'opinion de ceux qui connaissent les faits (le magistrat Marck, le juge D. Wells, le procureur général), votre déclaration devant la Chambre après l'exposé des faits suffit à clore l'affaire.

Naturellement, si vous êtes convaincu qu'il existe des motifs probables et raisonnables pour justifier des procédures de mise en accusation, c'est votre devoir d'y recourir. Je devrai y faire face devant les deux Chambres. Sur la base des événements actuels, je n'ai pas l'intention de démissionner. Au cours de ma carrière comme avocat, membre de conseils et de commissions et juge, je me suis conformé aux principes les plus élevés de la morale. Ceux qui me connaissent peuvent en faire foi.

Le 12 juin 1965, le magistrat Marck a écrit à la Law Society, qui lui avait envoyé une copie de son rapport. Il a qualifié celui-ci d'injustice grave. Il a dit qu'il n'existait aucune preuve que le demandeur se soit rendu coupable de corruption. Il a proposé aux membres du conseil de reconsidérer leur rapport et leur a indiqué qu'il était prêt à comparaître devant eux.

On June 18, 1965, Mr. Robinette wrote the Minister of Justice referring to the Magistrate's letter. He suggested that it provided the answer to the speculations of the Law Society. He expressed the hope, in those circumstances, the Minister would not deem it necessary to institute any form of judicial inquiry. Mr. Robinette pointed out he had written to the Minister in February of 1965 expressing grave doubts as to the constitutional power of the Governor in Council to direct a judicial inquiry with reference to the conduct of a superior court judge.

The Honourable Lucien Cardin became Minister of Justice. On July 29, 1965, he sent a telegram to the plaintiff. It stated in part: "I ... have reached the conclusion that, in your own interests, as well as in the interests of the administration of justice, a formal inquiry ... would be desirable." He invited comments from the plaintiff.

The plaintiff on August 4, replied:

It will be noted from your file that I have invited an inquiry on several occasions. I include conversations with your two predecessors Honourable Chevrier and Honourable Favreau.

However, your predecessor, having reviewed his file and the judgment of Magistrate Marck did decide in October 1964 that a public inquiry was not warranted by the facts. His comments to the press indicate this. There are no new facts.

Since that time, it has been pointed out to me by a number of my colleagues that for a Superior Court Judge to submit or consent to a public inquiry would establish a very dangerous precedent, particularly when such acts antedate his appointment and do not relate to the performance of his official duties. Further, your file contains a letter from my solicitor, J. J. Robinette, Q.C., to Honourable Favreau dated February 22, 1965. It expresses our view that a Superior Court Judge does not come under the Civil Service Act, the Public Officers Act, the Inquiries Act—nor any other applicable statute. Under the law the Superior Court Judge is answerable only before both Houses on proceedings of impeachment.

You do realize no one is more interested than I to vindicate fully my name. The dilemma raises, therefore, a question of jurisdiction.

You may deem the question to be of sufficient importance to be submitted to the Supreme Court of Canada for determination. I am prepared to submit only to whatever inquiry or process the Supreme Court of Canada holds to be legal.

That question, however, does not and will not prevent you from taking impeachment proceedings at any time if you deem facts justify such action. It must be noted no one has accused me of breach of Ethics in an act done nine years ago.

. . .

Le 18 juin 1965, Me Robinette a écrit au ministre de la Justice en se référant à la lettre du magistrat. Selon lui, elle fournit la réponse aux spéculations de la Law Society. Il a exprimé l'espoir que, vu les circonstances, le Ministre ne jugerait pas nécessaire d'instituer une enquête judiciaire et Me Robinette a déclaré avoir écrit au Ministre en février 1965 pour lui faire part de ses doutes sérieux sur le pouvoir constitutionnel du gouverneur général en conseil d'ordonner une enquête judiciaire relative à la conduite d'un juge d'une cour supérieure.

Le 29 juillet 1965, l'honorable Lucien Cardin devenu ministre de la Justice, a envoyé un télégramme au demandeur, dont voici des extraits: [TRADUCTION] «Je ... suis parvenu à la conclusion que, dans votre propre intérêt, ainsi que dans celui de l'administration de la justice, une enquête officielle ... serait souhaitable.» Il l'invitait également à formuler des commentaires.

Le 4 août, le demandeur a répondu:

[TRADUCTION] Il convient que vous notiez dans votre dossier qu'à plusieurs reprises j'ai sollicité une enquête, notamment au cours de mes entretiens avec vos deux prédécesseurs: l'honorable Chevrier et l'honorable Favreau.

Toutefois, ce dernier, après avoir examiné son dossier et le jugement du magistrat Marck, a décidé en octobre 1964 que les faits ne justifiaient pas l'ouverture d'une enquête publique. Rien fourni à la presse des commentaires dans ce sens. Il ne s'est produit aucun fait nouveau.

Depuis ce moment-là, plusieurs de mes collègues m'ont exprimé que le fait pour un juge d'une cour supérieure de consentir à une enquête publique, constituerait un dangereux précédent, surtout lorsqu'il s'agit d'actes antérieurs à sa nomination et sans rapport avec l'exécution de ses fonctions judiciaires. Votre dossier contient aussi une lettre de mon avocat, J. J. Robinette, c.r., à l'honorable Favreau, en date du 22 février 1965. Elle expose notre opinion qu'un juge d'une cour supérieure ne tombe pas sous le coup de la Loi sur la Fonction publique, de la Loi sur les fonctionnaires publics, de la Loi sur les enquêtes ou d'aucune autre loi applicable. En droit, un juge d'une cour supérieure n'est responsable que devant les deux Chambres en cas de mise en accusation.

Vous comprendrez volontiers que personne n'est plus intéressé que moi à une complète justification. Le dilemme soulève donc ici une question de compétence.

Vous pouvez juger la question suffisamment importante pour la soumettre à la Cour suprême du Canada, afin qu'elle en décide. Je ne consentirai qu'à l'enquête ou au processus qu'elle juge légaux.

Toutefois, cette question ne vous empêche pas d'engager à tout moments des procédures de mise en accusation si vous jugez que les faits les justifient. A noter que personne ne m'a accusé d'avoir dérogé à l'éthique professionnelle par un acte accompli il y a neuf ans.

. . .

It appears now that the issue takes a legal aspect, and in view also of my absence from the country until the end of this month, I would beg you to address future correspondence to Mr. J. J. Robinette, Q.C., c/o McCarthy and McCarthy, Solicitors, Canada Life Building, University Ave., Toronto.

Mr. Cardin, on August 18, answered:

I have very carefully considered your letter of August 4th, and the points you make. Nevertheless, I feel that in the interests of the administration of justice I must recommend to my colleagues that a Commissioner be appointed to conduct an inquiry and to make his report to the Government.

As I view the matter, the issue is not whether an offence was committed. The question that has been raised is, as I indicated in my telegram, quite a different one. The purpose of the inquiry would not be to review the decision of the Magistrate, but to ascertain whether it is in the interests of the administration of justice that, having regard to all the circumstances, you should continue to hold your present office. It is on this question that I feel an opinion from an eminent outside and independent authority ought to be obtained.

It is therefore my intention to proceed with the inquiry.

Mr. Cardin and the plaintiff then, on August 30, met in Toronto. It seems the past history of the whole affair was discussed. According to notes made by the plaintiff (Exhibit 37), he told the Minister that while a decision to hold an inquiry was, of course, the Minister's, Mr. Robinette and Mr. Sedgewick strongly opposed such an inquiry. There was some mention by the plaintiff of not answering any subpoenas that might be issued by a Commissioner, and a motion then being launched to have the inquiry declared illegal. The Minister indicated his view that an inquiry into the conduct of a judge was, under the *Inquiries Act*, permissible.

The discussion was inconclusive. The Minister indicated the whole matter would be left open; any decision to launch an inquiry would, at the moment, be held in abeyance.

Some telegrams were then exchanged in connection with a press suggestion that the Law Society's report was going to be released. Mr. Cardin's telegram of November 23, 1965, to Mr. Robinette said in part: "... I ... propose you consent to appointment of Commission under *Inquiries Act*."

Il me semble maintenant que le litige prend un aspect juridique et vu que je serai absent jusqu'à la fin de ce mois, je vous demande d'adresser votre correspondance à Me J. J. Robinette, c.r., a/s McCarthy and McCarthy, avocats, Canada Life Building, University Ave., Toronto.

Le 18 août, M. Cardin a répondu:

[TRADUCTION] J'ai examiné votre lettre du 4 août avec la plus grande attention, ainsi que les points que vous y faites ressortir. Néanmoins, j'estime que dans les intérêts de l'administration de la justice, je dois recommander à mes collègues de nommer un commissaire pour mener une enquête et faire rapport au gouvernement.

Selon moi, le point litigieux ne consiste pas à établir s'il y a eu ou non infraction. Comme je l'indiquais dans mon télégramme, il est tout à fait différent. L'enquête n'aura pas pour objet de réviser la décision du magistrat, mais de s'assurer si, compte tenu des circonstances, il est dans l'intérêt de l'administration de la justice que vous continuiez à occuper votre charge actuelle. C'est sur ce point qu'à mon avis il faut obtenir l'opinion d'une personne autorisée, indépendante et étrangère.

J'ai donc l'intention d'instituer une enquête.

Le 30 août, M. Cardin et le demandeur se sont rencontrés à Toronto. Il semble qu'ils aient passé toute l'affaire en revue. D'après les notes rédigées par le demandeur (pièce 37), il a dit au Ministre que Me Robinette et Me Sedgewick étaient naturellement fort opposés à sa décision de tenir une enquête. Il a aussi indiqué en passant qu'il ne répondrait pas à une citation à comparaître émanant d'un commissaire et présenterait une requête pour faire déclarer l'enquête illégale. Le Ministre a soutenu que, selon lui, la *Loi sur les enquêtes* autorisait une enquête sur la conduite d'un juge.

La discussion n'a pas été concluante. Le Ministre a déclaré que l'affaire n'était pas résolue et que toute décision d'ouvrir une enquête resterait momentanément en suspens.

Il y a alors eu un échange de télégrammes motivé par une intervention de la presse suivant laquelle le rapport de la Law Society était sur le point d'être publié. Le 23 novembre 1965, M. Cardin a adressé un télégramme à Me Robinette, qui déclarait en substance: [TRADUCTION] «... Je ... propose que vous consentiez à la nomination d'un commissaire en vertu de la *Loi sur les enquêtes*.»

Mr. Robinette replied on November 29. He quoted at length from his letter of February 22, 1965 to Mr. Cardin's predecessor. In that previous letter he had expressed the view that section 2 of the *Inquiries Act* did not authorize the Governor in Council to set up an inquiry with reference to the conduct of a superior court judge. He had, in February, set out his position that:

... under our Constitution the only person who has any jurisdiction whatsoever over the behaviour of a Superior Court Judge is the Governor General and then only "on address of the Senate and House of Commons" as stipulated in Section 99 of *The British North America Act*.

On pages 3 and 4 of his November letter, he said:

My view with respect to this matter I know is shared by others and I think it would involve an interference with the independence of the judiciary if Mr. Justice Landreville were to consent to the appointment of a Commissioner under The Inquiries Act. In any event a Commissioner under The Inquiries Act either would or would not have jurisdiction and Mr. Justice Landreville's consent could not give a Commissioner jurisdiction which he does not have. I have discussed the matter with Mr. Justice Landreville and what we suggest is that the government should refer the matter to the Supreme Court of Canada for an adjudication by it as to whether or not a Superior Court Judge in a province can be the subject of an inquiry under The Inquiries Act. Such a reference to the Supreme Court of Canada should also ask for the opinion of the Court as to what the words "during good behaviour" in section 99 of The British North America Act encompass. We made the suggestion to The Honourable Guy Favreau some months ago that this question as to the power of the government to appoint a Commissioner under The Inquiries Act to look into the status of a Judge of a Superior Court ought to be referred to the Supreme Court of Canada.

In short for the reasons which I have stated Mr. Justice Landreville is not prepared to consent to the appointment of a Commissioner but we repeat our suggestion that the question of the power of the government to appoint a Commissioner under the Inquiries Act should be referred to the Supreme Court of Canada along with a question the answer to which would define the scope and meaning of the words "during good behaviour" in section 99 of The British North America Act.

Mr. Justice Landreville would welcome an opportunity to state his position before a forum having jurisdiction to deal with the matter. Such a forum would be removed from any considerations of political expediency and would be in keeping with the dignity of his office. The position which Mr. Justice Landreville takes, not only in his own interests but in the interests of the other members of the judiciary, is that under The British North America Act the only person having jurisdiction with respect to any possible removal is the Governor General of Canada acting on joint address of the Senate and the House of Commons as provided in section 99 of The British North America Act.

Le 29 novembre, Me Robinette a répondu. I cité de longs passages de sa lettre du 22 févr 1965 au prédécesseur de M. Cardin, où il déclar que l'article 2 de la *Loi sur les enquêtes* n'auto pas le gouverneur en conseil à instituer enquête afférente à la conduite d'un juge d'u cour supérieure. En février, il avait énoncé position dans les termes suivants:

[TRADUCTION] ... aux termes de notre Constitution, la s personne qui ait une quelconque compétence pour juger d conduite d'un juge d'une cour supérieure, c'est le gouvern général et ce, seulement «sur une adresse du Sénat et d Chambre des communes», comme le prévoit l'article 99 l'*Acte de l'Amérique du Nord britannique*.

Aux pages 3 et 4 de sa lettre de novembre déclare:

[TRADUCTION] Mon opinion sur cette question, je le sais, partagée par d'autres. Je pense qu'il y aurait immixtion d l'indépendance du judiciaire si le juge Landreville devait sentir à la nomination d'un commissaire en vertu de la Loi les enquêtes. En tous cas, un commissaire ainsi nommé au ou n'aurait pas compétence et ce n'est pas le consentement juge Landreville qui pourrait lui donner une compétence n'a pas. J'ai discuté la question avec le juge Landreville et proposons que le gouvernement renvoie l'affaire devant la suprême du Canada pour qu'elle décide si dans une provinc juge d'une cour supérieure peut être assujetti à une enquêt vertu de la Loi sur les enquêtes. Il faudra aussi lui demande se prononcer sur le sens de l'expression «durant bonne duite», qui figure dans l'article 99 de l'Acte de l'Amérique Nord britannique. Il y a quelques mois, nous avons l entendre à l'honorable Guy Favreau qu'il faut déférer à la suprême du Canada, la question relative au pouvoir du gou nement de nommer un commissaire en vertu de la Loi su enquêtes, pour étudier le statut d'un juge d'une cour supérie

En bref, pour les raisons que j'ai mentionnées, le juge Lan ville n'est pas disposé à consentir à la nomination d'un com saire et nous répétons qu'il faut déférer à la Cour suprême Canada la question du pouvoir du gouvernement de nomme commissaire en vertu de la Loi sur les enquêtes, ainsi que de la portée et du sens à donner à l'expression «durant bo conduite», qui figure dans l'article 99 de l'Acte de l'Amér du Nord britannique.

Le juge Landreville accueillerait volontiers l'occasion d'exp sa position devant une tribune compétente pour tranche question. Une telle tribune ne serait influencée par auc considération de convenance politique et respecterait la dig de sa charge. Il soutient non seulement dans son intérêt, aussi dans celui des autres magistrats qu'en vertu de l'Act l'Amérique du Nord britannique, la seule personne qui a c pétence pour révoquer un juge, c'est le gouverneur généra Canada agissant sur adresse conjointe du Sénat et de la Ch bre des communes, comme le prévoit l'article 99 de l'Act l'Amérique du Nord britannique.

Mr. Cardin answered on December 28, 1965. He disagreed with Mr. Robinette's contention as to the limitations of the *Inquiries Act* in respect of the conduct of superior court judges. He expressed the view the plaintiff could give consent to a commissioner's jurisdiction. On this point he added: "A commissioner would have no jurisdiction to make any judgment or order; his sole function would be to ascertain and report on the facts." He did not agree that there should be a reference, as suggested, to the Supreme Court of Canada. On this point he said:

There is no doubt that Parliament itself has the right and the power to make an inquiry into the conduct of a judge, and such an inquiry could be instituted on the motion of any member of the House, whether he is a member of the Government's side or not. If Mr. Justice Landreville is not agreeable to having an inquiry under the Inquiries Act, then I think he might expect that there will be a parliamentary inquiry. Such an inquiry would be founded on an allegation of impropriety and I should have thought that the Judge would prefer an "open" inquiry under the Inquiries Act that is not founded on an allegation of impropriety and would be designed simply to ascertain the facts.

As for your proposed question to the Supreme Court, may I suggest that courts cannot be asked to interpret words in the abstract. The most that could be done would be to refer a statement of facts to the Court and ask whether on these facts there has been a breach of the condition of judicial office. However, the first thing to be done, in my judgment, is to ascertain what the facts are. In any event, I would point out that the question you suggest to be put to the Supreme Court is not the principal issue in this matter.

The question is not so much whether the Judge has breached the condition of his office, namely, that it be held during good behaviour, but whether he has in the opinion of Parliament conducted himself in such a way as to render himself unfit to hold high judicial office. Under section 99 of The British North America Act, a judge may indeed be removed for "misbehaviour", but the power to remove on address extends to any ground and it is open to Parliament to make an address for the removal of a judge on any ground it sees fit, whether it constitutes misbehaviour in office or not.

I may say frankly that I would not wish to institute an inquiry under the Inquiries Act if there is any prospect that Mr. Justice Landreville would attempt to frustrate the inquiry by prerogative writ or otherwise. However, if an inquiry under the Inquiries Act is not agreeable to your client, then the result may well be a motion in Parliament for an inquiry by a Parliamentary Committee. As I have pointed out, such a motion may be made by any member of Parliament. I should have thought that, from the Judge's point of view, an inquiry under the Inquiries Act would be preferable. However, the choice rests with him, and if he is unwilling to have an inquiry under the Inquiries Act, I think it only fair to say that he may expect an inquiry by Parliament itself.

M. Cardin a répondu le 28 décembre 1965. Il n'est pas d'accord sur les limites de la *Loi sur les enquêtes* invoquées par Me Robinette à propos de la conduite des juges des cours supérieures. Selon lui, le demandeur pourrait accepter la compétence d'un commissaire. A cet égard, il ajoute: [TRADUCTION] «Un commissaire n'aurait pas compétence pour rendre un jugement ou une ordonnance. Ses fonctions se borneraient à constater et à rapporter les faits.» Il ne consent pas à déférer la question à la Cour suprême du Canada, comme on le lui a proposé. Il déclare à ce propos:

[TRADUCTION] Il ne fait aucun doute que le Parlement a le droit et le pouvoir d'instituer une enquête sur la conduite d'un juge à la demande d'un membre du Parlement, qu'il appartienne ou non au parti du gouvernement. Si le juge Landreville n'accepte pas une enquête en vertu de la Loi sur les enquêtes, alors il peut s'attendre à une enquête parlementaire, qui sera fondée sur une allégation de mauvaise conduite. J'aurais pensé que le juge aurait préféré une enquête «ouverte» instituée en vertu de la Loi sur les enquêtes, qui ne serait pas fondée sur une allégation de mauvaise conduite, mais simplement destinée à vérifier les faits.

Quant à votre proposition concernant la Cour suprême, puis-je vous faire remarquer qu'on ne demande pas à un tribunal d'interpréter des termes d'un point de vue abstrait. Le plus que l'on pourrait faire, ce serait de déférer un exposé des faits à la Cour et de demander si ces faits sont incompatibles avec des fonctions judiciaires. Toutefois, à mon avis, la première chose à faire serait de vérifier ces faits. Quoi qu'il en soit, je désire faire remarquer que la question litigieuse que vous proposez de porter devant la Cour suprême n'est pas la plus importante dans cette affaire.

Il ne s'agit pas de savoir si le juge a dérogé aux conditions inhérentes à sa charge qui doit être occupée durant bonne conduite, mais si, de l'avis du Parlement, il s'est conduit de façon à le rendre inapte à occuper de hautes fonctions judiciaires. En vertu de l'article 99 de l'Acte de l'Amérique du Nord britannique, un juge peut en vérité être révoqué pour «mauvaise conduite», mais le pouvoir de le révoquer sur adresse s'applique à tous les motifs et le Parlement a entière latitude pour rédiger une adresse visant à révoquer un juge pour tout motif qu'il juge à propos, qu'il constitue ou non une mauvaise conduite dans l'exercice de sa charge.

Je peux dire franchement que je ne voudrais pas instituer une enquête en vertu de la Loi sur les enquêtes s'il existait une possibilité quelconque que le juge Landreville essaie de la faire avorter par un bref de prérogative ou autrement. Toutefois, si votre client n'accepte pas ce genre d'enquête, il se peut alors fort bien que, sur motion présentée en Chambre, il y en ait une menée par un comité parlementaire. Comme je l'ai déjà indiqué, une telle motion peut émaner de n'importe quel membre du Parlement. J'aurais pensé que le juge préférerait une enquête en vertu de la Loi sur les enquêtes. Toutefois, le choix lui incombe en définitive, et s'il ne désire pas subir ce genre d'enquête, j'estime honnête de dire qu'il peut s'attendre à une enquête instituée par le Parlement.

Following that correspondence, it seems Mr. Robinette went to Ottawa and discussed the affair either with the Minister or officials in the Department of Justice. He was made aware "in general terms" of the terms of reference for the proposed Commission.[9]

On January 17, 1966, Mr. Robinette sent a telegram to Mr. Cardin as follows:

Justice Landreville has instructed me on his behalf to request the Government to appoint a Commissioner under the Inquiries Act to inquire into his dealings with Northern Ontario Natural Gas Company or any of its officers or servants.

I here point out that the telegram has some noticeable similarity to Commissioner Rand's first term of reference. No reference is made to any other terms. The telegram was acknowledged two days later.

A statement was then made by the Minister in the House. The plaintiff wrote him on January 24, 1966. That letter is in French. My free translation of the first two paragraphs is as follows:

[TRANSLATION] I am indebted to you for the statement made in the House last week. I had understood from Mr. Robinette that you were to declare that this inquiry was to be held at my request. Moreover, he must have told you that this procedure has for its purpose to apprise you of the facts. The conclusions or recommendations will not have the force of a final decision, since we always contend that only Parliament and the Senate have jurisdiction and they will decide, if the necessity arises.

The procedure is therefore under all reserve and without creating a "precedent" because certain of my colleagues do not accept the position that the "Inquiries Act" applies.

The Commissioner was then appointed and his letters patent issued.

I shall, at this stage, deal with the first of the main submissions put forward, on behalf of the plaintiff, by Mr. Henderson, that the Commission was not validly constituted; the procedure to be followed is that set out in section 99 of *The British North America Act, 1867*. Mr. Ainslie, for the defendant, had three main points in reply: first, the Commission was, in law, validly constituted; second, the plaintiff had requested or consented to it and he now cannot challenge it; third, neither the plaintiff nor his counsel, at the inquiry itself, attacked the appointment of the Commissioner or his jurisdiction.

[9] Q. 253-254 of the plaintiff's examination for discovery.

A la suite de cette correspondance, Me Robinette serait allé à Ottawa et aurait discuté l'affaire soit avec le Ministre soit avec des fonctionnaires du ministère de la Justice, qui l'auraient informé «grosso modo» du mandat qu'aurait la commission projetée.[9]

Le 17 janvier 1966, Me Robinette a envoyé à M. Cardin le télégramme suivant:

[TRADUCTION] Le juge Landreville m'a prié de demander au gouvernement en son nom de nommer un commissaire en vertu de la Loi sur les enquêtes pour enquêter sur ses relations avec Northern Ontario Natural Gas Company, ses dirigeants et ses employés.

Ici, je souligne que le télégramme ressemble fortement au premier mandat du commissaire Rand. Il ne se réfère à aucun autre mandat. Deux jours plus tard, le destinataire du télégramme en a accusé réception.

Le Ministre a alors fait une déclaration à la Chambre. Le 24 janvier 1966, le demandeur lui a écrit une lettre en français, que je reproduis textuellement:

Je vous suis redevable pour la déclaration faite en Chambre la semaine dernière. J'avais compris de M. Robinette que vous deviez déclarer que cette enquête se faisait à ma demande. De plus, il a dû vous dire que cette procédure a pour but de vous saisir des faits. Les conclusions ou recommandations n'auront pas force de décision finale, puisque nous prétendons toujours que le Parlement et le Sénat ont seuls juridiction et décideront si la nécessité s'impose.

La procédure est donc sous toute réserve et sans créer de «précédent», car certains de mes collègues ne prisent pas du tout que «Inquiry Act» s'applique.

Le commissaire a alors été nommé et ses lettres patentes émises.

A ce stade, je vais traiter du premier des principaux arguments avancés par Me Henderson pour le compte du demandeur, à savoir: la Commission n'a pas été valablement constituée, la procédure à suivre étant celle énoncée dans l'article 99 de l'*Acte de l'Amérique du Nord britannique, 1867*. Me Ainslie, au nom de la défenderesse, a répondu par trois principaux points: (1) la Commission a été valablement constituée en droit; (2) le demandeur a demandé qu'il y ait une commission ou y a consenti et il ne peut pas maintenant la contester; (3) ni le demandeur ni son avocat n'ont attaqué à l'enquête la nomination du commissaire ou sa compétence.

[9] Q. 253-254 de l'interrogatoire préalable du demandeur.

I set out sections 2 and 3 of the *Inquiries Act*[10]:

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

3. In case such inquiry is not regulated by any special law, the Governor in Council may, by a commission in the case, appoint persons as commissioners by whom the inquiry shall be conducted.

The first *Inquiries Act* following Confederation appeared in 1868 (31 Vict. c. 38). The wording is identical, as to what matters may be inquired into, to the 1952 Revision:

. . . any matter connected with the good government of Canada, or the conduct of any part of the Public business . . . .

But in the pre-Confederation legislation of the Province of Canada, the words "administration of justice" had also been listed as a matter of inquiry. I assume those words were removed because section 92(14) of *The British North America Act, 1867* assigned legislative power, in respect of the administration of justice in the province, to the provinces.

It is necessary to set out, as well, sections 96 and 99(1) of *The British North America Act, 1867*:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

. . .

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

In respect of the tenure of superior court judges and their removal, the plaintiff contends that section 99(1) is a code in itself; in order to remove or dismiss a judge, there must first be an address of the Senate and House of Commons; the judge can then be removed by the Governor General. The plaintiff says any inquiry into the conduct of a judge must be initiated or made only by the Senate and the House of Commons. The plaintiff does not say the initial procedure must be the address

[10] R.S.C. 1952, c. 154.

Je reproduis les articles 2 et 3 de la *Loi sur les enquêtes*[10]:

2. Le gouverneur en conseil peut, chaque fois qu'il le juge à propos, faire instituer une enquête sur toute question touchant le bon gouvernement du Canada, ou la gestion de quelque partie des affaires publiques.

3. Si cette enquête n'est régie par aucune loi spéciale, le gouverneur en conseil peut, par commission *ad hoc*, nommer, à titre de commissaires, des personnes qui doivent poursuivre l'enquête.

La première *Loi sur les enquêtes* postérieure à la Confédération date de 1868 (31 Vict. c. 38). Le libellé en est presque identique à celui de la loi révisée de 1952 quant aux questions qui font l'objet de l'enquête:

. . . sur quelque objet ayant trait au bon gouvernement du Canada, ou sur la gestion de quelque partie des affaires publiques . . . .

Dans la législation de la Province du Canada, qui a précédé la Confédération, les mots «administration de la justice» figuraient parmi les sujets d'enquête. Je présume qu'ils ont été supprimés en raison de l'article 92(14) de l'*Acte de l'Amérique du Nord britannique, 1867*, qui a assigné aux provinces le pouvoir législatif relatif à l'administration de la justice dans la province.

Il me faut aussi reproduire ici les articles 96 et 99(1) de l'*Acte de l'Amérique du Nord britannique, 1867*:

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

. . .

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

En ce qui concerne l'occupation d'une charge de juge d'une cour supérieure et sa révocation, le demandeur prétend que l'article 99(1) est un code en soi. Pour révoquer un juge, il faut d'abord une adresse du Sénat et de la Chambre des communes; il peut ensuite être révoqué par le gouverneur général. Selon lui, seuls le Sénat et la Chambre des communes peuvent engager ou effectuer une enquête sur la conduite d'un juge. Il n'affirme pas que la procédure initiale doit être nécessairement

[10] S.R.C. 1952, c. 154.

referred to in section 99; he agrees the Senate and the House may, of their own motion, authorize or carry out investigative procedures before an actual address.

One must begin, the plaintiff argues, with the theory of separation of powers or functions: the executive, the legislative, and the judicial. The effect of section 99 of *The British North America Act, 1867* is, it is said, to ensure the independence of the judges; independence is more than mere tenure and salary; it is freedom from harassment or inquisition. On those premises, the plaintiff contends that any investigatory process into the conduct or fitness of a superior court judge must be initiated by the Senate and House of Commons; those bodies alone must ascertain the facts on which an address might be based; any preliminary processes must be authorized or carried out by them. Counsel for the plaintiff says that, in this case, the "complaint of misconduct" came from an outsider (The Law Society of Upper Canada), prompting a decision, outside the two Houses, to investigate or inquire; that decision was made, not by the Senate or House, but by the Governor in Council;[11] the consequent investigation was carried out by a person not authorized by them to inquire or report on their behalf and for their purposes only. Finally, it is submitted the inquiry in question was not ". . . concerning any matter connected with the good government of Canada . . ."; the judges are independent and apart from government; their conduct in office, and tenure, can only be inquired into by means of section 99 of *The British North America Act, 1867*; by that code, the right to investigate or inquire, and the mode, is given to the Senate and the House, and to no one else.

The parties here disagreed as to whether, in Canada, the only method of removal of judges is through an address system in Parliament. The defendant contended there were, in Canada, two

[11] The plaintiff pointed out that *The British North America Act, 1867* provides for the appointment and removal of superior court judges by the Governor General, not the Governor in Council (the cabinet). The *Inquiries Act* authorizes only the Governor in Council to cause inquiries to be held.

l'adresse, dont fait mention l'article 99; il adm que les deux Chambres peuvent, de leur prop chef, autoriser ou engager des procédures d'e quête avant de présenter une adresse.

Selon le demandeur, on doit partir de la théo de la séparation des pouvoirs ou des fonctio l'exécutif, le législatif et le judiciaire. L'article de l'*Acte de l'Amérique du Nord britanniq 1867* a pour effet d'assurer l'indépendance d juges. Or, l'indépendance ne signifie pas seulem l'occupation de la charge et le traitement, m aussi une immunité contre tout harassement enquête. Ce pourquoi, le demandeur prétend q tout processus d'investigation sur la conduite l'aptitude d'un juge d'une cour supérieure doit ê engagé par le Sénat et la Chambre des commun Ces organismes sont les seuls à qui il incombe vérifier les faits sur lesquels on peut baser u adresse. C'est à eux d'autoriser ou d'exécuter to les procédés préliminaires. L'avocat du demande déclare qu'en l'espèce, l'«accusation de mauva conduite» émane d'un étranger (de The Law Soc ty of Upper Canada) qui, en dehors des de Chambres, a suggéré d'instituer une enquête. décision a été prise non pas par le Sénat et Chambre, mais par le gouverneur en conseil[11] l'enquête a été menée par une personne que deux organismes n'avaient pas autorisée à enqu ter et à faire rapport en leur nom aux seules f fixées par eux. Enfin, il prétend que l'enquête question n'a rien à voir avec une «. . . questi touchant le bon gouvernement du Canada . . .». I juges sont indépendants et ne font pas partie gouvernement. On ne peut enquêter sur leur co duite pendant l'occupation de leur charge que p les moyens prévus par l'article 99 de l'*Acte l'Amérique du Nord britannique, 1867*. En ve de ce code, le droit d'enquêter et le choix du mo d'enquête appartiennent au Sénat et à la Chamb des communes, et à personne d'autre.

Les parties ne sont pas d'accord sur le fait qu' Canada, le seul moyen de révoquer les juges s l'adresse du Parlement. La défenderesse affir qu'il y a deux autres recours: (1) un bref de *sc*

[11] Le demandeur a fait aussi remarquer que l'*Acte de l'Am rique du Nord britannique, 1867* prévoit que la nominatio la révocation des juges d'une cour supérieure incombent gouverneur général et non au gouverneur en conseil (le ca net). La *Loi sur les enquêtes* autorise seulement le gouvern en conseil à faire ouvrir une enquête.

other courses open: (1) a writ of *scire facias* to repeal the letters patent appointing a judge; (2) a criminal information at the suit of the Attorney General.[12]

Professor W. R. Lederman, in 1956, wrote a lengthy and compelling essay "The Independence of the Judiciary"[13]. He reviewed the possible methods of removal of judges in England.[14] As to the post-Confederation situation in Canada, he said at page 1161:

> Also, as in England, it is probable that the provision for removal of superior-court judges by joint address in the federal Parliament is additional to, and thus not exclusive of, the older prerogative type of removal without reference to Parliament.

That statement, to me, suggests that in Professor Lederman's view, section 99 of *The British North America Act, 1867* is not, as the plaintiff contends, a code of its own. In any event, Professor Lederman does not appear to discuss specifically the point whether or not initial investigative procedures must emanate from Parliament.

The defendant relies, however, on a statement in *Todd* (footnote 12) that Parliament may originate the action of removal in various ways. It is said:

> ... after a preliminary enquiry—by a royal commission (at the instance of government, or at the request of either House of Parliament) ....[15]

The defendant relied on this statement for authority that the Executive in this case, as well as the Senate and House, could initiate the proceedings by means of a Royal Commission outside Parliament. I agree with Mr. Henderson that the case cited by *Todd* in support of the proposition, (*Chief Baron O'Grady*'s case) is readily distinguishable. In the *O'Grady* case there was a standing or continuing commission of inquiry in respect of the Courts of Justice in Ireland. In their ninth and eleventh reports, the Commissioners accused Chief Baron O'Grady of unjustly and arbitrarily increasing his own fees. Two select committees of the

[12] See Todd on *Parliamentary Government in England* (1889) Vol. II, pp. 853-880, particularly at 858-859.

[13] (1956) 34 *Canadian Bar Review* 769, continued at 1139.

[14] 34 *Canadian Bar Review* pp. 785-788.

[15] Todd, p. 873.

facias en vue d'annuler les lettres patentes qui ont nommé le juge; (2) l'ouverture d'une information criminelle à la requête du procureur général.[12]

En 1956, le professeur Lederman a écrit un traité assez long et péremptoire intitulé «The Independence of the Judiciary»[13]. Il y passe en revue tous les moyens possibles de révoquer les juges en Grande-Bretagne.[14] A propos de la situation au Canada après la Confédération, il déclare à la page 1161:

> [TRADUCTION] Ici, comme en Angleterre, la révocation des juges d'une cour supérieure par une adresse conjointe du Parlement fédéral vient s'ajouter à la prérogative plus ancienne de la révocation sans renvoi au Parlement. Elle n'est donc pas exclusive.

A mon avis, ce texte incite à penser qu'aux yeux du professeur Lederman, l'article 99 de l'*Acte de l'Amérique du Nord britannique, 1867* n'est pas un code en soi, comme le demandeur le prétend. En tout cas, il ne se prononce pas sur la question de savoir si les procédures d'enquête initiales doivent ou non émaner du Parlement.

Toutefois, la défenderesse invoque l'ouvrage de *Todd* (renvoi 12) pour déclarer que le Parlement peut engager une action en révocation de plusieurs façons:

> [TRADUCTION] ... après une enquête préliminaire—par une commission royale (à la demande du gouvernement ou de l'une ou l'autre des deux Chambres) ....[15]

Elle se fonde sur cette déclaration pour affirmer qu'en l'espèce, l'exécutif, au même titre que le Sénat et la Chambre, aurait pu engager les procédures en nommant une commission royale en dehors du Parlement. Je suis d'accord avec Me Henderson: l'affaire citée par *Todd* à l'appui de la proposition (*Chief Baron O'Grady*) se distingue nettement. Dans ladite affaire, il y avait une commission d'enquête permanente relative aux cours de justice d'Irlande. Dans leurs neuvième et onzième rapports, les commissaires ont accusé le juge en chef Baron O'Grady d'avoir augmenté ses honoraires injustement et arbitrairement. Deux

[12] Voir *Parliamentary Government in England*, par Todd (1889) Vol. II, pp. 853 à 880 et en particulier aux pp. 858 et 859.

[13] (1956) 34 *Revue du Barreau canadien* 769, qui continue à la page 1139.

[14] 34 *Revue du Barreau canadien*, pp. 785 à 788.

[15] Todd, p. 873.

House of Commons investigated the charge and confirmed the accusation. The government communicated their reports to the Commissioners, who again investigated the matter and reported back to the government. The whole matter was ultimately resolved, without Parliamentary address proceedings.

In the present case, there was, of course, no standing commission. The Executive passed an Order in Council setting up a special commission to inquire into the conduct of one particular judge in respect of certain transactions. I did not find the statement in *Todd* to be either helpful or conclusive on this point.

The defendant further asserts that because the Governor General, under section 96, appoints judges, then he and his council must, as a step in the process of their removal, have power to initiate investigations or inquiries. Professor Lederman, at page 1162 of his article, referred to sections 31 and 33 of the former *Judges Act*[16]. Where it was felt a superior court judge had become incapacitated or disabled by reason of age or infirmity, his salary could be stopped. The Governor in Council had first to issue a commission of inquiry to investigate and report upon the facts. Professor Lederman expressed doubt that this was a constitutionally permissible procedure. He said, (page 1163):

> In my view section 31 of the Judges Act is inconsistent with the meaning of tenure during good behaviour prescribed in section 99 of the B.N.A. Act.

The opinions expressed in *Todd* and in Professor Lederman's article do not bear squarely on the precise point raised by Mr. Henderson and disputed by Mr. Ainslie. I have concluded, but with doubt, that the Governor in Council, as distin-

[16] R.S.C. 1952, c. 159. Sections 31 and 32 of the present *Judges Act* go even further. The Canadian Judicial Council is empowered to hold an inquiry as to whether a judge has become incapacitated or disabled, not only by reason of age or infirmity, but by reason of misconduct, etc. The Council can recommend the judge be removed from office and his salary stopped. If the Cabinet then finds the judge to have become incapacitated or disabled, the judge's salary is stopped. In this note, I have not overlooked section 32.2 of the present legislation.

comités spéciaux de la Chambre des communs ont enquêté sur l'accusation et l'ont confirmée. Le gouvernement a communiqué leurs rapports aux commissaires, qui ont à nouveau enquêté sur l'affaire et fait rapport. La question a été réglée sans aucune adresse du Parlement.

Bien entendu, en l'espèce, il n'est pas question d'une commission permanente. L'exécutif a rendu un décret du conseil, qui a créé une commission spéciale chargée d'enquêter sur la conduite d'un seul juge à propos de certaines transactions. Je ne trouve donc pas qu'ici la déclaration de *Todd* soit utile ou concluante.

La défenderesse soutient également qu'étant donné que le gouverneur général nomme les juges en vertu de l'article 96, il est normal que lui et son conseil aient le pouvoir d'engager des enquêtes, qui constituent l'une des étapes de leur révocation. À la page 1162 de son ouvrage, le professeur Lederman se réfère aux articles 31 et 33 de l'ancienne *Loi sur les juges*[16]. Sous son régime, quand on pensait qu'un juge d'une cour supérieure était frappé d'incapacité ou devenu empêché de remplir utilement ses fonctions pour cause d'âge ou d'infirmité, il pouvait cesser de toucher son traitement. Le gouverneur en conseil nommait d'abord une commission d'enquête pour procéder à des recherches et faire rapport sur les faits. Le professeur doute qu'il s'agisse là d'une procédure admissible sur le plan constitutionnel. Il déclare (page 1163):

> [TRADUCTION] A mon sens, l'article 31 de la Loi sur les juges est incompatible avec l'occupation de la charge durant bonne conduite que prescrit l'article 99 de l'Acte de l'A.N.B.

Les opinions exprimées dans les ouvrages de *Todd* et du professeur Lederman ne portent pas exactement sur le point que Me Henderson a soulevé et que Me Ainslie a contesté. Je conclus, mais non sans quelque réserve, que le gouverneur

[16] S.R.C. 1952, c. 159. Les articles 31 et 32 de l'actuelle *Loi sur les juges* vont encore plus loin. Le Conseil canadien de la magistrature est habilité à tenir une enquête pour établir si un juge est frappé d'incapacité ou devenu empêché de remplir utilement ses fonctions non seulement pour cause d'âge ou d'infirmité, mais aussi de mauvaise conduite, etc. Le Conseil peut recommander que le juge soit révoqué et cesse de toucher son traitement. Si le Cabinet estime alors que le juge est frappé d'incapacité ou devenu empêché de remplir utilement ses fonctions, il arrête son traitement. Dans cette note je n'ai pas oublié l'article 32.2 de la loi actuelle.

guished from the Governor General or Parliament, can authorize an inquiry into the conduct of a superior court judge. Section 99 of *The British North America Act, 1867* deals only with the power of removal: by the Governor General, but only after a Parliamentary address for removal. In this country the appointment of the judges of the superior, district and county courts of the provinces lies with the federal power. As I see it, the conduct of those judges is a ". . . matter connected with the good government of Canada . . . ." The federal executive is empowered, under section 2 of the *Inquiries Act*, to cause an inquiry to be made. That was what occurred here. Section 99 of *The British North America Act, 1867* does not, to my mind, preclude inquiries of the kind here ordered. If, for example, the Commissioner's report had been favourable to the plaintiff, an investigation and address by the Senate and House, in accordance with section 99, would still have been open.

Technically, it is not now necessary for me to deal with the defendant's other contentions on this issue: that there was consent by the plaintiff to this inquiry; that no "constitutional" objection was raised at any time during it. I feel I should express my opinion.

It is true that, as a matter of form, the inquiry was ordered after a request by the plaintiff. But I conclude, on the evidence before me, there was a good deal of pressure exerted on him. One cannot shut out the state of Canadian political history at that time. It is permissible to take judicial notice of the facts of history. In *Calder v. Attorney General of British Columbia*, Hall J. delivering the dissenting judgment of himself, Spence J. and Laskin J. [as he then was], said[17]:

Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly exs. 8 to 18 inclusive and exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous: *Monarch Steamship Co. Ltd. v. A/B Karlshamms Oljefabriker* [[1949] A.C. 196], at p. 234, and the Court is entitled to rely on its own historical knowledge and

[17] [1973] S.C.R. 313 at 346.

conseil (qu'il convient de distinguer du gouverneur général ou du Parlement) peut autoriser une enquête sur la conduite d'un juge d'une cour supérieure. L'article 99 de l'*Acte de l'Amérique du Nord britannique, 1867* ne parle que du pouvoir de révocation du gouverneur général, pouvoir qu'il ne peut exercer qu'après une adresse du Parlement à cet effet. Au Canada, la nomination des juges des cours supérieures, de district et de comté des provinces incombe au pouvoir fédéral. J'estime que la conduite des juges est une «. . . question touchant le bon gouvernement du Canada . . . .» L'article 2 de la *Loi sur les enquêtes* habilite l'exécutif fédéral à faire instituer une enquête. C'est ce qui s'est produit ici. A mon sens, l'article 99 de l'*Acte de l'Amérique du Nord britannique, 1867* n'interdit pas les enquêtes du genre de celle qui a été ordonnée dans la présente affaire. Si, par exemple, le rapport du commissaire avait été favorable au demandeur, une enquête instituée sur une adresse du Sénat et de la Chambre aurait toujours été possible.

Du point de vue de la procédure, je n'ai pas besoin maintenant de statuer sur les autres prétentions de la défenderesse qui touchent à ce point litigieux, à savoir: que le demandeur a consenti à cette enquête; qu'aucune objection d'ordre «constitutionnel» n'a été soulevée à aucun moment. Toutefois, j'estime préférable d'exprimer mon opinion.

Il est vrai que l'enquête a été ordonnée à la requête du demandeur. Mais, au vu de la preuve produite devant moi, je conclus qu'il a fait l'objet de fortes pressions. On ne peut pas ne pas tenir compte de la situation politique du Canada à l'époque considérée. Il est légitime de prendre judiciairement connaissance des faits de l'histoire. Dans *Calder c. Le Procureur Général de la Colombie-Britannique*, le juge Hall, en prononçant le jugement dissident, qui a été aussi celui du juge Spence et du juge Laskin [tel était alors son titre], déclare[17]:

L'examen des questions en litige comporte l'étude des nombreux documents historiques et textes législatifs versés au dossier, particulièrement les pièces 8 à 18 inclusivement et les pièces 25 à 35. La Cour peut prendre judiciairement connaissance des faits historiques, tant passés que contemporains: *Monarch Steamship Co. Ltd. v. A/B Karlshamms Oljefabriker* [[1949] A.C. 196], p. 234; elle a le droit de se fonder sur ses

[17] [1973] R.C.S. 313, à la p. 346.

researches: *Read v. Lincoln* [[1892] A.C. 644], Lord Halsbury at pp. 652-4.

The judgment of Martland, Judson and Ritchie JJ. was given by Judson J. No specific reference was made to the power of a court to take notice of historical facts. But it is obvious from the reasons that those three judges also resorted to history.

Here, the plaintiff's name first came into prominence in 1962. In a general election in that year, the Progressive Conservative government was returned, with a minority. The next election in 1963 produced a Liberal minority government. That minority situation persisted until 1968. The history of that period records there were a number of matters which caused concern and difficulty to the minority government.[18] The plaintiff had earlier indicated he was prepared to launch legal attacks against any Royal Commission that might be set up. I think that would have been, if it had materialized, an embarrassing situation. The minority government's other method, unchallengeable by the plaintiff, was to try and obtain a joint address in Parliament. The plaintiff's choice, if it can be described as that, was not a real or free one.

Mr. Robinette had, before his telegram of January 17, 1966 (Exhibit 23), expressed his opinion on the constitutional issue. It was also his view a consent by the plaintiff could not validate something constitutionally invalid. The plaintiff in his letter of January 24, 1966 to Mr. Cardin (Exhibit 25) pointed out the procedure was under "all reserve".

No challenge was made, at the opening of the inquiry or at any other stage, based on the constitutional issue. Counsel for the defendant relied on that fact. The explanation is, I think, found at pages 1254 and 1255 of the transcript of proceedings. The plaintiff's testimony had then been completed. Mr. Robinette wished to tender evidence indicating the plaintiff had, long before, made efforts to have his position aired before a public inquiry. A ruling was requested. The Commission-

[18] The Munsinger affair, the Spencer affair, the Dorion Inquiry—to name a few.

propres connaissances historiques ainsi que sur les recherche qu'elle a faites à cet égard: *Read v. Lincoln* [[1892] A.C. 644 Lord Halsbury, pp. 652-4.

Le jugement des juges Martland, Judson e Ritchie a été prononcé par le juge Judson. Il ne s réfère pas en particulier au pouvoir imparti à u tribunal de prendre judiciairement connaissanc des faits historiques, mais il ressort clairement d leurs motifs que tous les trois ont aussi recouru l'histoire.

Le demandeur a accédé à une certaine notorié en 1962. Cette année-là, après des élections gén rales, le parti progressiste conservateur est rever au pouvoir, mais sous une forme minoritaire. L élections suivantes qui ont eu lieu en 1963 o amené un gouvernement libéral minoritaire, qui persisté jusqu'en 1968. Pendant cette périod un certain nombre de questions ont apparu ont causé des difficultés au gouverneme minoritaire.[18] Le demandeur s'était déclaré préc demment prêt à lancer des attaques juridiqu contre toute commission royale susceptible d'ê créée. Je pense que la situation aurait été emb rassante si elle s'était matérialisée. L'autre moy dont disposait le gouvernement minoritaire et q le demandeur ne pouvait pas contester, consistai essayer d'obtenir du Parlement, une adresse c jointe. Le choix du demandeur, si on peut par ainsi, n'a jamais été réel ni libre.

Avant son télégramme du 17 janvier 1966 (pi 23), Me Robinette a exprimé son opinion sur question constitutionnelle, et déclaré qu'un cons tement du demandeur ne pourrait pas valider qu que chose de nul sur le plan constitutionnel. D sa lettre du 24 janvier 1966 à M. Cardin (pi 25), le demandeur a souligné que la procéd était sous «toute réserve».

Ni à l'ouverture ni à aucun autre stade l'enquête, il n'y a eu d'opposition d'ordre const tionnel. L'avocat de la défenderesse a invoqué fait. Je pense que l'explication se trouve aux pa 1254 et 1255 de la transcription des procédu Le témoignage du demandeur avait alors été c plété. Me Robinette a voulu présenter ses pre indiquant que longtemps avant, le demand s'était efforcé d'obtenir une enquête publique o position serait étalée au grand jour. Il a dema

[18] L'affaire Munsinger, l'affaire Spencer, l'enquête Dor pour n'en nommer que quelques-unes.

er expressed the view it would be of little materiality (page 1233), but he heard it. At page 1254 the Commissioner fortuitously asked: "Was there ever any objection to the Commissioner under the *Inquiries Act* made?" [*sic*]. Mr. Robinette explained the legal position he had taken with Mr. Favreau. At pages 1254 and 1255 he continued:

I still have grave doubts whether the Dominion has the authority to empower a Commissioner to investigate, but that is really a matter of the constitution, organization and maintenance of the courts from a provincial standpoint, and therefore within the jurisdiction of the province, but I must add this, sir, that when this Commission was set up, on the instructions of Mr. Landreville I agreed with the present Minister of Justice that I would not raise any constitutional argument before you, sir, and I do not raise that question.

In my view, if there was no constitutional power in the Governor in Council to initiate this inquiry, then the plaintiff's consent or request for it, and the agreement not to object to it, cannot cure the defect.

I turn now to the second main submission by the plaintiff. It is first necessary to set out in more detail the facts surrounding the share transaction between NONG and the plaintiff. For that purpose I shall rely almost exclusively on the evidence referred to in the Commissioner's report.

In 1954 and 1955 the route of the TransCanada PipeLine Company and the distribution from the line to various communities in Northern Ontario became a matter of concern and interest. It appeared that only one company, or agency, rather than several, would handle that distribution. NONG had been incorporated with that purpose in mind. It was very much in the running. It put forward considerable effort endeavouring to obtain franchises from various communities including Sudbury.

As recounted, the plaintiff was, in 1955 and 1956, the mayor. NONG, chiefly through Farris, presented submissions for the Sudbury franchise. Over the course of those dealings, the plaintiff and Farris had, after perhaps an initial coolness, come to like each other. By the spring of 1956, most of the other franchises had been granted. Sudbury began to take action. A by-law, approving the franchise, had to be passed by Council. On May 22, 1956, first and second reading of the by-law were given. There remained third reading, the approval of the terms of the franchise, and a certificate of convenience and necessity by the Ontario Fuel Board. The latter was a foregone conclusion.

On July 17, 1956, Council gave, by a vote of 7 to 3, third reading to the by-law. The plaintiff, as was the general practice, did not vote. The agreement conferring the franchise was signed by the City the next day. It was returned on July 20 executed by NONG. The Fuel Board, at a later date, issued the necessary certificate. The plaintiff felt that the Board had in substance approved the franchise on June 21.

The plaintiff testified, at the Commission, that in a friendly talk with Farris, he pointed out his term as mayor would end in 1956. He indicated interest in doing NONG's legal work after that. He said he also indicated a desire to purchase some shares in NONG[19]. A key issue at the Commission hearing was the date of this discussion with Farris. Before Commissioner Rand the plaintiff felt it likely occurred on July 17, 1956, in the evening, after the Council meeting. That was the meeting where the by-law passed third reading. In testimony by the plaintiff in the previous proceedings referred to (the Ontario Securities Commission, the Farris preliminary and the Farris trial), he had thought the conversation had occurred sometime in the first two weeks of July. That earlier evidence, vague, if not inconsistent, was put to the plaintiff at the Commission.

In any event, a letter, dated July 20, 1956, was sent by NONG to the plaintiff. Among other things, it referred to the plaintiff's interest in assisting the company in some capacity in the future. It referred to his desire to purchase stock. It went on to say there had been a change in the capital of the company. Shares had been split five for one; existing shareholders had been given the right to subscribe for a limited number of shares at $2.50 per share.

[19] I have generally summarized this evidence. The Commissioner went into detail.

une ordonnance. Le commissaire a fait remarquer qu'elle serait de peu d'importance (page 1233), mais il les a néanmoins entendues. A la page 1254, le commissaire a demandé fortuitement: [TRADUCTION] «A-t-on déjà formulé des oppositions à la nomination d'un commissaire en vertu de la *Loi sur les enquêtes*?» [*sic*]. Me Robinette a expliqué la position juridique qu'il a prise avec M. Favreau. Aux pages 1254 et 1255, il continue ainsi:

[TRADUCTION] J'ai toujours de sérieux doutes sur le pouvoir imparti au Dominion d'habiliter un commissaire à enquêter, mais il s'agit là réellement d'une question de constitution, d'organisation et de maintien des tribunaux d'un point de vue provincial et donc, dans les limites de la juridiction de cette province, mais je dois ajouter, Monsieur, que lorsque cette commission a été créée, à la demande de M. Landreville, j'ai convenu avec l'actuel ministre de la Justice de ne soulever devant vous aucun argument d'ordre constitutionnel, et je n'en soulèverai donc pas.

A mon sens, si le gouverneur en conseil n'a pas le pouvoir constitutionnel d'instituer cette enquête, ni le consentement ni la requête ni l'accord du demandeur de ne pas faire opposition ne peuvent remédier à ce défaut.

Je passe maintenant au deuxième argument important présenté par le demandeur. Il convient d'abord d'énoncer plus en détails les faits qui ont entouré les transactions intervenues entre NONG et le demandeur. A cette fin, je me référerai presque exclusivement aux éléments de preuve contenus dans le rapport du commissaire.

En 1954 et 1955, le parcours du pipe-line de TransCanada PipeLine Company et la distribution de gaz aux diverses localités du nord de l'Ontario sont devenus un sujet d'intérêt et même de préoccupation. Il a paru préférable qu'une seule compagnie, ou une seule agence, procède à cette distribution. NONG a été constituée dans cette optique. Elle s'est heurtée à une forte concurrence et a déployé des efforts considérables pour obtenir des concessions dans plusieurs localités, dont Sudbury.

Comme je l'ai déjà dit, en 1955 et 1956, le demandeur était maire de cette ville. NONG, principalement par l'entremise de Farris, a présenté des demandes en vue d'obtenir la concession de Sudbury. Au cours de ces transactions, le demandeur et Farris, après une certaine froideur, en sont venus à s'apprécier mutuellement. Vers le printemps de 1956, la plupart des autres concessions

ont été accordées. Sudbury a commencé à prend des mesures. La concession devait être approuv par voie de règlement municipal. Un règlement été adopté en première et en deuxième lecture 22 mai 1956. Il restait la troisième lecture, l'a probation des termes de la concession et un certi cat de convenance et d'utilité délivré par l'Onta Fuel Board, qui en l'occurrence était une pu formalité.

Le 17 juillet 1956, le conseil par un vote de 7 a adopté le règlement en troisième lecture. demandeur, comme c'est la coutume, n'a pas vo Le jour suivant, la ville a signé l'accord confér la concession. Il a été renvoyé le 20 juillet sig par NONG. A une date ultérieure, la Fuel Boar émis le certificat requis. Le demandeur pensait q l'approbation du conseil datait du 21 juin.

Le demandeur a témoigné devant la Comm sion qu'au cours d'une conversation amicale a Farris, il lui avait fait remarquer que son man de maire prenait fin en 1956. Il l'a aussi infor qu'il serait intéressé à fournir des services juri ques à NONG et désireux d'acheter quelques-u de ses actions[19]. Devant la Commission, la date cette conversation a revêtu une importance pa culière. Le demandeur a déclaré au commissa Rand qu'il devait s'agir du 17 juillet 1956 au s après la réunion du conseil où le règlement a adopté en troisième lecture. Dans ses dépositi au cours des précédentes procédures (l'Onta Securities Commission, l'enquête préliminaire e procès de Farris), il pensait que ladite conversat se situait pendant les deux premières semaines juillet. La Commission a opposé au demand cette première preuve, vague, sinon contradicto

En tout cas, le 20 juillet 1956, NONG a env au demandeur une lettre, qui se référait e autres, à l'intérêt que celui-ci avait manifesté p fournir une aide juridique à la compagnie et à désir d'acheter des actions. Elle ajoutait q s'était produit un changement dans le capital d compagnie, les actions ayant été scindées à pour une. Les actionnaires avaient reçu le droi souscrire un nombre limité d'actions à $2.50 pi

[19] J'ai résumé cette déposition. Le commissaire, lui, l'a sée en détail.

At the same time it was resolved to offer you 10,000 shares at the same price of $2.50 per share. This offer is firm until July 18th, 1957. Should you wish to purchase portions of these shares at different times, that will be in order.

On July 30, 1956, the plaintiff wrote in reply. He said in part:

I fully appreciate the advantages of the offer you outline to me and I fully intend to exercise this option before July 18th, 1957.

On September 19, 1956, the plaintiff wrote Farris as follows:

Mr. Ralph K. Farris, President,
Northern Ontario Natural Gas Co. Ltd.,
44 King Street, W., Suite 2308,
TORONTO, Ontario.

My dear Ralph:

On the early morning of Tuesday following our meeting in North Bay, I was in conversation with the Minister of Justice and some other high official. I made my decision—I accepted.

After the dilemma of whether to have my appendix out or not, the dilemma of remaining a bachelor and happy or get married—this was the biggest dilemma! I feel that given three or four years and with my ambition, I would have squeezed you out of the Presidency of your Company—now I have chosen to be put on the shelf of this all-inspiring, [*sic*] unapproachable, staid class of people called Judges—what a decision! However, right or wrong, I will stick to it and do the best I can.

I want to assure you that my interest in your Company, outwardly aloof, will, nevertheless, remain active. I am keeping your letter of July 20th carefully in my file.[20]

Sincerely,

LAL:lmg Leo

There was a discussion between Farris and the plaintiff later in the fall of 1956, some time after the plaintiff's swearing in as a judge. Farris asked the plaintiff whether he still wanted the shares. The plaintiff replied that he did.

The plaintiff himself did nothing further until some time in 1957. He said he received a phone call from someone about the shares. The substance of it was that the shares were then trading for approximately $10.00; 2500 of the shares were to be sold to pay off the total number of 10,000. This meant, of course, the plaintiff never actually paid money. The Commissioner dealt at considerable length with the evidence as to the identity of the person who telephoned the plaintiff. The latter had always been adamant in the prior proceedings, and again at the Commission, that the caller was not

[20] The underlining was added by Commissioner Rand.

[TRADUCTION] En même temps, il a été résolu de vous offrir 10,000 actions à ce prix de $2.50 pièce. Cette offre demeure valable jusqu'au 18 juillet 1957. Si vous voulez les acheter en plusieurs fois, nous sommes d'accord.

Le 30 juillet 1956, le demandeur a répondu:

[TRADUCTION] J'apprécie à leur juste titre les avantages de votre offre et j'ai l'intention d'exercer cette option avant le 18 juillet 1957.

Le 19 septembre 1956, le demandeur a écrit à Farris la lettre suivante:

[TRADUCTION] M. Ralph K. Farris, président,
Northern Ontario Natural Gas Co. Ltd.
44, rue King W, suite 2308
TORONTO (Ontario)

Mon cher Ralph,

Le mardi matin qui a suivi notre rencontre à North Bay, j'ai eu un entretien avec le ministre de la Justice et plusieurs autres hauts fonctionnaires. J'ai pris la décision d'accepter.

Après le dilemme que m'a posé l'extraction de mon appendice et celui de rester célibataire et heureux ou de me marier, celui-là a été le pire! J'ai pensé que d'ici trois ou quatre ans, avec mon ambition, je vous aurais arraché de la présidence de votre compagnie. Or, j'ai choisi maintenant d'être mis au rancart de tout cela et de faire partie de la classe inspirante [*sic*], inaccessible et grave qui est celle des juges. Quelle décision! Toutefois, que j'aie eu tort ou raison, je m'y accrocherai et ferai de mon mieux.

Je veux vous assurer que, malgré l'éloignement, mon intérêt pour votre compagnie restera vivace. Je garde soigneusement votre lettre du 20 juillet dans mes dossiers.[20]

Bien à vous,

LAL/lmg Léo

Ultérieurement, pendant l'automne 1956, quelque temps après que le demandeur eut été assermenté, Farris lui a demandé s'il voulait toujours les actions et il lui a répondu que oui.

Le demandeur n'a pris aucune initiative jusqu'en 1957. Il a dit qu'il avait reçu un coup de téléphone de quelqu'un au sujet des actions l'informant en substance qu'elles étaient alors négociées pour environ $10.00 et qu'il avait fallu vendre 2,500 d'entre elles pour liquider le prix global des 10,000. Cela veut dire, bien entendu, que le demandeur n'a jamais réellement payé le montant. Le commissaire a examiné longuement la preuve afférente à l'identité de la personne, qui a téléphoné au demandeur. Celui-ci a toujours nié catégoriquement lors des précédentes procédures et

[20] C'est le commissaire Rand qui a souligné.

Farris. The Commissioner decided that it was Farris.

On February 12, 1957, Continental Investment Corporation Ltd., a broker, wrote the plaintiff as follows:

Vancouver, B.C.
February 12, 1957

Mr. Justice L. A. Landreville,
Osgoode Hall,
Toronto, Ontario.

Dear Sir:

Some time ago, we were instructed by Mr. R. K. Farris to purchase for your account, 10,000 shares of Northern Ontario Natural Gas Company Limited at $2.50 per share. We have as of this date sold 2,500 shares for your account at $10.00 per share which clears off the debit balance in your account.

You will find enclosed 7,500 shares of Northern Ontario Natural Gas Company Limited with stock receipt attached, which we ask you to sign and return to this office at your convenience.

Yours truly,
Continental Investment
Corporation Ltd.

JM:AH John McGraw

The plaintiff replied on February 16, 1957:

Osgoode Hall
Toronto 1.
Feb. 16th, 1957

Continental Investment Corporation,
Vancouver, B.C.

Dear Sirs:

Re: Northern Ontario Natural Gas Co.

I have received yours of the 12th with Stock Certificates enclosed for which I thank you. I am enclosing receipt for same.

Should I be of any assistance to your firm for the promotion and betterment of this company in Ontario, please do not hesitate to contact me.

Sincerely,
L. A. Landreville

The 7,500 shares were later sold, in blocks of various sizes. The plaintiff realized a profit of $117,000.

I go now to the Commissioner's report.

In the first 68 pages the Commissioner reviewed the history of pipe line development, the involvement of the City of Sudbury and the plaintiff, and the latter's dealings with NONG. In respect of those dealings and the receipt of the shares, he canvassed in detail the evidence the plaintiff had

devant la Commission qu'il se soit agi de Farris. Le commissaire a décidé que c'était lui.

Le 12 février 1957, la firme de courtiers Continental Investment Corporation Ltd. a écrit au demandeur ce qui suit:

[TRADUCTION] Vancouver (C.-B.)
12 février 1957

Monsieur le juge L. A. Landreville
Osgoode Hall
Toronto (Ontario)

Cher monsieur,

Il y a quelque temps, M. R. K. Farris nous a prié d'acheter pour votre compte 10,000 actions de Northern Ontario Natural Gas Company Limited à $2.50 pièce. Nous avons à cette date vendu 2,500 actions pour votre compte, à $10.00 l'action, ce qui liquide votre solde débiteur.

Vous trouverez ci-joint 7,500 actions de Northern Ontario Natural Gas Company Limited, que nous vous demandons de signer et de retourner à ce bureau à votre convenance.

Bien à vous,
Continental Investment
Corporation Ltd.

JM/AH John McGraw

Le 16 février 1957, le demandeur a répondu par la lettre suivante:

[TRADUCTION] Osgoode Hall
Toronto 1
16 février 1957

Continental Investment Corporation
Vancouver (C.-B.)

Messieurs,

Objet: Northern Ontario Natural Gas Co.

J'ai bien reçu votre lettre du 12, ainsi que les certificats d'actions qui y étaient joints et vous en remercie. J'inclus reçu.

Si je peux contribuer au développement et à la promotion de votre firme en Ontario, ne manquez pas de me le faire savoir.

Bien à vous,
L. A. Landreville

Le demandeur a ensuite vendu 7,500 actions par liasses d'une importance variable et a réalisé un profit de $117,000.

Je passe maintenant au rapport du commissaire.

Dans les 68 premières pages, il examine l'aménagement du pipe-line, l'implication de la ville de Sudbury et du demandeur, ainsi que les relations de ce dernier avec NONG. A ce sujet et à propos des actions reçues par le demandeur, il épluche en détail ses dépositions au cours des trois procédu

given in the three previous proceedings, and the evidence he gave at the Commission.

The Commissioner characterized the shares as a gift. He did not accept the contention that the correspondence of July 20, and July 30, 1956 amounted to an option, if not legally enforceable, perhaps morally enforceable. I quote from pages 68-69:

Arising out of the distribution of the 14,000 shares, prosecutions were launched against the mayors of four municipalities by which franchises had been granted: Sudbury, Orillia, Gravenhurst and Bracebridge. The offences charged were the same: in substance that NONG stock received by the mayors had been corruptly bargained for and that each, for the promise of reward, had used his influence to assist NONG in obtaining a franchise from his municipality. In three of them the information was dismissed on the ground of insufficient evidence to justify committing the accused to trial; in the fourth, that of Orillia, the accused was acquitted in a county court jury trial. Following these, a public statement was issued by the Attorney General that in the circumstances no Bill of Indictment would be preferred by him before a Grand Jury in any of the three cases of dismissal.

To the Province there has been committed by Section 92 of the British North America Act exclusive jurisdiction over the administration of justice. The courts here concerned are provincial courts although judges of the Supreme and County Courts are appointed by the Dominion Government. Such a charge levelled against a Judge of the Supreme Court of Ontario becomes obviously a matter of primary provincial interest; and in the case of Justice Landreville, it was to vindicate that as well as the general interest in municipal government, and the enforcement of the criminal law, also provincial matters, that the prosecution was brought. This formal action of the provincial authorities creates a situation where their judgment arrived at by a consideration of all the circumstances, must be accorded a respectful recognition by this Commission. That means that an originally corrupt agreement between Farris and Justice Landreville to bargain shares for influence is not to be found to be established; the presumption arises that there was no such agreement. Such a matter is a question of a state of mind; the external facts are before us; what is hidden is the accompanying understanding; and it is proper for this Commission to assume that the facts disclosed do not satisfy the requirements of our criminal law that that understanding, beyond a reasonable doubt, was corrupt.

This leads us first to the consideration of a conclusion from these external facts which is consistent with that assumption; and secondly, whether what took place in relation to those facts has infringed any other law or has violated an essential requirement of that standard of conduct which is to be observed by a member of the Supreme Court of a province.

To these considerations personal relations become significant.

Le commissaire qualifie lesdites actions de cadeau. Il n'accepte pas la prétention selon laquelle la correspondance du 20 et du 30 juillet 1956 équivaut à une option, sinon juridiquement exécutable, tout au moins moralement exécutable. Je cite les pages 68 et 69 de son rapport:

[TRADUCTION] A la suite de la distribution de 14,000 actions, des poursuites ont été engagées contre les maires de quatre municipalités, qui ont octroyé des concessions: Sudbury, Orillia, Gravenhurst et Bracebridge. Les chefs d'accusation ont été les mêmes en substance, à savoir que les actions de NONG que les maires ont reçues ont été négociées vénalement et que chacun d'eux, contre la promesse d'une récompense, a utilisé son influence pour aider NONG à obtenir une concession dans sa municipalité. Pour trois d'entre eux, l'information a été rejetée pour insuffisance de preuve justifiant le renvoi de l'accusé pour subir son procès; dans le quatrième cas, celui d'Orillia, l'accusé a été acquitté au cours d'un procès devant une cour de comté avec jury. Après quoi, le procureur général a publié une déclaration suivant laquelle, vu les circonstances, il ne présenterait aucun acte d'accusation devant un grand jury dans les trois cas de rejet.

L'article 92 de l'Acte de l'Amérique du Nord britannique confère à la province une compétence exclusive sur l'administration de la justice dans la province. Il s'agit ici de cours provinciales, bien que les juges des cours suprêmes et des cours de comté soient nommés par le gouvernement fédéral. Une accusation de cette nature portée contre un juge de la Cour suprême de l'Ontario devient, de toute évidence, un sujet d'intérêt primordial pour la province; et dans le cas du juge Landreville, les poursuites ont été engagées pour défendre l'intérêt général du gouvernement municipal, l'application du droit criminel et aussi des questions d'ordre provincial. Cette action formelle des autorités provinciales, qui ont formulé des conclusions basées sur l'examen des circonstances, crée une situation que la Commission doit en toute déférence reconnaître. Je veux dire par là qu'on ne trouvera pas de contrat vénal entre Farris et le juge Landreville où les actions soient négociées contre de l'influence. La présomption provient de la non-existence d'un tel accord. Il s'agit en l'occurrence d'un état d'esprit. Les faits extérieurs sont exposés devant nous, mais l'accord des parties y afférent est occulte. Il sied que cette commission parte du principe que les faits divulgués ne répondent pas aux exigences de notre droit criminel que cet accord des parties, au-delà d'un doute raisonnable, a un caractère vénal.

Cela nous conduit d'abord à tirer de ces faits extérieurs une conclusion compatible avec cette hypothèse; et, deuxièmement, à examiner si les actes qui ont pris place en rapport avec ces faits, ont violé une loi ou une norme de conduite qu'un juge de la Cour suprême d'une province doit observer.

Face à ces considérations, les relations personnelles prennent de l'importance.

The Commissioner, for the next several pages, then set out the plaintiff's personal history prior to his first association with Farris. I think it fair to comment that it does not appear to have been recorded in a completely objective way. Purely as one example, I quote these two sentences:

His emotions are active and he can be highly expansive; he is fascinated by the glitter of success and material well-being. His outlook is indicated by a residence in Mexico, as well as a lodge some miles from Sudbury.

The remainder of the report to page 98, is, as I read it, the basis for the Commissioner's second and third conclusions.

Counsel for the plaintiff contends the Commissioner, in inquiring into, and expressing findings and opinions on, the matters set out from pages 69 to 98, exceeded his terms of reference; he therefore exceeded or lost jurisdiction; the plaintiff is entitled to a declaration accordingly.

It is necessary at this stage, in order to fully appreciate the contention on behalf of the plaintiff, to set out the formal conclusions of the Commissioner. These appear on pages 107 to 108:

Drawn from the foregoing facts and considerations, the following conclusions have been reached:

I—The stock transaction between Justice Landreville and Ralph K. Farris, effecting the acquisition of 7,500 shares in Northern Ontario Natural Gas Company, Limited, for which no valid consideration was given, notwithstanding the result of the preliminary inquiry into charges laid against Justice Landreville, justifiably gives rise to grave suspicion of impropriety. In that situation it is the opinion of the undersigned that it was obligatory on Justice Landreville to remove that suspicion and satisfactorily to establish his innocence, which he has not done.

II—That in the subsequent investigation into the stock transaction before the Securities Commission of Ontario in 1962, and the direct and incidental dealing with it in the proceedings brought against Ralph K. Farris for perjury in 1963 and 1964 in which Justice Landreville was a Crown witness, the conduct of Justice Landreville in giving evidence constituted a gross contempt of these tribunals and a serious violation of his personal duty as a Justice of the Supreme Court of Ontario, which has permanently impaired his usefulness as a Judge.

III—That a fortiori the conduct of Justice Landreville, from the effective dealing, in the spring of 1956, with the proposal of a franchise for supplying natural gas to the City of Sudbury to the completion of the share transaction in February 1957, including the proceedings in 1962, 1963 and 1964, mentioned, treated as a single body of action, the concluding portion of which, trailing odours of scandal arising from its initiation and consummated while he was a Judge of the Supreme Court of

Dans les pages suivantes, le commissaire rela des faits personnels qui se rapportent au dema deur et sont antérieurs à ces premiers rappo avec Farris. J'estime équitable d'observer qu'il paraît pas les avoir consignés en toute objectivi A titre purement d'exemple, je cite ces de phrases:

[TRADUCTION] Il est très émotif et peut se montrer fort ex sif; il est fasciné par l'éclat du succès et le confort matériel conception de la vie se traduit par une résidence au Mexiq un manoir à quelques milles de Sudbury.

Si j'en juge par ma lecture, le commissaire b sa deuxième et sa troisième conclusion sur le r du rapport jusqu'à la page 98.

L'avocat du demandeur prétend que le com saire, en enquêtant sur les faits énoncés aux pa 69 à 98, a exprimé des opinions et formulé observations qui ont outrepassé son mandat. donc outrepassé ou perdu sa compétence, e demandeur a droit à un jugement déclaratoire.

A ce stade, pour que je puisse apprécier pl ment cette prétention du demandeur, il me énoncer les conclusions formelles du commiss Elles se trouvent aux pages 107 et 108:

[TRADUCTION] En me basant sur les faits et les considér qui précèdent, j'en arrive aux conclusions suivantes:

I—Les transactions entre le juge Landreville et Ralp Farris, qui ont consisté en l'achat de 7,500 actions de No Ontario Natural Gas Company, Limited, achat pour aucun motif valable n'a été fourni, en dépit des résult l'enquête préliminaire relative aux accusations formulées le juge Landreville, donnent légitimement lieu à un soupçon de mauvaise conduite. Dans cette situation, le gné est d'avis que le juge Landreville avait l'obligati dissiper ce soupçon et de prouver son innocence de satisfaisante, ce qu'il n'a pas fait.

II—Au cours de l'enquête subséquente afférente aux t tions devant la Securities Commission of Ontario, en 1 les conclusions directes ou incidentes auxquelles elles ont lieu lors des procédures de parjure engagées en 1963 contre Ralph K. Farris, où le juge Landreville a été tén la Couronne, la conduite du demandeur lors de ses dépos constitué un outrage flagrant à ces tribunaux et une dér sérieuse à ses obligations personnelles de juge de l suprême de l'Ontario, qui l'empêchent en permanence plir utilement ses fonctions de juge.

III—A fortiori, la conduite du juge Landreville, depuis demande de concession relative à la fourniture de gaz n la ville de Sudbury a abouti au printemps de 1956 l'achèvement de la transaction en février 1957, et y com procédures de 1962, 1963 et 1964 mentionnées, con comme une seule action et dont les conclusions traînent elles comme un arrière-goût de scandale qui a appar début de l'opération et s'est matérialisé alors qu'il était

Ontario, drawing upon himself the onus of establishing satisfactorily his innocence, which he has failed to do, was a dereliction of both his duty as a public official and his personal duty as a Judge, a breach of that standard of conduct obligatory upon him, which has permanently impaired his usefulness as a Judge.

In all three respects, Justice Landreville has proven himself unfit for the proper exercise of his judicial functions.

I do not think anything is to be gained by reviewing or setting out the impugned matters found at pages 69 to 98, or the Commissioner's comments and opinions. It is not for me to decide whether the evidence or materials referred to by the Commissioner on this aspect of the matter were relevant, cogent or trustworthy. Nor is it for me to decide whether the comments of the Commissioner, on what amounted to the personality and credibility of the plaintiff, were justified or valid. Opinions may well differ. I am only concerned with deciding whether the kind of findings set out in conclusions II and III were reasonably within the terms of reference set out in the Letters Patent.

In my opinion, what I have set out as (b)(ii) of the terms of reference are wide enough to embrace the portions of the Report and the conclusions attacked by the plaintiff. That portion of the term of reference is:

(b) to advise whether, in the opinion of the Commissioner:

(ii) whether the Honourable Mr. Justice Landreville has by such dealings [with NONG or its officers or in its shares] proved himself unfit for the proper exercise of his judicial duties.

As I see it, the credibility of the plaintiff was an issue. In conclusion II the Commissioner chose to find that the plaintiff's conduct in giving evidence before the Securities Commission and in the proceedings against Farris, constituted a gross contempt of those tribunals. It is true the Commissioner had before him only the transcript of the evidence given by the plaintiff in those proceedings. He did not have before him the testimony given by other witnesses. Nevertheless, it is my view the question of credibility was within the terms of reference. The quarrel is really with how the Commissioner dealt with the issue, and the facts or matters he chose to rely on. I do not think his method of dealing with the question, though others might have done differently, amounted to

la Cour suprême de l'Ontario, ont attiré sur lui le fardeau de prouver son innocence de façon satisfaisante (ce qu'il n'a pas fait), a constitué un manquement tant à son devoir de fonctionnaire public qu'à ses obligations personnelles de juge, une violation des normes de conduite qui s'imposent à lui en cette qualité, qui l'empêchent en permanence de remplir utilement ses fonctions de juge.

Sur les trois points, le juge Landreville s'est montré inapte à exercer correctement ses fonctions judiciaires.

Je pense que le fait d'examiner ou d'exposer les questions contestées, qui figurent dans les pages 69 à 98, ou bien les commentaires et opinions du commissaire, n'apportera rien de plus. Il ne m'appartient pas de décider si les dépositions ou les documents auxquels le commissaire se réfère pour cet aspect de la cause étaient pertinents, convaincants ou dignes de confiance. Il ne m'appartient pas non plus de décider si les commentaires du commissaire sur la personnalité et la crédibilité du demandeur sont justifiés ou valables. Les opinions peuvent fort bien différer. Mon seul souci consiste à décider si le genre d'observations formulées dans les conclusions II et III entrent raisonnablement dans les limites du mandat défini par les lettres patentes.

A mon avis, les termes du paragraphe b)(ii) du mandat ont un sens assez large pour englober les parties du rapport et des conclusions que le demandeur conteste. Les voici:

[TRADUCTION] b) de faire savoir si, d'après le commissaire:

(ii) M. le juge Landreville a démontré par ces transactions [avec NONG, ses employés et ses actions] son inaptitude à s'acquitter honorablement de ses fonctions judiciaires.

Selon moi, la crédibilité du demandeur était en cause. Dans la conclusion II, le commissaire a décidé que la conduite du demandeur lors de sa déposition devant la Securities Commission et au cours des procédures engagées contre Farris, a constitué un outrage flagrant aux tribunaux concernés. Il est vrai qu'il n'avait alors devant les yeux que la transcription des dépositions du demandeur et non pas celle des dépositions des autres témoins. Néanmoins, j'estime que cette question de crédibilité entre dans le cadre du mandat. La querelle porte en fait sur la manière de procéder du commissaire et sur les faits et les points qu'il a choisi d'invoquer. Je ne pense pas que ladite manière de procéder en l'occurrence ait outrepassé son mandat et lui ait fait perdre sa compétence.

going beyond the terms of the reference, and so losing jurisdiction.

I now turn to the final main submission on behalf of the plaintiff.

Section 13 of the *Inquiries Act* is as follows:

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

The plaintiff argues the Commissioner did not comply with this section. It is said there is nothing in the terms of reference, nor was there any indication at the hearing, that any allegation would be made against the plaintiff, in respect of previous testimony; that it would be alleged his conduct before those tribunals in giving evidence

... constituted a gross contempt ... and a serious violation of his personal duty as a Justice ..., which has permanently impaired his usefulness as a Judge.

It is further said the matters referred to in conclusion III, incorporating as it does the assertions in conclusion II, do not reasonably appear in the terms of reference; no notice was given to the plaintiff either before or during the hearing there would be those allegations of misconduct.

I digress somewhat to set out the procedure at the Commission hearings.[21] It was agreed that any witnesses called, including any requested on behalf of the plaintiff, and including the plaintiff, would be examined in chief by Commission counsel. The plaintiff's counsel, Mr. Robinette, would have the right to cross-examine last. Mr. Robinette would be permitted to present argument at the conclusion.

On the last day of the hearings, Commission counsel made his submissions. Mr. Robinette followed with his. Commission counsel then said (pages 1329-30):

Mr. Chairman, we have now reached a point where we can adjourn.

After some formal remarks by Commission counsel thanking various persons for their help, he said:

[21] The Agenda was put in as Exhibit 29.

Je passe maintenant au dernier argument important présenté au nom du demandeur.

L'article 13 de la *Loi sur les enquêtes* est rédi dans les termes suivants:

13. Nul rapport ne peut être fait contre qui que ce soi moins qu'un avis raisonnable ne lui ait été donné de l'accu tion de mauvaise conduite portée contre lui, et que l'occasion lui ait été donnée de se faire entendre en personne ou pa ministère d'un avocat.

Le demandeur prétend que le commissaire s'est pas conformé à cet article, car rien dans mandat ou au cours des débats n'indiquait qu'u allégation serait portée contre lui à propos de dépositions préalables, ou, plus précisément, qu alléguait que sa conduite devant ces tribunaux faisant sa déposition:

[TRADUCTION] ... a constitué un outrage flagrant ... et dérogation sérieuse à ses obligations personnelles de juge qui l'empêchent en permanence de remplir utilement ses fo tions de juge.

Il déclare aussi que les questions auxquelles réfère la conclusion III, qui reproduit les affirm tions contenues dans la conclusion II, n'entrent raisonnablement dans le cadre du mandat. demandeur n'a reçu aucun avis ni avant l'audien ni pendant l'audience que des allégations de ma vaise conduite seraient portées contre lui.

Je fais une petite digression pour indiquer procédure suivie aux audiences de la commission Il a été convenu que l'avocat de la commissi procéderait à l'interrogatoire principal de tous témoins cités, y compris ceux cités par le dema deur et le demandeur lui-même, et que l'avocat demandeur, Me Robinette, aurait le droit de contre-interroger ensuite et de présenter sa plaid rie à la clôture de l'audience.

Le dernier jour d'audience, l'avocat de la co mission a fait sa plaidoirie, qui a été suivie de ce de Me Robinette. L'avocat de la commission ensuite déclaré (pages 1329-30):

[TRADUCTION] Monsieur le président, nous avons maintena atteint le point où nous pouvons ajourner.

Après quelques formules conventionnelles remerciement, il a ajouté:

[21] L'ordre du jour figure sous la cote 29.

With that, sir, I suggest that we adjourn sine die.

The Commissioner, shortly after, said:

The Hearing is adjourned sine die.

Counsel for the plaintiff submits that in the circumstances here the provisions of section 13 became mandatory and ought to have been followed. The contention runs this way. When the Commissioner reached his decision (as he obviously at some stage did before actually signing his written report) to assert or allege that the plaintiff's conduct in giving his evidence before other tribunals amounted to misconduct or misbehaviour in office, the Commission should then have been reconvened, and notice of the "charge" of misconduct given; the plaintiff should then have been allowed to call witnesses, if he wished, to answer the so-called charges and to make his defence, either personally or by counsel, to them; instead, the first notice the plaintiff had was the publication of the Commissioner's report.

Counsel for the plaintiff asserts there is nothing in the terms of reference, nor was there anything throughout the hearing, that indicated allegations of misconduct as set out in conclusions II and III would be levelled or considered. It is further asserted that if the plaintiff and his legal representative had known these allegations were going to be made by someone or by the Commissioner, they could well have sought evidence to answer the "charges". It is not, as I see it, unreasonable to surmise the plaintiff and his advisers might have considered, in respect of allegations of gross contempt, calling as witnesses the officials of the Securities Commission, and perhaps those presiding over the Farris cases to canvass their opinions as to whether the conduct of the plaintiff in those proceedings was gross contempt.

I agree with the plaintiff that the assertion of gross contempt was a very serious one. The Commissioner said at pages 94 and 95:

The unpleasantness of the matter investigated cannot be allowed to minimize its derogatory character. There was conscious contempt before all three tribunals; it may or may not have passed the borders of criminality; but to confuse, to raise doubts by the juxtaposition of contrived and emphatic assertion and nullifying qualifications and reservations, is not to be distinguished in effect from deliberate falsity.

I translate that as a finding of perjury.

Counsel for the defendant maintains the allegations or charges are set out in the Order in Council and Letters Patent; they are the notice of the charges of misconduct alleged; the impugned conclusions obviously and reasonably arose out of charges set out in the terms of reference.

I do not agree that the matter of gross contempt of the other tribunals can be said to be included, by implication or necessary intendment, in the terms of reference.

This was a somewhat unusual Royal Commission. The majority of Royal Commissions seem to be constituted to investigate a particular subject, thing or state of affairs. Rarely do they relate to one person. This Commission was, however, directed to the investigation of one particular person and his dealings with a certain company, its officers, or its shares. The Commissioner was requested to inquire into those dealings and to express an opinion whether, in the course of them, there had been misbehaviour by the plaintiff as a judge, or whether the plaintiff, by the dealings, had proved himself unfit. I am unable to see how those general terms indicated to the plaintiff there would, or might be, an allegation of gross contempt of certain tribunals, amounting to misconduct.

No authority was cited to me, in respect of the application of section 13, which was closely in point. Reference was made to *Crabbe v. Minister of Transport*[22]. I agree the facts of that case are readily distinguishable; so too, the relevant statutory provisions and rules. There is, nevertheless, some similarity. In my opinion the case is helpful.

There, a court of investigation was appointed, pursuant to the *Canada Shipping Act*, to investigate a collision between two large vessels. The

[22] [1972] F.C. 863.

[TRADUCTION] Ceci dit, monsieur, je propose que nous ajournions sine die.

Peu après, le commissaire a déclaré:

[TRADUCTION] L'audience est ajournée sine die.

L'avocat du demandeur prétend que, vu les circonstances, les dispositions de l'article 13 étaient impératives et auraient dû être suivies. Voici ce qu'implique cette prétention. Lorsque le commissaire a pris sa décision (comme il l'a fait manifestement à un certain stade avant de signer son rapport écrit) d'affirmer que la conduite du demandeur en faisant sa déposition devant les autres tribunaux équivalait à une mauvaise conduite dans l'exercice de ses fonctions, il aurait dû reconvoquer la commission et donner avis au demandeur de l'«accusation» de mauvaise conduite. Le demandeur aurait alors eu la possibilité de citer des témoins, si tel était son désir, de répondre aux prétendues accusations et d'assurer sa défense soit personnellement soit par le ministère de son avocat, ou les deux. Au lieu de cela, il a été mis au courant par la publication du rapport du commissaire.

L'avocat du demandeur prétend que rien dans le mandat ou au cours des débats n'indiquait que des allégations de mauvaise conduite, comme celles qui figurent dans les conclusions II et III seraient soulevées ou considérées. Il prétend aussi que si le demandeur (ou son représentant légal) avait su que quelqu'un ou le commissaire allait le faire, il aurait pu rechercher les éléments de preuve pour répondre aux «accusations». A mon avis, il n'est pas déraisonnable de supposer que le demandeur et ses conseillers, face à des allégations d'outrage flagrant, auraient pu envisager de citer comme témoins les fonctionnaires de la Securities Commission et peut-être aussi les magistrats qui ont présidé le procès de Farris, afin d'examiner en détail leurs opinions quant à savoir si la conduite du demandeur au cours des procédures a constitué ou non un outrage flagrant.

Je suis d'accord avec le demandeur: l'allégation d'outrage flagrant est très grave. Aux pages 94 et 95, le commissaire déclare:

[TRADUCTION] Je ne peux pas invoquer le caractère désagréable de l'affaire sur laquelle j'enquête pour minimiser son caractère dérogatoire. Il y a eu un outrage conscient devant les trois tribunaux. A-t-il ou non outrepassé les limites de la criminalité? C'est possible, mais de toutes façons le fait de causer de la confusion et de soulever des doutes, en accumulant des affirmations emphatiques et fallacieuses et des restrictions dirimantes a un effet analogue à la fausseté délibérée.

Il s'agit là, à mon avis, d'une constatation parjure.

L'avocat de la défenderesse soutient que allégations ou accusations sont énoncées dans décret du conseil et dans les lettres patentes; el tiennent lieu d'avis en ce qui concerne les accu tions de mauvaise conduite; de toute évidence, conclusions contestées découlent des accusati énoncées dans le mandat.

A mon avis, on ne peut pas dire que la quest de l'outrage flagrant devant les autres tribuna soit, implicitement ou par présomption, incl dans le mandat.

Il s'agit là d'une commission royale quelque inhabituelle. La majorité des commissions roya sont instituées pour enquêter sur un sujet, chose ou un état de choses. Elles se rapport rarement à une personne. Toutefois, celle-ci a constituée à la seule fin d'enquêter sur une sonne en particulier et ses rapports avec une taine compagnie, ses dirigeants et ses actions. commissaire a été chargé d'enquêter sur les rapports et d'apprécier s'ils ont donné lieu à mauvaise conduite de la part du demandeur d l'exercice de ses fonctions de juge ou si celu s'est révélé inapte à les remplir utilement. Je vois vraiment pas comment des termes aussi gé raux pouvaient indiquer au demandeur qu'on a guerait ou pourrait alléguer un outrage flagr devant certains tribunaux, qui équivaut à mauvaise conduite.

Personne ne m'a cité de jurisprudence con nant l'application de l'article 13, qui présente l'espèce une complète similitude. On a invo *Crabbe c. Le ministre des Transports*[22]. J'est que les faits de cette cause se distinguent aisém ainsi que les dispositions législatives et les règ Néanmoins, elle présente une certaine analogie la rend intéressante en l'occurrence.

Dans cette affaire-là, un tribunal a été nom en vertu de la *Loi sur la marine marchande Canada* pour enquêter sur l'abordage de deux

[22] [1972] C.F. 863.

statute and the *Shipping Casualties Rules* governed the procedure at the investigation.

All of the parties concerned, including some of the officers and the pilots of the two vessels, were served, prior to the commencement of the investigation, with a "statement of the case". That document contained 15 questions. The first fourteen covered somewhat formal and technical matters. The last question read [at page 865]:

> Was the collision caused or contributed to by the wrongful act or default by any person or persons and if so what were those wrongful acts or defaults and by whom were they committed.

The Department of Transport had conduct of the proceedings. The *Shipping Casualties Rules* (Rule 17) provided that when the examination of witnesses, called on behalf of the Department of Transport, had been concluded, and after cross-examination of those witnesses by interested parties, the Department should then state

> ... in open Court the questions concerning the casualty, and the conduct of the certificated officers ... upon which the opinion of the Court is desired.

In the *Crabbe* case, the Department of Transport contended that the statement of the case, containing as it did, the question earlier set out, complied with the provisions of Rule 17; that nothing beyond the reading of the questions was required. Counsel for Captain Crabbe submitted that merely reading the questions was insufficient; the particular things alleged against Captain Crabbe or other officers (the charges) should then be set out; the particular officer or officers against whom allegations were made would then have the opportunity to call evidence and make submissions.

The Federal Court of Appeal upheld the contention of counsel for Captain Crabbe.

In my opinion, similar reasoning applies in this case. I agree with the plaintiff's position that in the circumstances here, the Commission should have been reconvened. The substance of the proposed allegations of misconduct set out in conclusions II and III should have been made known to the plaintiff in accordance with section 13. The plaintiff should then have been given the opportunity to meet those specific charges.

navires. La loi et les *Règles sur les sinistres maritimes* ont régi les procédures afférentes à l'enquête.

Toutes les parties concernées, notamment plusieurs officiers et les pilotes des deux navires, ont reçu signification avant l'ouverture de l'enquête d'un «exposé de l'affaire». Ce document contenait 15 questions. Les quatorze premières couvraient des points quelque peu formels et techniques, et la dernière était libellée dans les termes suivants [à la page 865]:

> [TRADUCTION] L'abordage est-il directement ou indirectement imputable à la faute ou à la prévarication d'une ou de plusieurs personnes, et s'il en est ainsi, quelles sont ces fautes ou prévarications et qui les a commises?

La conduite des procédures a incombé au ministère des Transports. Les *Règles sur les sinistres maritimes* (Règle 17) prévoient qu'une fois terminés l'interrogatoire des témoins cités pour le compte du ministère des Transports et leur contre-interrogatoire par les parties intéressées, le Ministère doit alors exposer:

> ... à huis ouvert les questions dont il désire saisir la Cour relativement au sinistre et à la conduite des officiers brevetés ou autres personnes visées.

Dans l'affaire *Crabbe*, le ministère des Transports a prétendu que l'exposé de l'affaire, du fait qu'il contenait la question que je viens de reproduire, était conforme aux dispositions de la Règle 17 et que seule la lecture des questions était requise. L'avocat du capitaine Crabbe a soutenu que la simple lecture des questions était insuffisante et qu'on aurait dû formuler aux intéressés les accusations portées contre son client et les autres officiers, afin qu'ils aient la possibilité de citer des témoins et de présenter des arguments.

La Cour d'appel fédérale a confirmé l'argument de l'avocat du capitaine Crabbe.

A mon avis, un raisonnement analogue s'applique en l'espèce. Je suis d'accord avec le demandeur: vu les circonstances, la Commission aurait dû être reconvoquée et le demandeur, avisé conformément à l'article 13 des allégations de mauvaise conduite formulées dans les conclusions II et III. Il aurait alors eu la possibilité de les réfuter.

I therefore hold, with diffidence, that the Commissioner failed to comply with the mandatory requirements of section 13 of the *Inquiries Act*.

I have come slowly to that conclusion. The Commissioner was an eminent and renowned judge of the Supreme Court of Canada.

> Ivan Cleveland Rand was appointed to the Supreme Court of Canada on April 22nd, 1943 in his fifty-ninth year. It would be more accurate to say that he was drafted into the court. His reputation as a man of principle, an independent thinker, and an outstanding lawyer, had preceded him to Ottawa. Rand's appointment to the court, like the universal respect which he enjoyed, had commanded itself.
>
> . . .
>
> The Honourable, J. R. Cartwright, eloquently summarized Rand's judicial career in observing that "his record offered a fair promise which, in the sixteen years that he occupied the Bench, was gloriously fulfilled". Rand established himself securely in the minds of many as the greatest judge who ever graced that bench, although others would concede that position to the former Chief Justice, Sir Lyman Duff. Without doubt, they are the two most eminent judges Canada has yet produced.[23]

As a mere trial bench judge, I feel some reluctance in concluding that this distinguished Commissioner omitted to comply with one of the terms of the statute governing his inquiry; that this was error in law. But my function cannot be affected by diffidence or reluctance. I am required to apply the law, as I conceive it to be, to the issues between the parties to this suit.

There remain two final matters of defence.

The first is laches. The plaintiff, it is said, has slept too long on his rights. The report issued on August 11, 1966; he ought then to have attacked the inquiry, even before the Joint Committee of the Senate and House was appointed; the present litigation was not commenced until August 4, 1972; the delay or lapse of time is substantial.

Snell's Principles of Equity has this to say on laches[24]:

> Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim. Delay will accordingly be fatal to a claim for equitable relief if it is evidence of an agreement by the plaintiff to abandon or release his right, or if it has

[23] "Mr. Justice Rand—A Triumph of Principle", by E. Marshall Pollock (1975) 53 *Canadian Bar Review* 519, and 522.

[24] 27th ed. (1973) p. 35.

Je conclus donc, avec hésitation, saire a omis de se conformer aux ratives de l'article 13 de la *Loi sur*

Je suis venu lentement à cette commissaire a été un juge éminent la Cour suprême du Canada.

> [TRADUCTION] Ivan Cleveland Rand a ét suprême du Canada, le 22 avril 1943, à l'âg ans. Il serait plus exact de dire qu'il y réputation d'homme de principe, de pen d'homme de loi éminent l'avait précédé à tion de Rand à la Cour, vu le respect unive allait de soi.
>
> . . .
>
> L'honorable J. R. Cartwright a éloq carrière judiciaire de Rand en faisant dossier offrait une belle promesse qui, qu'il a passés dans la magistrature, a été Rand s'est solidement imposé à bien des grand juge qui ait jamais siégé dans la m d'autres accordent ce rang à l'ancien jug Duff. Sans aucun doute, ce sont là les éminents que le Canada ait jamais produi

En tant que simple juge de j'éprouve une certaine réticence commissaire aussi distingué a o mer à l'une des exigences de la enquête, qu'il a commis une erre la réticence et l'hésitation ne d sur mes fonctions. Il m'incombe telle que je la conçois, au liti parties à la présente instance.

Il reste deux derniers moyens

Le premier est le retard indu trop laissé traîné l'exercice de port a été publié le 11 août 196 dû attaquer l'enquête, même av du comité mixte du Sénat et de présent litige n'a commencé qu y a là un retard ou un laps de te

L'ouvrage de *Snell's Princip* tient sur le retard indu les comm

> [TRADUCTION] Le retard indu consis laps de temps qui, associé à des circons ble l'exécution de la réclamation. Le re à une demande de redressement fondé tue un signe évident que le demandeur

[23] «Mr. Justice Rand—A Triumph o shall Pollock (1975) 53 *Revue du Bar* 522.

[24] 27e éd. (1973) p. 35.

resulted in the destruction or loss of evidence by which the claim might have been rebutted, or if the claim is to a business (for the plaintiff should not be allowed to wait and see if it prospers), or if the plaintiff has so acted as to induce the defendant to alter his position on the reasonable faith that the claim has been released or abandoned. But apart from such circumstances delay will be immaterial.

On the facts before me, I see nothing which makes it inequitable that the plaintiff's claim be enforced. None of the "fatal" circumstances described in *Snell* are present here. The defendant (for practical purposes, the plaintiff's fellow-citizens) has not been induced to alter any position. I see no compelling or equitable reason to invoke the defence of laches.

The defendant says, finally, the Court should not, in the exercise of its discretion make any declaration of any kind in favour of the plaintiff. All the surrounding circumstances are pointed to: the affair is now old; the plaintiff has long since resigned from the bench; the matter is, in a practical sense, academic; there has been long delay. I agree the Court has, in the circumstances, a discretion to grant or not grant a declaration. I do not see any equitable, legal, or moral reason to exercise my discretion against the plaintiff. As Pratte J. said:

> . . . the Court has the jurisdiction to make a declaration which, though devoid of any legal effect, would, from a practical point of view, serve some useful purpose.

One useful purpose, to my mind, and assuming my decision in respect of section 13 of the *Inquiries Act* to be correct, is that it will be a matter of public record that the plaintiff did not, at the commission hearing, have full opportunity to refute the allegation or finding he had committed, as a judge, gross contempt in his testimony before certain tribunals.

It is a matter of record that the plaintiff is pursuing, in this Court, another action against the defendant. It was commenced on the same date as this suit. In that litigation the plaintiff seeks, among alternative relief claims, a declaration that he is entitled to a pension from June 30, 1967, the date of his resignation as a judge. The amount of pension sought is based on the relevant provisions of the *Judges Act*. It may be that the declaration I find he is here entitled to will serve some useful purpose in the prosecution of that other suit.

The plaintiff will have a declaration limited to the section 13 issue. He will also recover the costs of this action.

I request counsel for the plaintiff to draw a draft judgment giving effect to these reasons, and to submit it to counsel for the defendant. If counsel cannot agree on the terms, I shall hear submissions.

s'il a eu comme résultat la destruction ou la perte de la preuve grâce à laquelle cette demande aurait pu être réfutée, ou si la demande vise une entreprise (car le demandeur ne doit pas être autorisé à attendre de voir si celle-ci est prospère) ou si le demandeur a agi de manière à inciter le défendeur à modifier sa position en se basant sur la croyance raisonnable que la réclamation a été abandonnée. Ces cas mis à part, le retard sera de peu d'importance.

D'après les faits dont je dispose, je ne vois rien qui rend peu équitable l'exécution de la réclamation du demandeur. On ne trouve ici aucune des circonstances «fatales» décrites par *Snell*. La défenderesse (aux fins pratiques, les compatriotes du demandeur) n'a été poussée à altérer aucun point de vue. Je ne vois aucune raison équitable ou impérative pour invoquer une défense basée sur le retard indu.

Enfin, la défenderesse déclare que dans l'exercice de son pouvoir discrétionnaire, la Cour ne devrait rendre aucun jugement déclaratoire en faveur du demandeur. Toutes les circonstances concourent à cet effet: l'affaire est maintenant ancienne; le demandeur a depuis longtemps démissionné de la magistrature; la question est devenue de la pure rhétorique et il y a eu un long retard. J'admets que, vu les circonstances, la Cour est libre d'accorder ou de ne pas accorder un jugement déclaratoire. Je ne vois aucune raison équitable, morale ou juridique pour exercer ma discrétion contre le demandeur. Comme l'a dit le juge Pratte:

> [TRADUCTION] . . . la Cour est compétente pour rendre un jugement déclaratoire qui, bien que dénué de tout effet juridique, servira sur le plan pratique à remplir quelque objectif utile.

A mon sens, et en présumant que ma conclusion relative à l'article 13 de la *Loi sur les enquêtes* soit correcte, l'objectif utile, c'est qu'il sera de notoriété publique que le demandeur n'a pas eu aux audiences de la commission, la possibilité de réfuter l'accusation d'avoir commis, en tant que juge, un outrage flagrant en déposant devant les tribunaux.

Il est également notoire que le demandeur poursuit actuellement devant cette cour, une autre action contre la défenderesse, qui a été engagée à la même date que celle qui nous occupe. Le demandeur y sollicite, parmi d'autres demandes de redressement, un jugement déclaratoire portant qu'il a droit à une pension à partir du 30 juin 1967, date de sa démission comme juge. Le montant de la pension réclamé est basé sur les dispositions pertinentes de la *Loi sur les juges*. Il se peut qu jugement déclaratoire auquel j'estime que demandeur a droit en l'espèce serve quelque o utile dans les poursuites afférentes à cette a instance.

Le demandeur aura donc un jugement décl toire limité à la question de l'article 13. Il re vrera également les frais de la présente action.

Je demande à l'avocat du demandeur de réd un projet de jugement donnant effet aux prés motifs et de le soumettre à l'avocat de la défe resse. Si celui-ci n'est pas d'accord sur les ter j'entendrai ses arguments.

replica of a weapon which is in fact a cap gun and indeed, during the evening had been drinking. However, we may deplore the act of the appellant in using this replica of a weapon in the way that he did, and creating the alarm in the officer who was doing his duty, we are not persuaded that the evidence establishes that the appellant intended to possess the cap pistol for a purpose dangerous to the public peace. We are of the opinion that the Crown has failed to prove the offence charged and the appeal will therefore be allowed and the conviction quashed and a verdict of acquittal entered.

Appeal allowed; acquittal entered.

RE EWING AND KEARNEY AND THE QUEEN

British Columbia Court of Appeal, Farris, C.J.B.C., Maclean, Branca, Taggart and Seaton, JJ.A. June 4, 1974.

Civil rights — Right to counsel — Whether accused may be tried where unable to afford counsel — Whether State must provide counsel to accused — Cr. Code, ss. 577(3), 737 — Canadian Bill of Rights, s. 2(c)(ii).

Trial — Full answer and defence — Right to counsel — Whether accused may be tried where unable to afford counsel — Whether State must provide counsel to accused — Cr. Code, ss. 577(3), 737 — Canadian Bill of Rights, s. 2(c)(ii).

Appellants, both 18 years of age at the time of their arrest (having just finished high school), were charged with two counts of possession of narcotics. When they appeared in Provincial Court they indicated they wished to plead not guilty and their cases were adjourned to give them an opportunity to obtain counsel. Owing to a lack of funds they were unable to obtain counsel privately, since they could not afford the necessary retainer, and as a matter of policy they were refused legal aid on the ground that their conviction was not likely to result in imprisonment or a loss of livelihood. As a result, when they appeared for trial the Provincial Court Judge felt impelled to proceed. A motion for prohibition was dismissed and on appeal from that decision, *held*, Farris, C.J.B.C., and Branca, J.A., dissenting, the appeal should be dismissed.

The *Criminal Code* contemplates that an accused can make full answer and defence either personally or by counsel or agent. The common law did not guarantee a trial with counsel. While representation by counsel is desirable, there is no authority that it is a mandatory necessity so as to preclude the trial of an accused who desires, but cannot afford, counsel. The *Canadian Bill of Rights* guarantees the right to retain counsel, not to have one provided.

Per Farris, C.J.B.C., Branca, J.A., concurring, dissenting: An accused is entitled to a fair trial which cannot be assured without the assistance of counsel and therefore if, owing to a lack of funds, he cannot obtain counsel, the State has an obligation to provide one.

[*Gideon v. Wainwright* (1963), 372 U.S. 335, 9 L. ed. 2d 799; *Powell v. Alabama* (1932), 287 U.S. 68, consd; *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, 25 C.R.N.S. 270, [1974] 4 W.W.R. 49, 2 N.R. 53; revg 13 C.C.C. (2d) 137, 39 D.L.R. (3d) 161, 22 C.R.N.S. 271; *Vescio v. The King* (1948), 92 C.C.C. 161, [1949] 1 D.L.R. 720, [1949] S.C.R. 139, 6 C.R. 433; *R. v. Piper*, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 534; *Re Vinarao* (1968), 66 D.L.R. (2d) 736, 63 W.W.R. 93, apld; *R. v. Clewer* (1953), 37 Cr. App. R. 37; *R. v. Johnson* (1973), 11 C.C.C. (2d) 101, 21 C.R.N.S. 375, [1973] 3 W.W.R. 513; *R. v. Butler* (1973), 11 C.C.C. (2d) 381; *Spataro v. The Queen* (1972), 7 C.C.C. (2d) 1, 26 D.L.R. (3d) 625, [1974] S.C.R. 253; *Argersinger v. Hamlin* (1972), 407 U.S. 25, 32 L. ed. 2d 406, refd to]

APPEALS by the accused from the judgment of Macfarlane, J., 15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57, dismissing their application for prohibition.

I. G. Waddell and *D. W. Mossop*, for accused, appellants.
C. R. Lander, for Attorney-General of Canada.
R. M. Paris, for Attorney-General of British Columbia.

FARRIS, C.J.B.C. (dissenting):—The two appellants are charged with two counts of possession of narcotics, namely, possession of *cannabis* (resin) and possession of *cannabis* (marijuana). At the time of their arrest, July 15, 1973, they were 18 years old and had just finished high school. They were unemployed and without funds.

They appeared in Provincial Court in Vancouver on July 17, 1973, and indicated that they wished to plead not guilty. Their cases were adjourned until July 24th so that they would have the opportunity to obtain counsel. They attempted to do so but were unsuccessful as the counsel involved wished a retainer.

On July 24th their case was further adjourned so that they could apply for legal aid. Legal aid was refused because of a policy which dictates the granting of such aid only if a conviction is likely to result in imprisonment or loss of livelihood.

The appellants appeared again on July 31st and the Provincial Court Judge to whom the circumstances had been related said, "Well there's nothing really I can do for you", and fixed November 13, 1973, as the date for trial at which trial the accused would be required to defend themselves without the benefit of counsel. Subsequently, a motion for a writ of prohibition against the Provincial Court Judge was launched seeking to stop the trial. This motion was heard before the Honourable Mr. Justice Macfarlane of the Supreme Court who dismissed it [15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57]. It is from this dismissal the present appeal is brought.

The issue to be determined is: Can these two young people

be assured of a fair trial when they have to defend themselves without the assistance of counsel? In my opinion, to ask the question is to answer it, and the answer is an emphatic no.

Our criminal justice is administered under the adversary system; that is to say, a system where when a conflict arises between a citizen and the State the two are to be regarded as adversaries. The conflict is to be resolved by fighting it out according to fixed, sometimes rather arbitrary rules. The tribunal trying the matter settles the dispute on the basis of only such evidence as the contestants choose to present. In such a proceeding there are rules of procedure and rules of evidence that can only be properly understood and applied after years of training and experience. For this reason, the Crown in this case, as it does in most criminal cases, employs counsel who are trained in the law. This means not only trained in the rules of evidence and rules of procedure but knowledgeable in the art of advocacy, in the marshalling of facts and in the case law. The prosecutor not only has this advantage but he has the resources of the State and the power of a police force behind him. Anyone who has prosecuted an assize or who has conducted prosecutions in any Court knows what it means to have such power available. Into such an arena two 18-year-old youths are projected, totally unequipped by experience or education to defend themselves against such a powerful adversary. In my opinion, it is unrealistic in the extreme to believe that in such a contest these accused can be assured of a fair trial without the assistance of counsel.

It is equally unrealistic to believe that the assistance and guidance of the trial Judge are adequate substitutes for representation by counsel. It is not the function of a trial Judge to act as counsel for either party. Further, without briefing, interviewing of witnesses and preparation, the benevolence of the trial Judge cannot be equated with the dedication of counsel.

If I am correct in these views the next question is: Does the accused have the right to have counsel provided for him by the State where he is unable to obtain one himself? Again in my view he does have such a right. Lord Chief Justice Goddard in *R. v. Clewer* (1953), 37 Cr. App. R. 37 at p. 40, said: ". . . the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial". Implicit in this is not only that it should appear that he is having a fair trial but that he in fact is having such a trial.

Numerous Canadian cases have recognized in various contexts that the trial of an accused without counsel endangers the fairness of the hearing and where that has happened have ordered a new trial. To quote but a few:

R. v. Johnson (1973), 11 C.C.C. (2d) 101, 21 C.R.N.S. 375, [1973] 3 W.W.R. 513, where this Court held that an accused was denied the right to make a full answer and defence when the trial Court refused his request for an adjournment of his trial so that he could instruct new counsel, having discharged his former counsel that morning.

R. v. Butler (1973), 11 C.C.C. (2d) 381, where the Ontario Court of Appeal ordered a new trial of an accused who was not represented by counsel.

We have not been referred to any authority binding on this Court that precludes us from granting a writ of prohibition in the circumstances of this case.

Vescio v. The King (1948), 92 C.C.C. 161, [1949] 1 D.L.R. 720, [1949] S.C.R. 139, does not deal specifically with the point involved here. While it is true that at p. 169 C.C.C., p. 728 D.L.R., Mr. Justice Rand stated "And certainly there is no statutory rule that defence by counsel is a necessary part of the machinery of trial" it will be noted that he refers to "statutory rule". Further, his statements must be read in the light of the facts of that case where the accused was in fact represented by counsel. Again, I find nothing in *Spataro v. The Queen* (1972), 7 C.C.C. (2d) 1, 26 D.L.R. (3d) 625, [1974] S.C.R. 253, which is in conflict with the views that I have expressed. It may be noted that Judson, J., at p. 2 C.C.C., p. 626 D.L.R., states: "This case . . must be unique on its own facts." It is interesting to note, however, that at p. 4 C.C.C., p. 629 D.L.R., the same learned Judge states:

> This accused is totally incapable of adequate self-representation in a trial of this magnitude and had he been told that he must conduct his own defence and that this was his only alternative, I feel sure that an appellate Court would have had reason to question whether justice has been done.

I do not rest my judgment on the provisions of the *Code* providing for full answer and defence, nor on the provisions of the *Canadian Bill of Rights*. As far as the latter Act is concerned I note the observations of Martland, J., in *R. v. Burnshine* S.C.C. April 2, 1974, unreported [since reported 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, 25 C.R.N.S. 270], where at p. 513 C.C.C., p. 592 D.L.R., he says: "Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights." In my opinion, the right of an accused in a criminal case to be defended by counsel is an existing right.

Simply stated, it is my opinion that:

(1) An accused person is entitled to a fair trial.

(2) He cannot be assured of a fair trial without the assistance of counsel.

(3) If, owing to the lack of funds, he cannot obtain counsel, the State has an obligation to provide one.

For these reasons I would allow the appeal and grant the writ of prohibition.

MACLEAN, J.A.:—Appellants appeal against the refusal of a Judge of the Supreme Court to make an order calling upon a Judge of the Provincial Court to show cause why a writ of prohibition should not issue prohibiting the Judge from proceeding with the trial of the appellants on a charge that they did unlawfully have possession of *cannabis* (marijuana) contrary to the *Narcotic Control Act*, R.S.C. 1970, c. N-1, on the principal ground that the appellants did not have counsel and had not the means to provide counsel, having been denied the assistance of the legal aid system that operates in this Province.

Appellants argue in this Court through their counsel that they have been denied the right to make full answer and defence guaranteed to them under ss. 577(3) and 737 of the *Criminal Code* and under the common law.

I have studied the judgment of the learned Chamber Judge, Mr. Justice Macfarlane, with the greatest care, and I entirely agree with what he has said [15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57]. I would like, however, to add a few remarks more or less by way of a summary of my own views. First of all, no decision has been cited to us by a Court whose decision is binding upon us to the effect that the common law guarantees a trial with counsel to enable the accused to make "full answer and defence". Furthermore, it is clear that ss. 577 and 737 contemplate that the accused can make full answer and defence either "personally" or "by counsel or agent".

Without doubt it would be desirable that all accused persons should be represented by counsel, but to say that they *must* be so represented is entirely another matter. In their factum appellants submit that:

> THAT the appeal be allowed and a writ of prohibition be granted to prohibit the trial judge, Judge J. D. Layton, or any other judge of the Provincial Court of British Columbia, from proceeding with the trial of the applicants *until Counsel is appointed for each of the appellants.*

(My emphasis.) No authority for such a proposition was cited to us.

Many cases have been cited to us where convictions have been set aside where the accused has been denied his right to make full answer and defence for the most part in cases where an accused has been unfairly treated by arbitrary or unjust denial of adjournments. There is no suggestion in the case at bar that the accused have been unfairly treated by the Provincial Court Judge. On the contrary the appellants have received fair treatment from the learned Provincial Court Judge and there is no reason to anticipate that the appellants will receive anything other than a fair trial whether they have counsel or not. Appellants only complaint is that they had no counsel provided for them. We do not even know whether the appellants have a defence or even whether they think they have. This application is in fact premature. The trial has not started and for all we know appellants may appear with counsel at the trial.

Appellants make a strong bid to get some assistance from the *Canadian Bill of Rights*, 1960 (Can.), c. 44 [now R.S.C. 1970, App. III]. However, s. 2(*c*)(ii) which is the only provision dealing directly with the matter under consideration here provides only that an accused "who has been arrested or detained" has "the right to retain and instruct counsel without delay". This provision clearly has no application to the case under consideration here. In submitting that the *Bill of Rights* is applicable to the situation appellants' counsel relied on the majority opinion in *R. v. Burnshine* (1973), 13 C.C.C. (2d) 137, 39 D.L.R. (3d) 161, 22 C.R.N.S. 271, a decision of this Court reversed by the Supreme Court of Canada since the present appeal was argued but as yet unreported [since reported 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, 25 C.R.N.S. 270].

Accordingly I would dismiss the appeal.

BRANCA, J.A. (dissenting):—I have had the privilege of reading the reasons for judgment of my brother the Chief Justice and I would allow the appeal and grant the writ of prohibition for the reasons given by him.

TAGGART, J.A.:—I have read the judgment of my brother Seaton and agree that these appeals must be dismissed for the reasons given by him.

I agree also that the trial Judge is bound to see that an accused has a fair trial. If he concludes that the trial cannot be a fair one if the accused is unrepresented, the Judge ought to

ensure that his view is communicated to the Legal Aid Society. I prefer, however, to express no opinion as to what the Judge may do if in spite of his view that the accused should be represented, counsel is not appointed. That problem does not present itself for decision in this case and, given the present policies applicable to the provision of legal aid, it seems to me highly unlikely it will ever arise. In these circumstances I prefer to say nothing on the subject until the problem is raised for our consideration.

SEATON, J.A.:—On July 15, 1973, the appellants were charged with possession of *cannabis* (resin) and possession of *cannabis* (marijuana). They appeared in Provincial Court on July 17th and indicated that they wished to plead not guilty. Their cases were adjourned until July 24th so that they could retain counsel. They were not successful and on July 24th the cases were further adjourned so that they could apply for legal aid. Their applications were rejected. On July 31, 1973, the appellants advised the Court that they were unable to obtain legal aid and unable to retain counsel. The learned Provincial Judge advised them that there was nothing he could do for them and fixed November 13, 1973, as the date for trial.

The appellants moved for a writ of prohibition on the ground that the trial Court had lost jurisdiction when it failed to appoint counsel. The application was dismissed and this appeal is from that dismissal.

Counsel advised this Court that legal aid is available where the proceedings are on indictment but where, as here, they are pursuant to the summary conviction provisions of the *Criminal Code* legal aid is provided only if conviction is likely to lead to a jail sentence or to loss of livelihood.

Nothing was put before the trial Judge to indicate that the trial would be a particularly difficult one. It has been suggested that every charge that involves an element of possession is highly complex but I am unable to accept that submission. It depends upon the facts of the particular case. Because there is nothing to distinguish this case from other cases involving indictable offences tried by way of summary conviction, the appellants' position must be a broad one.

The principle put forward by counsel for the appellants is that every person charged with a criminal offence is entitled to have counsel and shall have counsel unless he chooses to represent himself. There are many cases referring to the right to retain counsel, but what the appellants here seek is a very

significant additional step, that is, the right to have counsel provided.

The appellants' first contention is that at common law an accused has the right to employ counsel and the right to have counsel assigned to him if he cannot obtain counsel on his own. That was the contention put before Macfarlane, J., and I would reject it for the reasons given by him and reported at 15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57.

In support of a number of arguments the appellants relied upon an observation in *Gideon v. Wainwright* (1963), 372 U.S. 335, 9 L. Ed. 2d 799, referred to in *R. v. Johnson* (1973), 11 C.C.C. (2d) 101 at pp. 112-3, 21 C.R.N.S. 375, [1973] 3 W.W.R. 513 at p. 525:

> In pointing up the difficulties inherent in self-defence, I can do no better than quote from *Gideon, supra*, where Justice Black [at p. 805] approved the words of another distinguished Judge, who said in part:
>
> > "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The statement ought to be placed in its context. It was made by Mr. Justice Sutherland in *Powell v. Alabama* (1932), 287 U.S. 45 at pp. 68-9, in the appeal from the infamous trial in which the Scottsboro boys were sentenced to death. The suggestion that an accused "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible" may have been applicable to that trial but I am satisfied that it has no application to a trial in this jurisdiction today.

The words were quoted with approval in the majority judgment in *Gideon v. Wainwright, supra*. The situation being considered in *Gideon* is described by Mr. Justice Black at p. 337:

> Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained

in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison.

Gideon represented a broadening of the protection first enunciated in *Powell*, but it was not until *Argersinger v. Hamlin* (1972), 407 U.S. 25, 32 L. Ed. 2d 406 at p. 530, that the line was drawn. In that case the Court concluded that counsel was to be provided whenever imprisonment was to be anticipated. The American cases follow this interesting route to approximately the same position legal aid has created in this jurisdiction. They lend little weight to an attack upon that position.

It is argued that the provisions in the *Code* for full answer and defence are to be interpreted as bestowing the right to the provision of counsel. The words have been in the Act for many years and have not been so interpreted. The provision in s. 577(3) that an accused is entitled "to make full answer and defence personally or by counsel" suggests that the words "full answer and defence" do not include a reference to counsel but deal with another aspect of a fair trial. Similar reasoning appears in *Vescio v. The King* (1948), 92 C.C.C. 161, [1949] 1 D.L.R. 720, [1949] S.C.R. 139, where Rand, J. said at p. 169 C.C.C., p. 728 D.L.R., p. 147 S.C.R.:

> And certainly there is no statutory rule that defence by counsel is a necessary part of the machinery of trial. In fact the contrary appears from what is contemplated by s. 944(2) of the *Cr. Code* where it uses the language "... or the accused, if he is not defended by counsel, shall be allowed."

I do not find that reading the provisions respecting full answer and defence in the light of the *Bill of Rights* permits me to arrive at a different understanding of them.

The appellants contend that the right to counsel may be found in s. 2 of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. In my view that contention fails for the reasons given in *R. v. Piper*, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 534, a decision followed by this Court in *Re Vinarao* (1968), 66 D.L.R. (2d) 736, 63 W.W.R. 93. In *R. v. Piper* the Manitoba Court of Appeal pointed out [at p. 136 C.C.C., p. 535 D.L.R.]:

> Section 2(*c*)(ii) of the *Bill of Rights* says that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. That is as far as the section goes.

In the *Vinarao* case, Bull, J.A., said at p. 739:

> With respect to the submission that the appellant was deprived of her right to retain counsel contrary to s. 2(*c*)(ii) of the *Canadian Bill of Rights*, I am of the view that this must be determined against the appellant under the authority of the decision of *R. v. Piper*, 51 D.L.R. (2d) 534, [1965] 3 C.C.C. 135. Although this decision is not binding on this Court, being that of the Court of Appeal of Manitoba, in view of being an interpretation of a national statute — the *Canadian Bill of Rights* — I consider strongly it is one that should be followed unless there is very good reason for the contrary.

The essential difficulty in the appellants' position is that these provisions of the *Bill of Rights* prevent a law being construed so as to deprive the accused of the right to counsel, but do not provide that a law shall be construed so as to bestow the right to counsel. *R. v. Burnshine*, S.C.C. April 2, 1974, unreported [since reported 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, 25 C.R.N.S. 270], is conclusive on this question. Martland, J., speaking for the majority, said at p. 513 C.C.C., p. 592 D.L.R., of his judgment: "Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights."

The appellants also rely upon s. 1 of the *Bill of Rights* and suggest that to be unrepresented would constitute discrimination by reason of impecuniosity. Essential to the argument is the proposition that the section created new rights. That conclusion was rejected in *R. v. Burnshine, supra*, at p. 511 C.C.C., p. 590 D.L.R., of the judgment of Martland, J.:

> I am not prepared to accept the respondent's submission as to the meaning of the phrase "equality before the law" in s. 1(*b*) of the *Canadian Bill of Rights*. Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.

I conclude that an accused person does not have the right to have counsel assigned to him in all cases. It follows that these appellants are not entitled to have counsel assigned to them, there has been no loss of jurisdiction, prohibition is not available, and the appeals cannot succeed.

I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial Judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial Judge might conclude that defence counsel was essential to a fair trial. In the past when a trial Judge thought that he could not secure a fair trial without counsel for the defence, he approached the Attorney-General or the Bar. Under similar circumstances today he might contact the Legal Aid Society. If a trial Judge

concluded that he could not conduct a fair trial without defence counsel and his requests for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly. The matter was discussed in *obiter* in *Vescio v. The King, supra,* particularly at p. 169 C.C.C., p. 727 D.L.R., p. 147 S.C.R.:

> To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance.

But there is no foundation for a finding in this case that a fair trial cannot be conducted in the absence of defence counsel.

I would dismiss the appeals.

Appeals dismissed.

REGINA v. PERRY

Prince Edward Island Supreme Court, in banco, Trainor, C.J., Tweedy and Bell, JJ. May 7, 1974.

Narcotics — Trafficking — Proof of offence — Whether purchaser of drug accomplice of accused on charge of trafficking — Narcotic Control Act (Can.), ss. 4, 2.

Evidence — Corroboration — Accomplice — Whether purchaser of drug accomplice of accused on charge of trafficking — Narcotic Control Act (Can.), ss. 4, 2.

Purchasers of narcotics from an accused are not *ipso facto* accomplices on a charge against the accused in respect of the sale of trafficking contrary to s. 4(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. A purchaser may or may not be an accomplice depending on whether there are other facts which, coupled with the purchase, go to establish the purchaser as the accused's accomplice in the commission of the offence charged. To become an accomplice one must be an aider or abettor of the accused.

[*Ex p. Barker* (1891), 30 N.B.R. 406; *Cullen v. The King* (1949), 94 C.C.C. 337, [1949] 3 D.L.R. 241, [1949] S.C.R. 658, 8 C.R. 141, apld; *R. v. Dyer* (1971), 5 C.C.C. (2d) 376, 17 C.R.N.S. 207, [1972] 2 W.W.R. 1, consd; *MacDonald v. The King* (1946), 87 C.C.C. 257, [1947] 2 D.L.R. 625, [1947] S.C.R. 90; *R. v. Coughlan, Ex p. Evans*, [1970] 3 C.C.C. 61, 8 C.R.N.S. 201, 70 W.W.R. 321, *sub nom. Evans v. Pesce and A.-G. Alta.; Ruest v. The Queen* (1952), 104 C.C.C. 1, [1952] 2 S.C.R. ix, 15 C.R. 63; *R. v. Perry* (1945), 84 C.C.C. 323, [1945] 4 D.L.R. 762, 18 M.P.R. 144; *R. v. Stoddart* (1909), 25 T.L.R. 612; *R. v. Marciniec*, [1963] 2 C.C.C. 212, 40 C.R. 182, 42 W.W.R. 101, refd to]

APPEAL by the Crown from the accused's acquittal on a charge of trafficking in a narcotic contrary to s. 4(2) of the *Narcotic Control Act* (Can.).

G. B. MacDonald, Q.C., for the Crown, appellant.

G. E. Mitchell, for accused, respondent.

TRAINOR, C.J.:—This is an appeal by the Crown from a verdict of acquittal by a jury on November 22, 1973, on a charge by way of indictment against the above respondent that he did, on or about October 3, 1972, unlawfully traffic in a narcotic, to wit, *cannabis sativa*, contrary to the provisions of s. 4(1) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, thereby committing an offence under s. 4(3) of the said Act.

The grounds of the said appeal, each involving a question of law alone, are as follows:

1. That the learned trial Judge erred in law in directing the jury that the four Crown witnesses who were occupants of the Toyota automobile, could have been charged with a more serious offence than possession of a narcotic, *i.e.*, trafficking in a narcotic or having possession of a narcotic for the purpose of trafficking when the evidence was that they had the narcotic for their own use, and
2. That the learned trial Judge erred in directing the jury that these same four Crown witnesses, *i.e.*, the occupants of the Toyota automobile, may be considered to have been accomplices of the accused as purchasers of the narcotic, and the danger of convicting on their evidence standing alone and uncorroborated.

With respect to the first ground, the offence is created by s. 4 of the *Narcotic Control Act* which reads as follows:

> 4(1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.
>
> (2) No person shall have in his possession any narcotic for the purpose of trafficking.
>
> (3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

The term "traffic" is defined in s. 2 as follows:

> "traffic" means
>
> (*a*) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
>
> (*b*) to offer to do anything mentioned in paragraph (*a*)
>
> otherwise than under the authority of this Act or the regulations.

The evidence disclosed that the four persons mentioned in the notice of appeal, namely, Thompson, Fraser, MacDonald

The overpayment is, however, in a different category. As of October 11, 1972, the Town, through its engineering consultant, Canadian-British Consultants Limited ("Canadian-British"), claimed deficiencies in the job which the Canadian-British principal manager, Williams, then valued at approximately $2,300. These consisted of about $650 for some painting and other rough finishing in the treatment plant unit of the water system, work which Digdon could do with its own labour, and about $1,650 for work of a kind which Digdon could not do but had subcontracted to experts under the direction of Canadian-British. Work of this kind remaining included miscellaneous calibrating and adjusting of control equipment in the treatment plant and obtaining and installing there a number of small parts or pieces of equipment. The latter included replacement of a compressor (not priced) which a subcontractor, Mulgrave Machine Works Limited, had installed in too small a size, and of a turbidity meter or "recorder" ($150), which had been installed weeks earlier, which had been sent back to the supplier, Neptune Meters Limited, for repair, and which, it turned out, Neptune refused to return until many months later and then only on payment by Canadian-British of $1,000 "ransom", for a piece of equipment costing, installed, only about $150, a peculiar and unexplained episode.

The "overpayment" was the payment in full (except the contractual holdback for mechanics' liens) of all items under the contract pursuant to progress estimate No. 7 on November 15, 1972, wherein Canadian-British certified that the treatment plant was "complete, operational, tested and guaranteed". This resulted in all the deficiencies alleged, being paid in full. Thus, Digdon and, through it, we must presume, the subcontractors and suppliers, were paid in full for all work including the remedying of all deficiencies. Such payment, as was to be expected and as the results confirmed, removed most of the incentive for the subcontractors and suppliers to complete the work at the behest of Digdon or Canadian-British, or of Simcoe, had Simcoe assumed the direction of the work.

The payment in full left no money in the contract to lure those who should have done the work to do so, or to pay others to do it. In this type of bond Simcoe was entitled to expect that, if it were called in on a default, the Town would ordinarily still have the money with which it would have paid Digdon and the subcontractors for the rest of the work, and which Simcoe could now ask to have applied to its cost of completion. No such money remained because of the Town's payment in full.

It is true that as of November 15, 1972, the Town owed about $2,800 for extra work done by Mulgrave Machine Works Limited, a subcontractor. This money, however, would not have been available to Digdon or Simcoe for completion of any other work. It could not serve as a lure to anyone except possibly Mulgrave Machine Works Limited. It is perhaps no coincidence that this firm subsequently replaced the wrong compressor referred to above, before the notice of default was given to Simcoe on January 22, 1973.

A rather vaguely possible credit of about $3,000 might have been granted to Digdon on negotiation at a later date, as a credit respecting excavation; it is not clear, however, that Digdon knew of this, or that the possibility was a very real one. In any event, it would have served as no incentive to the subcontractors and suppliers.

I, accordingly, respectfully agree with the learned trial Judge that overpayment occurred, with respect to the very work allegedly not done, in circumstances that might well have prejudiced Simcoe. On this ground I would affirm the decision appealed from.

I need not deal with the respondent's argument that the appellant's action should have been dismissed in any event because of the plaintiff's failure to prove that Simcoe was ever given notice of the details of Digdon's alleged default or because any default evidenced by the deficiency list of October 11, 1972, was waived by the progress estimate of November 15, 1972, which, in authorizing full payment of the contract sum, confirmed satisfactory completion of the work. I also need not consider whether the plaintiff proved any of its alleged damages of $63,201.99 or, in particular, whether it proved that the later work done, costing $12,693.62, was in fact done to remedy any specific deficiencies for which Simcoe should have to pay; certainly I have great difficulty in finding such proof in the record except for a few hundred dollars' worth of doubtful items.

In conclusion, I would dismiss the appeal with costs.

Appeal dismissed.

RE WHITE AND THE QUEEN

Alberta Supreme Court, Trial Division, D. C. McDonald, J. *December 7, 1976.*

Civil rights — Right to counsel — Whether Provincial Court has power to appoint counsel for indigent accused — Whether accused has right to have counsel appointed — Considerations in appointing counsel — Cr. Code, s. 611.

Criminal law — Trial — Full answer and defence — Right to counsel — Whether Provincial Court has power to appoint counsel for indigent accused — Whether accused has right to have counsel appointed — Considerations in appointing counsel — Cr. Code, s. 611.

Courts — Jurisdiction — Right to counsel — Whether Provincial Court has power to appoint counsel for indigent accused — Whether accused has right to have counsel appointed — Considerations in appointing counsel — Cr. Code, s. 611.

Extraordinary remedies — Certiorari — Mandamus — Judge refusing to appoint counsel for indigent accused — Whether certiorari lies to quash decision where Judge holding he did not have power to appoint counsel or where decision not based on relevant considerations — Whether mandamus lies to compel Judge to consider application to appoint counsel.

Any Judge, including a Judge of the Provincial Court, has the power to appoint counsel for an indigent accused. Although the *Criminal Code*, in s. 611, only specifically provides that the Court of Appeal may appoint counsel for indigent accused, it is clear, having regard to the history of that section, that Parliament did not thereby intend to eliminate the power of the superior Court to appoint counsel in an appropriate case and if such a power exists in the superior Court then it likewise exists in a provincial Court, the *rationale* of the power being the same in both instances. Although an accused who is without counsel does not have the absolute right to have counsel appointed for him by the Court, nevertheless, where he makes an application to the Court for the appointment of counsel, the Judge must consider the request and take into account all relevant considerations. Some of these considerations would be the accused's financial ability to retain counsel on his own, whether or not a legal aid certificate may be granted, the accused's education level, the complexity of the case, whether the case is one in which the assistance of counsel would be required in order to marshall evidence and whether the case is one which may result in a term of imprisonment. Such an application may be made before trial to a Judge of the Court whether or not that Judge may ultimately be the trial Judge. The decision of a Judge to whom such an application is made refusing the application will be quashed on *certiorari* where the Judge failed to take into account relevant considerations or where he based his decision on the erroneous view that he had no power to appoint counsel. As well, *mandamus* will go to compel the Judge to consider the application in accordance with the law.

[*Re Ewing and Kearney and The Queen* (1974), 18 C.C.C. (2d) 356, 49 D.L.R. (3d) 619, 29 C.R.N.S. 227, [1974] 5 W.W.R. 232; affg 15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57; *Barrette v. The Queen* (1976), 29 C.C.C. (2d) 189, 68 D.L.R. (3d) 260, 33 C.R.N.S. 377, 10 N.R. 321, consd; *R. v. Talbot*, [1966] 3 C.C.C. 28, [1965] Que. Q.B. 159*n*; *Gideon v. Wainwright* (1963), 372 U.S. 335, 93 A.L.R. 2d 733; *Powell et al. v. Alabama* (1932), 287 U.S. 45; *R. v. Gibson* (1887), 18 Q.B.D. 537; *R. v. Legislative Committee of Church Assembly*, [1928] 1 K.B. 411; *Calgary Power Ltd. and Halmrast v. Copithorne* (1958), 16 D.L.R. (2d) 241, [1959] S.C.R. 24, 78 C.R.T.C. 31; *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 349, [1976] 1 S.C.R. 453, refd to]

APPLICATION by the accused for an order of *mandamus* with *certiorari* in aid.

J. Watson, for the Crown.
D.R. Thomas, for accused.

D.C. MCDONALD, J.:—The applicant is a person accused of two criminal offences. He is charged with having committed common assault against one Dave Johnson on August 15, 1976, contrary to s. 245(1) [rep. & sub. 1972, c. 13, s. 21] of the *Criminal Code*, an offence punishable on summary conviction. He is also charged that on the same date he assaulted a peace officer engaged in the execution of his duty, contrary to s. 246(2)(*a*) of the *Criminal Code*. That is an indictable offence but the Crown has chosen to proceed summarily.

The accused seeks an order in the nature of *certiorari* quashing a decision of His Honour Judge C.H. Rolf of the Provincial Court, on August 24th, refusing the accused's application that the learned Judge appoint counsel to represent the accused; an identical order in respect of an identical refusal by His Honour Judge Saks of the Provincial Court, on September 1st; an order in the nature of prohibition prohibiting any Judge of the Provincial Court from taking any further proceedings with respect to the charges; and alternatively an order in the nature of *mandamus* requiring the Judges named to reconsider the accused's application and apply the law as the accused's counsel on the motion submits it is.

In so far as the motion for *certiorari* is concerned, no return has been made as required by Rule 832, but counsel agreed that no formal record was required in this case and that the record could be deemed to consist of the two informations and the transcripts of proceedings before the two Provincial Court Judges, which are an exhibit to the accused's affidavit.

At the time of argument those were the two remedies sought. I suggested that, assuming that the applicant had the merits on his side, an appropriate remedy might be an order in the nature of *mandamus*. Hence, a further motion was launched by the accused for that relief. It is agreed by counsel that the two motions are to be considered together and that I am to approach the matter as if all those remedies had initially been sought.

The accused appeared before Judge Rolf on August 24th to have a date set for trial. A student at the Faculty of Law at the University of Alberta, Mr. Machida, appeared as a representative of Student Legal Services to "assist the accused". The accused pleaded not guilty. Then the transcript reveals that the following occurred:

MR. MACHIDA: Your Honour, I was wondering due to the circumstances in this case and the seriousness of incarceration to Mr. White, he cannot afford a lawyer, he has no financial assets, and I was wondering if the Court would appoint counsel for him.

THE COURT: No. The Court wouldn't appoint counsel.

MR. REID: Has he talked to Legal Aid?

MR. MACHIDA: Yes, he has. He has been refused Legal Aid due to the fact that they are both summary and not indictable charges.

THE COURT: Summary matters. I think he has to do something to stand on his own two feet. I am not going to appoint counsel on this matter. I will set the matter over for a week.

On September 1st, the accused appeared before Judge Saks to have the trial date set. This time Mr. James, another law student with Student Legal Services, appeared with the accused. The transcript shows that the following occurred:

MR. JAMES: Your Honour, my name is Regan James. I am here to assist the accused from Student Legal Services. The accused in the last week, he had approached three lawyers and Legal Aid all of whom have refused him. In the light of the situation the charges are serious and he has not been employed since May. It appears likely to being incarcerated on these charges and we would ask if possible if you can appoint counsel for him.

THE COURT: I cannot appoint counsel for him. I have no power to appoint counsel. He will either have to get it through Legal Aid —

MR. JAMES: They will not take summary matters.

THE COURT: Well this is something that I have no — I have no power to appoint counsel.

MR. JAMES: We have prepared a brief, Your Honour. If I can submit to the Court. Otherwise we'll simply set a trial date and go.

THE COURT: Well I can allow him another week or so to see if he can find a lawyer, but I don't think I have any power to appoint a lawyer. All I can do is direct him to Legal Aid, and if they wouldn't do anything there is nothing that I can do.

MR. JAMES: In that case we'll set a trial date.

THE COURT: Do you want a trial date set?

MR. JAMES: Yes.

A trial date was then set, namely, November 9th, but the matter was apparently adjourned on that day so that these motions could be heard on November 12th.

In his affidavit, the accused says that on August 24th, he applied to the representative of the Legal Aid Society of Alberta who was in attendance at Provincial Judges' Court in Edmonton, for the appointment of counsel to act on his behalf, but that his application was refused. He also says that on August 26th he applied again at the offices of the Legal Aid Society of Alberta but that his application was rejected.

The accused appealed this decision to the Edmonton Regional Legal Aid Committee on September 15th, but apparently the appeal was unsuccessful, for on September 16th, the Assistant Director of the Legal Aid Society of Alberta wrote to the accused as follows:

> Your application for Legal Aid together with a report from the Student Legal Services was discussed at the Edmonton Regional Legal Aid Committee meeting on September 15, 1976. The Committee gave serious consideration to your application and carefully studied the report of the Student Legal Services however, members of the Committee did not feel that your position was in jeopardy nor did they feel their [*sic*] was a likelihood of jail if you were convicted in this case. Legal Aid is therefore refused.
>
> If you wish to appeal this decision, you may do so by applying in writing to the Director of Legal Aid for further consideration by the Joint Committee on Legal Aid.

It does not appear that an appeal was taken from that decision; at least it has not been referred to before me.

The accused says that about August 27th, he telephoned Lawyer Referral Service at Edmonton, a service operated by the Law Society of Alberta, and was given the names and telephone numbers of three lawyers practising at Edmonton, whom he then asked to represent him, and that each of them declined to act for him. He says that on September 1st, he spoke to another lawyer who had previously acted for him, but that that lawyer declined to act for him.

The accused says further in his affidavit:

9. That I have had a serious drinking problem for approximately three years and have on a number of occasions suffered alcohlic seizures. That on that date of the above described charges I had been drinking a great deal and do not recall anything of the incidents referred to in the above described Informations, and I do verily believe that I was at the time of the alleged offences suffering from an alcoholic seizure.

10. That I am presently unemployed and have been unemployed since on or about June 1, 1976 and that I have no assets whatever and no reasonable expectation of obtaining money with which to retain a lawyer.

11. That I am desirous of having counsel to represent me on the above described charges.

Terence Alan McCrum, a solicitor in Mr. Thomas' firm, has filed an affidavit in which he says that he has interviewed the accused in respect of these charges. His affidavit continues:

2. THAT Roderick Albert White has related to me his recollections prior to and subsequent to the incidents referred to in the above described Informations and has advised me that at the material time he was in an extreme state of intoxication.

3. THAT Roderick Albert White has advised me that he is an alcoholic and has suffered from alcoholism for approximately three years. That Roderick Albert White has advised me that he has on a number of occasions suffered 'blackouts' or seizures induced by the consumption of alcohol and that he believes that at the time of the incidents giving rise to the above described charges he was suffering from an alcoholic seizure.

4. THAT it is my considered opinion that, if the information provided to me by Roderick Albert White is true, there exists a defence to the charge of assaulting a peace officer, by reason of drunkenness, to form the specific intent requisite to be guilty in law of the offence of assaulting a peace office. That it is my considered opinion that, if the information provided to me by Roderick Albert White is true, there may be a tenable defence to the charge of common assault, above described, based on the fact that Roderick Albert White may have been operating in a state of alcoholic automatism.

5. THAT I am informed by Roderick Albert White and do verily believe that the said Roderick Albert White did on the 1st day of November 1976 attend the Community Forensic Assessment Services in the City of Edmonton, Alberta, and did thereunder go psychological tests for the purpose of determining the effects of alcohol on the behaviour of Roderick Albert White.

6. THAT I am informed by Roderick Albert White and do verily believe that the said Roderick Albert White did on the 3rd day of November 1976 attend Dr. Hopkinson at the Alberta Hospital, in the City of Edmonton, Alberta, and did thereunder go an E.E.G. test for the purpose of obtaining data relative to Roderick Albert White's mental functioning.

7. THAT I am informed by Roderick Albert White and do verily believe that the said Roderick Albert White has made arrangements with the said Dr. Hopkinson to attend Dr. Hopkinson in the future and then to undergo an 'alcohol E.E.G.' in which an alcoholic seizure is induced and certain data is obtained relative to Roderick Albert White's mental functioning in an intoxicated condition.

8. THAT it is my considered opinion that in order to properly conduct a defence on behalf of Roderick Albert White it would be necessary for counsel to obtain and review the results of these tests referred to in Paragraph 5, 6 and 7 of this my Affidavit, dicusss the said results with the administrators of the tests, review the existing law as it applies to the information obtained, and make arrangements to call expert witnesses at the trial of Roderick Albert White on the above described charges. That I am informed by Roderick Albert White and do verily believe that the said Roderick Albert White is twenty-nine years of age and has a grade 9 education. That it is my considered opinion that Roderick Albert White does not have the training nor ability to perform the tasks referred to in this paragraph of this my Affidavit nor to conduct his own defence to the charge above described.

Mr. Thomas submits that the accused is entitled in law to have counsel assigned by the Court to represent him. He relies upon the low education of the accused, his alcoholism, his pennilessness and lack of prospects of income, his attempts to have counsel provided at the expense of the state (for the Legal Aid Society administers the expenditure of federal and provincial Government funds), the complexity of the legal points open to the defence, the need for the defence to organize medical evidence, the possibility of imprisonment even though these are a summary conviction matter, and the possibility that even if the penalty imposed is a fine, the inability to pay the fine might result in imprisonment.

In the alternative, Mr. Thomas submits that, if the accused did not have an absolute right to have the Provincial Judge assign counsel to him, at least the Judges each had a discretion to do so, to be exercised upon the application of certain principles, and that the Provincial Court Judges failed to consider those matters which in law they ought to have considered before reaching their decision.

The only Canadian case which has considered this problem directly is *Re Ewing and Kearney and The Queen* (1974), 18 C.C.C. (2d) 356, 49 D.L.R. (3d) 619, [1974] 5 W.W.R. 232 (B.C.C.A.). In that case the accused were charged with possession of *cannabis resin* and *cannabis*. They were unable to pay for counsel. Their application for legal aid was refused by the provincial body which administered the legal aid plan, because of a policy which dictated the granting of aid only if a conviction were likely to result in imprisonment or loss of livelihood. When the accused appeared before a Provincial Court Judge to have a date set for trial, the Judge, upon hearing these circumstances, said: "Well there is nothing really I can do for you", and set the date for trial at which the accused would be required to defend themselves without the benefit of

counsel. The accused then applied for a writ of prohibition against the Provincial Court Judge, to stop the trial. Macfarlane, J., dismissed the motion (15 C.C.C. (2d) 107, 25 C.R.N.S. 130, [1974] 1 W.W.R. 57). The Court of Appeal of British Columbia dismissed an appeal from that decision, by a majority of three Judges to one. The majority judgments were delivered by Maclean, Taggart and Seaton, JJ.A. The dissent was by Farris, C.J.B.C. Each judgment must be examined.

Maclean, J.A., agreed with the reasons of Macfarlane, J. Macfarlane, J., at p. 109 C.C.C., p. 59 W.W.R., had expressed satisfaction: "... in the present case that there has not been any breach of natural justice, and I do not contemplate that such a breach will occur". He reviewed one case in which a new trial was ordered because an adjournment of the trial had been refused an accused who had discharged his counsel on the morning of the trial; another case in which prohibition was granted when a Judge had refused an adjournment and had embarked on a preliminary hearing in a complicated case in the absence of counsel who had become ill; three cases (including *R. v. Talbot*, to be referred to later in these reasons) in which it was held that a refusal of an adjournment in order to obtain counsel was held to have been a breach of the rules of natural justice; and three cases in which a denial by the police of an opportunity for the accused to consult counsel was held to have been a breach of natural justice. Macfarlane, J., then said; at p. 109 C.C.C., pp. 59-60 W.W.R.:

> Each of the cases that I have reviewed highlights the importance of counsel in criminal cases, which is a concept with which I wholeheartedly agree. However, in each case the accused had been deprived of a reasonable opportunity to consult or retain counsel. The circumstances of each case constituted a denial of natural justice. The cases say that the accused must be given a reasonable opportunity to obtain legal assistance. They do not, in my view, say that the trial Judge is without jurisdiction to proceed in the absence of counsel, merely because the accused has not been able to obtain a lawyer.
>
> The common thread which runs through these cases is that the Courts will not countenance any interference with or restriction of the reasonable exercise by an accused of his right to consult or retain counsel of his choice.

At p. 111 C.C.C., pp. 61-2 W.W.R. Macfarlane, J., developed another point:

> As our law has developed, the question has not been whether the accused should be acquitted because he did not have counsel, but rather whether the accused has had a fair hearing. The duty of ensuring that an accused person is given a fair hearing rests upon the trial Judge. The matter, however, is open for review by a superior Court. In *R. v. Darlyn* (1946), 88 C.C.C. 269 at p. 227, 3 C.R. 13, [1947] 3 D.L.R. 480, 63 B.C.R. 428 the British Columbia Court of Appeal had this to say about the duty of a Court in trying an accused not represented by counsel:
>
> > "In such circumstances there was cast upon the learned Judge presiding the added duty of protecting in every reasonable way the interest of the accused to the end that he should be assured a fair trial; the ancient the-

ory of our jurisprudence being that the Court in such circumstances shall be vigilant to protect the interests of the accused and in effect to act as counsel for him ..."

Our law has not required that every accused person be defended by counsel, but rather that, with or without counsel, he or she be afforded a fair hearing. I ensure that result the superior Courts have constantly reviewed cases where it has been alleged that a fair hearing had not been provided.

This same point was elaborated upon by Macfarlane, J., at pp. 112-3 C.C.C., p. 63 W.W.R., as follows:

Although it is undoubtedly very important in a complicated case that an accused should have counsel, that is not to say that a breach of natural justice will necessarily occur if the accused is not represented by counsel at his trial. Each case must be reviewed in the light of its own particular circumstances. The broad question of whether counsel is to be provided by the state to all indigent persons is a social, economic or political problem, the solution of which rests with the people and their Governments.

A third point to be found in the reasons of Macfarlane, J., is based on a power to assign counsel which s. 611 of the *Criminal Code* expressly gives to a Court of Appeal. Section 611 reads:

611. A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal aid and where it appears that the accused has not sufficient means to obtain that aid.

Macfarlane, J., said:

It is to be noted that Parliament has decreed that a Court of Appeal *may* assign counsel for an accused person. It has not decreed that the Court shall assign counsel, or that the failure to do so goes to jurisdiction. It is significant to note that Parliament has not decreed that the trial Courts may assign counsel. In other words, an accused person is not yet entitled, as a matter of right, to have counsel assigned for him in all cases. Parliament has not gone so far as to say that no person shall be tried without counsel but it has directed that an accused shall have a fair hearing.

These, then, are the reasons which Macfarlane, J., gave, and which, it must be assumed, were adopted by Maclean, J.A. He also said, in his own words [pp. 360-1 C.C.C., p. 624 D.L.R., pp. 236-7 W.W.R.]:

Without doubt it would be desirable that all accused persons should be represented by counsel, but to say they *must* be so represented is entirely another matter. In their factum appellants submit that:

> "THAT the appeal be allowed and a writ of prohibition be granted to prohibit the trial judge, Judge J. D. Layton, or any other judge of the Provincial Court of British Columbia, from proceeding with the trial of the applicants *until Counsel is appointed for each of the appellants.*"

(My emphasis.) No authority for such a proposition was cited to us.

Many cases have been cited to us where convictions have been set aside where the accused has been denied his right to make full answer and defence for the most part in cases where an accused has been unfairly treated by arbitrary or unjust denial of adjournments. There is no suggestion in the case at bar that the accused have been unfairly treated by the Provincial Court Judge. On the contrary the appellants have received fair treatment from the learned

Provincial Court Judge and there is no reason to anticipate that the appellants will receive anything other than a fair trial whether they have counsel or not. Appellants only complaint is that they had no counsel provided for them. We do not even know whether the appellants have a defence or even whether they think they have. This application is in fact premature. The trial has not started and for all we know appellants may appear with counsel at the trial.

Taggart, J.A., agreed with the reasons given by Seaton, J.A., and added at pp. 361-2 C.C.C., p. 625 D.L.R., p. 237 W.W.R.:

I agree also that the trial Judge is bound to see that an accused has a fair trial. If he concludes that the trial cannot be a fair one if the accused is unrepresented, the Judge ought to ensure that his view is communicated to the Legal Aid Society. I prefer, however, to express no opinion as to what the Judge may do if in spite of his view that the accused should be represented, counsel is not appointed. That problem does not present itself for decision in this case and, given the present policies applicable to the provision of legal aid, it seems to me highly unlikely it will ever arise. In these circumstances I prefer to say nothing on the subject until the problem is raised for our consideration.

Seaton, J.A.'s judgment contains the following passages to which I wish particularly to refer. At pp. 362-3 C.C.C., pp. 625-6 D.L.R., p. 238 W.W.R.:

Nothing was put before the trial Judge to indicate that the trial would be a particularly difficult one. It has been suggested that every charge that involves an element of possession is highly complex but I am unable to accept that submission. Because there is nothing to distinguish this case from other cases involving indictable offences tried by way of summary conviction, the appellants' position must be a broad one.

The principle put forward by counsel for the appellants is that every person charged with a criminal offence is entitled to have counsel and shall have counsel unless he chooses to represent himself. There are many cases referring to the right to retain counsel, but what the appellants here seek is a very significant additional step, that is, the right to have counsel provided.

The appellants' first contention is that at common law an accused has the right to employ counsel and the right to have counsel assigned to him if he cannot obtain counsel on his own.

Seaton, J.A., rejected this contention for the reasons given by Macfarlane, J., and then, after considering arguments based upon provisions of the *Canadian Bill of Rights* and the *Criminal Code*, he expressed his conclusion, at p. 365 C.C.C., p. 628 D.L.R., p. 241 W.W.R., that:

... an accused person does not have the right to have counsel assigned to him in all cases. It follows that these appellants are not entitled to have counsel assigned to them, there has been no loss of jurisidiction, prohibition is not available, and the appeals cannot succeed.

Thus, Seaton, J.A., for the reasons given by Macfarlane, J., dismissed the broad contention that an accused has a right to have counsel assigned to him in all cases. However, he clearly was prepared to accept a narrower proposition that in appropriate circumstances a trial Judge might assign counsel to the accused if he considered it essential to a fair trial. At pp. 365-6 C.C.C., pp. 628-9 D.L.R., pp. 241-2 W.W.R., he said:

> I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial Judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial Judge might conclude that defence counsel was essential to a fair trial. In the past when a trial Judge thought that he could not secure a fair trial without counsel for the defence, he approached the Attorney-General or the Bar. Under similar circumstances today he might contact the Legal Aid Society. If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his requests for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly. The matter was discussed in *obiter* in *Vescio v. The King*, *supra*, particularly at p. 169 C.C.C., p. 727 D.L.R., p. 147 S.C.R.:
>
> > "To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance."
>
> But there is no foundation for a finding in this case that a fair trial cannot be conducted in the absence of defence counsel.

That is, on the facts of that case, as he had already said in a passage. I have quoted, there was nothing to suggest that the case involved difficulty or complexity.

A recent judgment of the Supreme Court of Canada, *Barrette v. The Queen* (1976), 29 C.C.C. (2d) 189, 68 D.L.R. (3d) 260, 33 C.R.N.S. 377, is, like the cases discussed by Macfarlane, J., one in which the accused did have counsel. However, his counsel was absent when the trial was to begin and the trial Judge refused the accused an adjournment for a reason which the majority of the Supreme Court found to be irrelevant to the question whether an adjournment should be granted. Pigeon, J., delivering the judgment of the majority of the Supreme Court, quashed the conviction and ordered a new trial. The case was one in which the accused, as in the present case, had been charged with assaulting a peace officer engaged in the execution of his duty. The conviction resulted in a sentence of one year's imprisonment. Pigeon, J., adopted, as applicable to the facts of *Barrette*, the following passage from the judgment of Owen, J., delivering the judgment of the Court of Appeal of Quebec in *R. v. Talbot*, [1966] 3 C.C.C. 28, [1965] Que. Q.B. 159*n* [p. 195 C.C.C., p. 266 D.L.R.]:

> "... though our courts have not yet gone as far as to hold that the fact that the accused was not represented by an attorney, for reasons other than his own choice, means *per se* that he has not had the opportunity to make a full answer and defence, it appears that, if the offence was serious enough to warrant a sentence of six months imprisonment, it was serious enough to warrant that the appellant be allowed to be defended by a lawyer if he so wished."

The approval thus given to that passage appears to me to constitute a statement of the law by our highest Court that, at the very least where an offence is serious in that a conviction may result in imprisonment, an accused should be represented by counsel if he wishes one. It is true that Owen, J.'s words are that the accused should "be *allowed* to be defended by a lawyer if he so wished". This might be taken to refer only to a case of refusal of an adjournment where the counsel retained by the accused is unable to attend the trial because of another commitment in Court, or to a case such as *R. v. Talbot* itself, where counsel retained by the accused was refused the adjournment which he had sought, his reason for the request being that he had been retained only the previous day.

However, there was an additional circumstance in *R. v. Talbot*, namely, that, after the accused's counsel was given leave to withdraw from the case, at some point during (approximately near the beginning of) the trial, the following occured [pp. 30-1]:

> "BY THE ACCUSED: Could I be defended by a lawyer? I want that recorded, if you please."
>
> "BY THE COURT: I do not think that the gravity of the offence with which you are charged is sufficient to necessitate my designating a lawyer to represent you. Do you have any questions to ask the witness?"

Owen, J., treated the refusal by the Judge to appoint a lawyer for the accused and the refusal of an adjournment "taken together" as sufficient to warrant a new trial. However, the words quoted by Pigeon, J., in my view say that, apart from the question of a right to an adjournment in the circumstances that existed in *R. v. Talbot*, the accused was, in that case, entitled to have a lawyer designated by the Court. If that interpretation is correct, then what Owen, J., said, adopted as it was by Pigeon, J., is some authority for the existence of an accused's right, at least in some circumtances, to have counsel appointed by the Court to represent him.

I adopt that moderate position, relying on that support and on the judgment of Seaton, J.A., in *Re Ewing and Kearney and The Queen* (1974), 18 C.C.C. (2d) 356, 49 D.L.R. (3d) 619, [1974] 5 W.W.R. 232.

I do not rely on the thinking expressed by Black, J., in *Gideon v. Wainwright* (1963), 372 U.S. 335 at p. 345, 93 A.L.R. 2d 733 at p. 742, who quoted the following passage from a judgment of Sutherland, J., in *Powell et al. v. Alabama* (1932), 287 U.S. 45 at pp. 68-9:

> Left without the aid of counsel he [Even the intelligent and educated layman] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

As Seaton, J.A., said in *Re Ewing and Kearney and The Queen*, at p. 363 C.C.C., p. 626 D.L.R., p. 239 W.W.R., that suggestion "has no application to a trial in this jurisdiction today". By that I infer that Seaton, J.A., was referring to the position accepted in Alberta as no doubt in British Columbia, but perhaps not in the United States, that the trial Judge has a duty (even if there is defence counsel and he makes a mistake):

> ... to see that proper evidence only was before the jury ... [the Judge] must take care that the prisoner is not convicted on any but legal evidence.

(*Per* Wills, J., in *R. v. Gibson* (1887), 18 Q.B.D. 537 at p. 543.)

It follows that I do not accept the broader position adopted by Farris, C.J.B.C., in *Re Ewing and Kearney and The Queen*, which Mr. Thomas submitted I ought to follow. Farris, C.J.B.C., pointed out that the unrepresented accused is faced by legally trained Crown counsel as well as "the resources of the state and the power of a police force". Moreover, he described as "unrealistic" any equation of the assistance and guidance of the trial Judge with representation by counsel. He concludes (at p. 358 C.C.C., p. 621 D.L.R., p. 234 W.W.R.)

> ... it is unrealistic in the extreme to believe that in such a contest these accused [two 18 year old youths ... totally unequipped by experience or education to defend themselves against such a powerful adversary] can be assured of a fair trial without the assistance of counsel.

His broad position has three points [p. 360 C.C.C., p. 623 D.L.R., p. 235 W.W.R.]:

(1) An accused person is entitled to a fair trial.

(2) He cannot be assured of a fair trial without the assistance of counsel.

(3) If, owing to the lack of funds, he cannot obtain counsel, the State has an obligation to provide one.

I would not go so far as to assert that there cannot be a fair trial in any case if the accused is unrepresented by counsel, or that, if counsel is appointed by the Court, the *state* has an obligation *in law* to provide counsel. (I used the word "state" as meaning the executive arm of Government. It may be that Farris, C.J.B.C., was using "state" in a broader sense, including the Legislature and the judiciary.) Rather, I adopt the passage quoted from the judgment of Seaton, J.A., at p. 366 C.C.C., p. 629 D.L.R., p. 242 W.W.R., and adopt and apply it to the present case. When an accused asks a Provincial Court Judge to appoint counsel to represent his interests at his trial, the Judge must consider the request and take into account all relevant considerations, of which some are the following:

1. Is the accused not in a position financially to retain counsel himself? It is true that this inquiry may be a difficult one, but no more difficult than many other matters a Court is required to inquire into without the assistance of counsel. The Judge may wish the accused to swear under oath, orally or by affidavit, as to his financial circumstances.

2. Is the case one in which the Legal Aid Society may grant a legal aid certificate? If so, an adjournment may be granted to enable the accused to apply to the Society.

3. What is the educational level of the accused? Apart from formal education, are there other reasons for which it can be said that he is competent to defend himself without counsel? For example, does he have the language skills which would enable him to express himself adequately in the English language?

4. Does the case appear to be complex in the sense of raising any question of fact or of law as to which an accused is likely to be at a significant disadvantage if he is unrepresented by counsel?

5. Does the case appear to be one raising any question of fact or of law as to which without the benefit of counsel an accused is likely to find it difficult to marshall relevant evidence?

6. Is the case one which may result in the imprisonment of accused, in the event of conviction?

There may well be other relevant considerations which should be considered in the circumstances of a particular case.

The first and sixth of the considerations I have enumerated were place before His Honour Judge Rolf. As to the second consideration, the representative of Student Legal Services also advised Judge Rolf that a legal aid certificate had been refused because the charges were summary matters. (In fact, this Court has been advised that the Society does grant legal aid certificates even in prosecution for summary conviction offences if there is a possibility of imprisonment.) Judge Rolf did not inquire into the third, fourth and fifth considerations I have enumerated.

When the same request was made to His Honour Judge Saks, the learned Judge based his decision not to appoint counsel upon the considerations that he had no power to appoint counsel. That consideration was erroneous in law.

Thus, the first of the Judges failed to exercise the discretion which was available to him as required by law, in the sense that he failed to take into account relevant considerations. The second of the Judges failed to exercise his discretion according to law, in the sense that the ground upon which he exercised it was erroneous and therefore was an extraneous consideration.

Therefore an order in the nature of *mandamus* will lie, to require either one Judge or the other to exercise his discretion according to law.

At one time in Alberta it was common practice in the Supreme Court, at least, that in appropriate cases a Judge would appoint counsel to represent the interests of an accused person, who would then act for the accused without any expectation of payment, whether by the accused or the Attorney-General of the Province, and without any payment in fact being made by the Attorney-General. Later, in the years preceding the introduction of the present legal aid plan, a Judge of the Supreme Court could appoint a counsel and, at least in many if not all cases when this was done, the Attorney-General paid counsel's fee. No doubt such payment was made *ex gratia*. In the Supreme Court I do not believe that this power to appoint counsel has been eliminated by the creation of

the present legal aid plan. Rather, a consequence of the legal aid plan is that there will be few instances now where the Supreme Court will be called upon to exercise this power.

If there is such a power in the Supreme Court, is there a like power in the Provincial Court? I do not know of any reason for drawing a distinction between the two Courts in this regard. Whichever Court the accused is tried in, the rationale of the power the Court has to appoint counsel remains the same.

It is true that if the Court exercises this power, and appoints counsel, the Court cannot pay counsel, and counsel cannot depend on being paid by the Attorney-General. However, the tradition of the bar and its willingness to accept the task of representing an accused at the request of the Court without guarantee of the payment of a fee are implicitiy recognized by the Code of Professional Conduct adopted by the Council of the Canadian Bar Association in 1974 and since then adopted by the Benchers of the Law Society of Alberta. At p. 53 the following appears:

> The lawyer has a general right to decline particular employment *(except when he has been assigned as counsel by a Court)*, but it is a right he should be slow to exercise if the probable result would be to make it very difficult for a person to obtain legal advice or representation.

(Emphasis added.)

It was said by Mr. Watson, on behalf of the Crown, that if the provincial Court has the power to appoint counsel to represent the accused, it is the Judge who tries the case to whom the application for such an appointment should be made. I do not agree. While such an application may be made to the trial Judge, there is no reason why it may not be made to another Judge before trial. The appointment of counsel just as the trial is about to begin may afford only the illusion of assistance to the accused. In many cases one of the ways in which counsel can assist the accused is in marshalling the evidence necessary for the conduct of the defence and preparing to meet the prosecution's case over a period of time before the trial takes place. When there is no sure way of knowing who the trial Judge will be, it is appropriate that such an application be made before trial to any Judge of the Court.

Mr. Watson also said that, if the Court has the power to appoint counsel to represent the accused, the accused should not be able to raise the question and make a request for counsel before one Judge after another. I agree that, if one Judge has declined to appoint counsel, having taken the proper considerations into account, a second Judge should not then be faced with the necessity of making the same inquiry, unless a change in the accused's circumstances is alleged. However, in the present case I have held that the first Judge to whom the request to appoint counsel was made did not take the material considerations into account.

Before leaving the merits, I wish to say something about the point made by Macfarlane, J., based upon the power expressly given by s. 611 of the *Criminal Code* to the Court of Appeal to "assign counsel to act on behalf of an accused". Macfarlane, J., said "it is significant to note that Parliament has not decreed that the trial courts may assign counsel". With respect, I doubt that there is any significance to Parliament having expressly given such a power to the Court of Appeal but not to trial Courts. The power was first expressly given to the Court of Appeal in 1923 by 1923 (Can.), c. 41, at which time it was found in s. 1021*A*(1). This provision was introduced as part of a legislative package which generally introduced a new appeal procedure to replace the previous provisions of the *Criminal Code* pursuant to which the right to appeal from conviction was limited to a case stated on a question of law. The 1923 legislation introduced new appeal provisions which, as the editor of *Tremeear's Annotated Criminal Code*, 4th ed. (1929), observed at p. 1362, "generally are adopted from the English statute of 1907, ch. 23". That statute was the *Criminal Appeal Act*, 1907 (U.K.), c. 23, which created the English Court of Criminal Appeal. What is now s. 611 of the *Criminal Code* of Canada was in 1923 taken almost *verbatim* from s. 10 of the *Criminal Appeal Act, 1907*. This, then being the historical context of the birth of the present s. 611, it is not surprising that the *Criminal Code* expressly gives to a Court of Appeal the power to appoint counsel, without mentioning the trial Courts. In enacting the predecessor of s. 611 in 1923, Parliament was concerned only with the powers the Courts of Appeal should have, ancillary to their new statutory jurisdiction. From the enactment of the predecessor of s. 611 it is not possible to draw the inference that Parliament tacitly was negating the existence of any power which then existed or might in the future exist in the trial Courts of any Province in criminal cases, to appoint counsel to represent the accused, or of any right which then existed or might in the future exist on the part of the accused to apply to a Judge of any of the trial Courts of any Province for the appointment by the Court of counsel to represent him.

It will be observed that the reasons I have given for granting relief to the accused do not rest at all on any of the provisions of the *Canadian Bill of Rights*, R.S.C. 1970, App. III.

What is the appropriate remedy in the present case?

An order in the nature of prohibition is inappropriate, at least at this point in time. Presumably one of the learned Judges of the Provincial Court will be given an opportunity promptly to exercise his discretion according to law, before the case proceeds to trial.

However, it is appropriate that this Court issue an order in the nature of *mandamus*, directing that a Judge of the Provincial Court consider the request of the accused in accordance with law.

Moreover, an order in the nature of *certiorari* is appropriate, quashing the decisions of the two Provincial Court Judges not to appoint counsel to represent the interests of the accused. The two Provincial Court Judges, in deciding whether or not to appoint counsel, had legal authority to determine a question affecting a right of the accused. In addition, they had a duty to act judicially. Therefore, the circumstances of this case satisfy the dual test pronounced by Hewart, L.C.J., in *R. v. Legislative Committee of Church Assembly*, [1928] 1 K.B. 411 at p. 415, and approved by the judgment of the Supreme Court of Canada delivered by Martland, J., in *Calgary Power Ltd. and Halmrast v. Copithorne* (1958), 16 D.L.R. (2d) 241 at p. 247, [1959] S.C.R. 24 at p. 30, 78 C.R.T.C. 31, and by the majority judgment delivered by Pigeon, J., in the Supreme Court of Canada in *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 349, [1976] 1 S.C.R. 453. The decision of each of them was based on an error of law which is apparent on the face of the record. (In Alberta, Rule 831 provides that the evidence and exhibits filed "shall, for the purposes of an application for an order in the nature of *certiorari*, be deemed to be part of the record".)

Therefore, an order in the nature of *mandamus* will issue, with an order in the nature of *certiorari* in aid, in the forms previously stated.

Application granted.

REGINA v. ALWARD

New Brunswick Supreme Court, Appeal Division, Hughes, C.J.N.B., Limerick and Ryan, JJ.A. September 14, 1976.

Criminal law — Defences — Intoxication — Charge to jury — Murder — Judge charging jury that drunkenness a defence if accused unable to form intent to commit "the crime" and incapable of forming requisite "specific intent" — Theory of Crown that death caused to facilitate robbery — Whether charge sufficient — Whether Judge must particularize specific intents involved.

Criminal law — Trial —Charge to jury — Murder — Judge charging jury that drunkenness defence if accused unable to form intent to commit "the crime" and incapable of forming requisite "specific intent" — Theory of Crown that death caused to facilitate robbery — Whether charge sufficient — Whether Judge must particularize specific intents involved.

Criminal law — Defences — Intoxication — Charge to jury — Judge charging jury that evidence of drunkenness short of "proved incapacity" not rebutting "presumption" that person intends natural consequences of acts — Jury also charged that if "satisfied beyond a reasonable doubt" that accused inflicted injuries but was so drunk that did not know what he was doing then may return manslaughter — Whether constitutes misdirection.

Criminal law — Trial — Charge to jury — Defence of intoxication — Judge charging jury that evidence of drunkenness short of "proved incapacity" not rebutting "presumption" that person intends natural consequences of acts — Jury also charged that if "satisfied beyond a reasonable doubt" that accused inflicted injuries but was so drunk that did not know what he was doing then may return manslaughter — Whether constitutes misdirection.

Criminal law — Defences — Intoxication — Sufficiency of evidence — Charge of murder — Theory of Crown that death caused by infliction of bodily harm in course of robbery — Evidence that accused intoxicated prior to offence — Accused giving statement that intended to rob victim and beat victim to get his money — Whether any evidence upon which defence of intoxication could be left to jury.

On his trial on a charge of murder the accused relied on the defence of intoxication. It was the theory of the Crown that the accused and his co-accused robbed the deceased and beat him to facilitate the robbery. The evidence of intoxication consisted of one witness's testimony that several hours before the offence the accused was refused admission to a bar because of his condition and the testimony of the accused's sister that he was quite drunk when she saw him after the offence. However, the accused gave a statement to the police detailing his plan to rob the victim and describing how he and his co-accused beat the victim in order to get his money. Moreover, the accused's sister testified that although he and his co-accused were drunk and noisy the accused sat down, had a conversation with her and then drove to a motel some three miles away. In charging the jury as to the defence of intoxication the trial Judge stated that this was a defence if the accused did not have the ability to form the intent to "commit the crime" or the requisite "specific intent" and that drunkenness falling short of "a proved incapacity" did not rebut "the presumption that a man intends the natural consequences of his acts". He further charged the jury that if they were "satisfied beyond a reasonable doubt that they inflicted [the injuries to the deceased] but in doing so they were so drunk that they did not know what they were doing" then the jury would be entitled to return a verdict of manslaughter. On appeal by the accused from his conviction for murder, *held*, the appeal should be dismissed.

The Judge's charge as to intoxication, if that defence was available, was inadequate in the circumstances of the case. The reference to the intent to commit "the crime" was inadequate since the jury might understand that intoxication was a defence only if the intent involved was the intent to cause death whereas ss. 212 and 213 (am. 1974-75-76, cc. 93 & 105, ss. 13 & 29) provide for circumstances, as in this case, in which the causing of death constitutes murder even though there be no intention to cause death. As well, the Judge's reference to "specific intent" without making it clear what specific intent he was referring to was not sufficient. The trial Judge rather should have referred to the particular intents involved such as the intent (in reckless disregard of the consequences) to cause bodily harm known to the accused to be likely to cause death, the specific intent to rob, the specific intent to occasion bodily harm to facilitate the robbery and the specific intent to simply occasion bodily harm. The charge as it stood would confuse the jury beyond the point of comprehension. Moreover, the jury may have been led to believe by the phrase "proved incapacity" that the burden was on the accused to prove beyond a reasonable doubt that in inflicting the injuries on the deceased that they did not know what they were doing when all the accused must do is raise a reasonable doubt. As well, the use of the words "presumption that a man intends the natural consequences of his acts" is to be avoided and rather the jury charged that this is a "reasonable inference".

However, no substantial wrong or miscarriage of justice was occasioned since there was no evidence upon which the "defence" of intoxication could be based. The

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[IN THE COURT OF APPEAL.]

THE QUEEN *v.* ASSESSMENT COMMITTEE OF SAINT MARY ABBOTTS, KENSINGTON.

Poor Rate—Objections to Valuation List—Assessment Committee, Procedure before—Right to appear by Agent—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *ss.* 18, 19—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 1, 11, 19.

By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18, any person aggrieved by a valuation list may give notice of objection, and by s. 19 the assessment committee shall hold meetings for hearing objections, and "may at such meeting hear and determine such objections."

A householder objected to a valuation list, and, at the hearing before the assessment committee, did not appear personally, but was represented by another person, who claimed to be heard as his agent in support of the objections. The committee refused to hear such person, on the ground that their rule was not to hear any one other than the objector himself or a member of his family or household, or a member of the legal profession.

On an application for a mandamus to compel the committee to hear the agent:—

Held, that, as the statute gives the objector the right to appear and be heard in support of his objections, and contains no provision prohibiting him from appearing by an agent, the committee were bound to hear the agent, and a mandamus must be granted.

A RULE NISI had been obtained on behalf of Mr. Preston, a householder in the parish of Saint Mary Abbotts, Kensington, for a mandamus commanding the assessment committee to hear and determine the matter of certain objections to a valuation list made by or on behalf of the prosecutor, and to hear his agent and witnesses. The prosecutor, Mr. Preston, did not appear personally before the assessment committee in support of his objections, but deputed Mr. Fuller, who was a surveyor and the manager of a ratepayers' association of which Mr. Preston was a member, to act as his agent and appear in that capacity before the assessment committee in support of his objections to the valuation list. Mr. Fuller accordingly appeared and claimed to be heard on behalf of Mr. Preston, and also to give evidence as a skilled witness in the case. The assessment committee refused to hear Mr. Fuller, as Mr. Preston's agent, in support of the objections, on the ground that their rule was to hear no one other than the objector himself or a member of his family or household, or a member of the legal profession; but they considered the facts without hearing him, and left the valuation list as it stood. (1)

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Henn Collins, Q.C., and *J. V. Austin*, for the assessment committee, shewed cause. The assessment committee are empowered and required by statute to hear and determine objections to the valuation list, and therefore act in a judicial capacity, and have power to regulate their own proceedings, and determine what persons they will or will not hear. This is so in the case of magistrates in summary proceedings: *Collier* v. *Hicks* (2); also in the case of quarter sessions: *Ex parte Evans* (3); and in the case of an arbitrator: *In re Macqueen and the Nottingham Caledonian Society*. (4) If it were otherwise, there would be no check on the appointment of improper persons to appear and be heard as agents. The contention on behalf of the assessment committee is supported by the use of the word "decision" in 32 & 33 Vict. c. 67, s. 32.

[They also referred to *Willis* v. *Maclachlan* (5); *Reg.* v. *Mansel Jones* (6); *Reg.* v. *Williamson*. (7)]

Philbrick, Q.C., in support of the rule. Where a man is empowered by statute to do a particular act, he can, in the absence of express prohibition, appoint an agent to do such act on his behalf: *Jackson & Co.* v. *Napper*; *In re Schmidt's Trade-mark*. (8) It lies on those who object to the appointment

(1) By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18: . . . "Any person who may feel himself aggrieved by any valuation list, on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may" give notice in writing of his objection.

By s. 19, "The committee shall hold such meetings as they may think necessary for hearing objections to the valuation lists . . . and the committee may at such meeting hear and determine such objections."

The above Act is incorporated by s. 1 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), and ss. 19 and 32 of the latter Act make provision for appeals to special sessions against the decision of the assessment committee on objections made to the valuation list.

(2) 2 B. & Ad. 663.
(3) 9 Q. B. 279.
(4) 9 C. B. (N.S.) 793.
(5) 1 Ex. D. 376.
(6) 23 Q. B. D. 29.
(7) 59 L. J. (Q.B). 493.
(8) 35 Ch. D. 162.

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of an agent to make out their contention by shewing some prohibition, and here no such prohibition is to be found in the statutes. The assessment committee is not a judicial tribunal. They have no power to summon witnesses, or to compel the production of documents, or to administer an oath. He referred to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57, sub-s. 9.

POLLOCK, B. This case raises a somewhat novel question. An application is made for a mandamus to the assessment committee directing them to hear and determine the matter of certain objections to the valuation list. The householder objected to the list, and did not appear before the assessment committee himself, but named an agent who claimed to appear and conduct the case on his behalf. The assessment committee refused to hear him, and the ground of their objection to hearing him is, that he is not a counsel or solicitor, or a member of the household or family of the householder. This is clear from the affidavit of the agent himself, and from a letter of the assessment committee. Looking at the position of the assessment committee, it appears that they have a duty imposed upon them to hear and determine objections to the valuation list; but in other respects there is no fair analogy to the position of a court. That being so, nothing is to be gathered as to the right of audience, except from the terms of the Act itself. Sect. 19 of 25 & 26 Vict. c. 103, does not provide that they are to hear the objector, but that they are to hear the objection. It becomes necessary, therefore, to consider what the rule is as to the right to appoint an agent in such cases. The person taking the objection may be absent from the country, or may be unable or incompetent to conduct the appeal, and there may be some other person both able and willing to act in his place. Take, for instance, the case of a number of persons living in the same street who all take the same objection. The person who is best fitted to do the business—for instance, a surveyor—may be deputed to represent all the others. Could the assessment committee decline to hear him? I am of opinion that they could not. If that is so,

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it is clear in the present case that the assessment committee ought to have heard the agent. Then, how should they hear him? He claimed to be heard as agent and also as a skilled witness. I think they were entitled to decline to hear him in such a double capacity, but they had no right absolutely to refuse to hear him; and, therefore, I think the mandamus ought to go.

CHARLES, J. The right of the ratepayers to be heard is a statutory right, and there is nothing in the statute to shew that they must appear in person. In *Jackson & Co.* v. *Napper; In re Schmidt's Trade-mark* (1) Stirling, J., stated the rule thus: "I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course, the legislature may do so; but, primâ facie, when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose." (2) In the present case I can find nothing to limit the common law right of the ratepayer to appoint an agent to act for him. It is contended that the assessment committee is in the position of a court or judicial tribunal, and can regulate their own procedure; but the authorities do not go so far. The statute provides that they are to hear and determine the objection, not that they are to hear the objector. They may determine how they will hear the objection, but they cannot refuse to hear the objector's agent, and that is what they claim to do.

Rule absolute.

P. B. H.

The assessment committee appealed.

Feb. 2. *J. V. Austin, (Henn Collins, Q.C.)*, with him, for the assessment committee. The assessment committee are entrusted by statute with functions of a judicial nature. Their determina-

(1) 35 Ch. D. 162. (2) 35 Ch. D., at pp. 172, 173.

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tions are called by the statute decisions, and an appeal is given against them to special sessions by s. 19 of the Valuation (Metropolis) Act, 1869. They are, therefore, within the general rule that there is an inherent right in any court or tribunal to regulate its own procedure. It was competent for them to impose reasonable limits on the appearance of objectors through agents. It is a very inconvenient practice that persons should be allowed to appear in the double capacity of advocates and expert witnesses; and the rule laid down by the committee is intended to prevent that practice.

[FRY, L.J. The assessment committee refused to hear the agent as advocate. The question is not whether, after hearing him as advocate, they could refuse to allow him also to give evidence.

LORD ESHER, M.R. If the objector appeared personally and conducted his own case, could it be said that he could not give evidence?]

That would not be like the case of an expert.

[He cited the same authorities as were cited for the assessment committee in the Court below.]

Philbrick, Q.C., and *Alexander Glen*, for the prosecutor, were not called upon.

LORD ESHER, M.R. The assessment committee have been called a court or tribunal, and spoken of as exercising judicial functions. They are a certain number of persons, in this case selected vestrymen, to whom power has been given by statute to hear objections, which have been made to the valuation list, and to decide whether such objections are well founded. I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms. The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by

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any agent authorized by them. It was argued that it is inconvenient to hear a person as agent and then to allow him to be a witness. I do not think we are called on to determine any such point; but personally I can see no greater power to limit the persons whom the party objecting to the list may call as witnesses than to limit the persons from whom he may appoint an agent. No doubt the assessment committee would have some discretion, and might refuse to hear a manifestly improper person as agent; but I do not think that they have the power which they claim to exercise in this case. Therefore, the appeal must be dismissed.

BOWEN, L.J., concurred.

FRY, L.J. I agree. It does not appear to me that the assessment committee have any power to limit the common law right of a person, whom the statute entitles to appear in support of the objection to the list, to appear by an agent.

Appeal dismissed.

Solicitors for assessment committee: *Pontifex, Hewitt, & Pitt.*
Solicitors for prosecutor: *Nye, Greenwood, & Moreton.*

E. L.

THE LONDON BANK OF MEXICO AND SOUTH AMERICA, LIMITED *v.* APTHORPE.

1890 *Dec.* 16, 17. 1891 *Jan.* 19.

Income Tax—Company residing in the United Kingdom—Trade carried on partly in the United Kingdom, partly Abroad—Profits earned Abroad not remitted to the United Kingdom—"Foreign Possessions"—5 & 6 Vict. c. 35, *s.* 100—16 *&* 17 *Vict. c.* 34, *s.* 2, *Sched. D.*

The appellants were a banking company carrying on business in London, and having branches in foreign countries. They were registered under the Joint Stock Companies Acts, and had their head office and seat of direction in London. General instructions and directions for management were issued from time to time from the head office to the managers of the foreign branches. The dividends of the company were paid in London, and for the purposes of the dividends no division was made between the profits earned in London and those earned by the foreign branches. Of the profits earned by the company at the foreign branches a portion was not remitted to this country:—

Held, that inasmuch as the business of the company was partly carried on in this country, the fact that a portion of the profits earned abroad was

> While we must concede to the Legislature of this Province great powers in creating corporations in certain fields, it can exercise its creative powers only upon material out of which corporations can be made. Without such material it cannot create a corporation. It may, like the poet, "give to airy nothing a local habitation and a name," but it cannot give to nothingness a corporate personality with corporate powers. It cannot do the impossible. The purported creation of the Institute is merely an attempt at the impossible.

(My emphasis.)

The learned trial Judge reviewed the merits of the plaintiff's action and concluded that his qualifications should be examined more fully by the Institute before he is denied the benefit of radium under the Act. He then concluded at p. 199:

> *In view of what I already said, the defendant Institute is not such a thing as can be reached directly by mandamus, and as the Board is not a party defendant in the action it cannot directly be affected by any judgment in this action.* The only hope then is that the Board may adopt the suggestion impliedly contained in the foregoing discussion and reconsider the plaintiff's application upon its merits, along the lines that I have indicated.

(My emphasis.)

The learned trial Judge then ordered the defendant to reconsider the plaintiff's application to receive radium or its emanations under the Act. It is of interest to note that the board in this case had accepted service of the statement of claim, filed a defence in the name of the Institute and stoutly defended the action.

Mr. Justice Dysart, however, left unanswered the question whether the board would be obliged to satisfy any judgment obtained against the Institute and whether the members of the board could be held individually liable for contempt if they disregarded the *mandamus* order since they were not named as defendants.

In an editorial comment to the report the editor states [p. 191]:

> This is a most unusual case, the point being that although plaintiff was entitled to succed in his action the relief granted was unenforceable against the defendant Institute. Whether the Board of Trustees could be compelled to carry out the judgment against the Institute, if themselves made parties to the action, is left in doubt.

It seems to me that the hurdle facing the appellant on the instant appeal is greater than the hurdle faced by Mr. Justice Dysart in the foregoing case. The problem here is not merely one of enforcement of any order the board of inquiry or the Court might make. In this case, as in the *Army & Navy Veterans* case, *supra*, no offence has been, or could be, committed by the respondent because it is not a "person" within the meaning of s. 2 of the Code. The complaint in this case should have been laid against named officers or directors of the respondent association. The

Court cannot add or substitute such persons as parties in a proceeding which has been a nullity from its inception because of the respondent's immunity from suit: *Hay v. Local Union No. 25 Ontario Bricklayers & Masons Int'l Union* (1929), 63 O.L.R. 418, [1929] 2 D.L.R. 336.

For the reasons given I would dismiss the appeal. I would make no award of costs.

Appeal dismissed.

RE MEN'S CLOTHING MANUFACTURERS ASSOCIATION OF ONTARIO et al. AND ARTHURS et al.*

Ontario High Court of Justice, Divisional Court, Southey, Anderson and Saunders, JJ. September 7, 1979.

Administrative law — Boards and tribunals — Right to counsel before domestic tribunals — Whether arbitrator has discretion to limit lawyers' participation as agents.

Labour relations — Arbitration — Whether parties entitled to be represented by counsel — Whether arbitrator has discretion to limit lawyers' participation as agents.

An arbitration was held pursuant to a collective agreement between a company and a union in the clothing industry. The arbitrator had been a permanent arbitrator in the industry for many years and arbitrations had historically been handled in an informal, expeditious and inexpensive manner without the intervention of lawyers. The grievance involved a claim by the union that the company was in violation of the collective agreement in contracting certain work out to non-employees. The company concluded that the legal issues involved were too complex to be handled by their usual representative and sought to present their case through a lawyer. The union objected and the arbitrator ruled that the parties had no right to legal representation, though he permitted, in his discretion, the attendance of counsel, the submission of written arguments, and a limited right to speak to certain points.

On an application under the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, *held*, the arbitrator's ruling should be quashed. Ordinarily, the right to legal representation can be implied by interpretation of the collective agreement in the light of practice in the particular industry. Here, the implication from the practice was otherwise and the collective agreement was silent on the point. However, all the parties were entitled to appear and be heard and since none of them was a natural person, the only way in which they could appear was by the agency of natural persons. By ruling that the company could not be represented by legal counsel, the arbitrator improperly restricted the choice of agents available to the company. Furthermore, even if the arbitrator had the power to exclude legal counsel, the importance of the controversy to the company and the apparent complexity of the

*Leave to appeal to the Ontario Court of Appeal refused (Howland, C.J.O., Jessup and Arnup, JJ.A.) October 17, 1979.

matter require that the company should be permitted to be represented by legal counsel without any limitation.

[*University of Ceylon v. Fernando*, [1960] 1 All E.R. 631; *Re Bradley et al. and Ottawa Professional Fire Fighters Ass'n et al.*, [1967] 2 O.R. 311, 63 D.L.R. (2d) 376, 67 C.L.L.C. 202, para. 14,043; *The Queen v. Assessment Committee of Saint Mary Abbotts, Kensington*, [1891] 1 Q.B. 378; *Whatley v. Morland* (1834), 2 Dowl. 249; *Pett v. Greyhound Racing Ass'n, Ltd.*, [1968] 2 All E.R. 545; *Enderby Town Football Club Ltd. v. Football Ass'n Ltd. et al.*, [1971] 1 All E.R. 215, consd; *Aruna Mills Ltd. v. Dhanrajmal Gobindram*, [1968] 1 Q.B. 655, refd to]

APPLICATION to quash an arbitrator's ruling, 22 L.A.C. (2d) 328.

C. F. Scott, for applicants.
P. J. J. Cavalluzzo, for respondent union.

The judgment of the Court was delivered by

SOUTHEY, J.:—This is an application under the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, for an order quashing a ruling of the respondent Harry W. Arthurs, dated May 15, 1979, sitting as a sole arbitrator under a collective agreement, in which he held that the respondents were not entitled to be represented by legal counsel at the hearing before him, except in certain limited respects. The learned arbitrator held that it was within his discretion whether, and to what extent, any party could be represented by legal counsel, and he gave directions narrowly limiting the extent to which legal counsel for the applicants could participate.

The learned arbitrator described as follows the two issues to be decided in his ruling [22 L.A.C. (2d) 328 at p. 329]:

(1) whether a party to arbitration proceedings under this collective agreement has an absolute right to legal representation, and

(2) if not, whether my discretion should be exercised in the instant proceeding so as to permit representation.

As to the first issue, after referring to a number of English and Canadian authorities, the learned arbitrator concluded as follows [at p. 333]:

> While the authorities are not entirely consistent, one can fairly summarize the common law position with regard to the right to counsel this way: (1) neither in Courts nor in other forums is an absolute right to counsel regarded as an indispensable feature of natural justice; (2) generally, legal representation is desirable, and the exercise of discretion by the tribunal should favour it; and (3) there may be some circumstances where the participation of counsel is inimical to the functioning of the tribunal.

The learned arbitrator then pointed out that the provisions of Part I of the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, giving the right to counsel to parties at hearings before certain tribunals, were expressly made inapplicable to labour arbitrations.

He concluded from this that the draughtsmen of the statute did not believe an absolute right to legal representation existed at common law, and recognized that in certain respects the processes and institutional characteristics of labour arbitration boards may be distinguished from those of statutory tribunals.

None of the common law authorities to which the learned arbitrator referred were arbitrations under collective agreements, and no English or Canadian cases were cited to us in which the issue as to the right to legal counsel in such arbitrations was squarely raised. There is a decision of the Court of Appeal, however, which contains a comment relating to the question. In *Re Bradley et al. and Ottawa Professional Fire Fighters Ass'n et al.*, [1967] 2 O.R. 311, 63 D.L.R. (2d) 376, 67 C.L.L.C. 202, para. 14,043, the Court of Appeal upheld the quashing of an award by an arbitrator under a collective agreement on the ground that certain employees interested in the proceedings had not been given notice thereof. Laskin, J.A., as he then was, delivering the judgment of the Court, said at p. 317 O.R., p. 382 D.L.R.:

> What kind of notice should be given and who should give it? Preferably, it should be in writing indicating the issue or issues to be arbitrated as involving the possible diminution of the collective agreement benefits being enjoyed by the persons entitled to the notice; and it should advise of the date, time and place of hearing, of the right to be represented by counsel or otherwise, and should be served personally or by registered mail sufficiently in advance of the date fixed for the hearing to give the notified persons a reasonable opportunity to prepare their submissions if they decide to appear.

I interpret the passage just quoted as meaning that the employees in question should have been notified that they had a right to be represented by counsel, or by some other agent. The Court was not saying, as I read the passage, that they should have been notified as to whether or not they had the right to be represented by counsel. The right to counsel was not in issue in that case, but it is of significance, in my view, that a Judge of such great experience and authority in labour law apparently considered that the parties to an arbitration under a collective agreement had a right to representation by counsel.

Not only did the common law authorities to which the learned arbitrator referred not deal with arbitrations under collective agreements, they also did not deal with the right of a corporation or association to representation at an arbitration hearing. In the case at bar, none of the parties to the proceedings before the learned arbitrator is a natural person. The applicants are a corporate employer and the association of employers to which it belongs; the respondent is the union representing the employees of

those employers. It is not questioned that the association, the company, and the union are all entitled to appear at the arbitration hearing and to be heard by the learned arbitrator. The only way in which they can appear is by natural persons acting as their agents. By ruling that the applicants could not be represented by legal counsel, the learned arbitrator limited the parties in their choice of agents, by denying them the right to retain as agents a particular class of persons whose members are widely retained in such matters in other industries. In my judgment, the learned arbitrator had no authority thus to limit the rights of persons who were clearly entitled to appear before him by agents, and he erred in law in so doing. As a general rule, in my judgment, a party entitled to be represented by an agent before a domestic tribunal, cannot be restricted by the tribunal in the choice of its agent, in the absence of an applicable rule or agreement containing such restriction. That is not to say that the tribunal cannot exclude persons who have misconducted themselves or are otherwise clearly inappropriate.

In *The Queen v. Assessment Committee of Saint Mary Abbotts, Kensington*, [1891] 1 Q.B. 378, the Court of Appeal upheld a *mandamus* requiring an assessment committee to hear an objection by or on behalf of a householder to a valuation list, and to hear his agent and witnesses. The householder had authorized a surveyor to appear as his agent before the committee. The committee had refused to hear the surveyor, on the ground that their rule was not to hear anyone other than the objector himself or a member of his family or household, or a member of the legal profession. Lord Esher, M.R., said, in part, at pp. 382-3:

> The assessment committee have been called a court or tribunal, and spoken of as exercising judicial functions. They are a certain number of persons, in this case selected vestrymen, to whom power has been given by statute to hear objections, which have been made to the valuation list, and to decide whether such objections are well founded. I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms. The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorized by them.

Bowen, L.J., concurred. Fry, L.J., agreed, and said [at p. 383]:

> It does not appear to me that the assessment committee have any power to limit the common law right of a person, whom the statute entitles to appear in support of his objection to the list, to appear by an agent.

None of the cases to which the learned arbitrator referred dealt with arbitrations under a provision in an agreement providing for arbitration. The closest of them to that situation was *Aruna Mills Ltd. v. Dhanrajmal Gobindram*, [1968] 1 Q.B. 655, which involved a dispute between parties to a contract made subject to the rules and regulations of the Liverpool Cotton Association Limited. Those rules provided for the settlement of disputes by arbitration, but prevented parties to the arbitration from being represented by lawyers.

The other cases all involved hearings under a statute (often discipline hearings), or the constitution or rules of a union, club or association. The conclusion of the learned arbitrator that those cases do not establish an absolute right to counsel is an entirely fair one, in my view, but I question whether it is necessarily applicable to arbitrations arising out of an agreement. Where the arbitration arises out of an agreement, one must look at the intention of the parties as it appears from the words of the agreement and the surrounding circumstances. If it is clear from the words of the agreement, or the surrounding circumstances, that the parties intended that representation by counsel be permitted, the arbitrator has no discretion to exclude counsel. For example, in a case in which a detailed submission to arbitration had been settled by the lawyers on behalf of the parties, it would be an astonishing thing if the arbitrator in the exercise of a supposed discretion, could subsequently rule that the parties were not entitled to be represented by counsel at the hearing, simply because there was no provision for such representation in the submission.

In most arbitrations under collective agreements, the real adversaries are the corporate employer and the union, both of whom are entitled as of right to be represented by counsel for the reason I have given. As was recognized by the learned arbitrator, it is common in other industries for such parties to be represented by counsel. In an industry in which that is the case, I should think it would be an implied term of the collective agreement that an individual party, *i.e.*, a natural person, would also be entitled as of right to representation by counsel, assuming there was no provision in the collective agreement covering the point.

In the industry with which the learned arbitrator was concerned, however, neither side had been represented by legal counsel in arbitrations throughout a history of about 60 years. It would be impossible to find in these circumstances that the parties clearly intended to be represented by legal counsel at an arbitration hearing, if desired, and to find an implied term to that effect

in the collective agreement. The result is that a natural person in the industry in question does not have an absolute right to representation by legal counsel, for the reasons given by the learned arbitrator. The point is probably entirely academic, however, because the natural person would be entitled to representation by legal counsel in any case where another party was so represented (*Whatley v. Morland* (1834), 2 Dowl. 249), and in any case where it would be contrary to natural justice to deny the natural person such representation. Furthermore, such representation would always be permissible by agreement, or whenever the arbitrator exercised his discretion in favour of permitting it.

On the second issue, the learned arbitrator, having found that the applicants had no absolute right to representation by legal counsel, declined to exercise his discretion to permit such representation in this case, except to a very limited extent. The learned arbitrator and his predecessor, Jacob Finkleman, Q.C., have been permanent arbitrators in the men's clothing industry since 1937. Arbitrations have been handled without intervention of lawyers in a very informal and expeditious manner, which has resulted in speedier and cheaper decisions than those in other industries. Furthermore, the range of conflict covered by arbitration has been much broader than usual. The general conclusion of the learned arbitrator was stated as follows [at. p. 338]:

> This review of the history and practices of arbitration in the men's clothing industry leads me to the conclusion that I should, in general terms, hesitate to exercise my discretion in favour of permitting the parties to be represented by lawyers. For 60 years, the parties have been arbitrating with lay representatives only, to their apparent mutual satisfaction. Both the procedural and substantive aspects of industrial relationships throughout the industry seem to function well because they are unusually responsive to the special needs and traditions of the industry, rather than to the logic of legal analysis.
>
> The egregious introduction of lawyers may put all of this at risk: arranging arbitration dates to convenience counsel may well delay hearings; conventional techniques of proof may well lengthen them by many hours; legal arguments based on contract analysis may shift the arbitrator's attention from issues which the parties have hitherto expected him to consider and which need to be addressed if their relationship is to remain stable; and the cost of legal representation may generate such a deterrent to arbitration — especially of minor matters such as price setting — that processes of mutual adjustment break down because the wealthier party is effectively insulated from challenge.
>
> But general hesitancy over the introduction of lawyers does not mean that they should be excluded altogether. There may be certain kinds of issues, especially those which touch the impact of general legal rules upon the parties' special regime of understandings, which are suitable for argument by counsel.

The learned arbitrator also felt that the question of changing the arbitration proceedings by permitting representation by legal counsel should have been raised first in the collective bargaining that had resulted in an agreement only a few months before the applicants had asserted their right to use counsel, or in separate and subsequent negotiations.

Against this background, he decided because of (1) the delay that had already occurred in finding a date convenient to counsel; (2) the suggestion that this hearing, with counsel, would take two full days; (3) the warning from counsel that there were numerous issues of contract interpretation and of the law of contract to be argued; and (4) the additional cost of arbitration resulting from the appearance of counsel, that counsel should not be permitted to participate in the presentation of facts. His direction as to the extent to which counsel could participate was as follows [at p. 343]:

> 1. Counsel for the union, the association and Canadian Clothiers Corporation may file written argument relating to the jurisdiction of the chairman and the interpretation of the collective agreement at the hearing on May 23, 1979, the date agreed to by the parties.
> 2. Counsel may attend the hearing, and will be heard at the conclusion of the hearing, for the limited purpose of advancing further argument on the matters indicated.
> 3. Save as stated, counsel will not be permitted to participate in the hearing, unless all parties agree otherwise, or unless I otherwise direct.

The grievances giving rise to these proceedings involved a claim by the union and certain employees that the company should not arrange for the manufacture of certain types of clothes to be done for it by persons who were not employees of the company. The grievors are seeking a declaration that the company is in violation of the agreement, an order that it refrain from doing so in the future, and compensation for losses allegedly sustained from the alleged violations.

The practice of the company in issue is one in which the company has engaged for approximately three years. In addition, when the practice was started, it was started with the full knowledge and agreement of the union.

The company established the following points in affidavit evidence that were not contradicted:

1. That the general manager of the company, who might otherwise have conducted the arbitration proceedings on behalf of the company, did not feel capable of conducting the proceedings in this case because of the complexity of the legal issues;
2. that the company would cease to be an economically viable business if the arbitrator rules that it must cease the practices under attack by the union;

3. that the compensation sought by the union could be assessed in an extremely large amount, which, if awarded by the arbitrator, would jeopardize the continued existence of the company.

The executive director of the applicant association also deposed that he would not feel competent to present properly the evidence, facts and issues in the matter, despite his experience in the processing of arbitrations in the industry.

The learned arbitrator made the following observation near the beginning of his ruling [at p. 329]:

> One must approach with some diffidence the question of whether parties to a labour arbitration do or do not enjoy an absolute right to legal representation. On the one hand, there is a widely-held belief, if not in the existence of such a right, then at least in its desirability. On the other, the appearance of lawyers in labour arbitration proceedings is sufficiently common in other industries that the notion that their presence may be a matter of discretion rather than right may occasion some surprise.

I have no doubt that the applicants and their counsel shared such widely-held belief. For this reason, I do not attach significance to their failure to raise the question of representation by counsel in the collective bargaining leading to the current agreement. They may well have felt that the existence of such right, when asserted by them, would or should not be questioned. In a memorandum of understanding dated June 27, 1977, quoted in part by the learned arbitrator, they agreed to continue the practice heretofore followed in arbitrations, but only for the lifetime of the then current agreement. New agreements were made as of December 4, 1978.

In *Pett v. Greyhound Racing Ass'n, Ltd.*, [1968] 2 All E.R. 545, the Court of Appeal dismissed an appeal from an order granting an interlocutory injunction to restrain the defendants from proceeding with an inquiry as to whether the plaintiff had administered drugs to a dog without permitting the plaintiff to have legal representation. Such representation had not been permitted to other persons under investigation in the past, although there was no rule against it. The following is a passage from the judgment of Lord Denning, M.R., at p. 549:

> Now the point arises: has the trainer a right to be legally represented? The club object to any legal representation. Their secretary states in his affidavit:
>
> > "If legal representation were allowed as of right, the delay and complications that this would cause would largely frustrate the stewards' intention to conduct their meetings expeditiously and with complete fairness."
>
> Counsel for the defendants, says that the procedure is in the hands of the stewards. If they choose to say: "We will not hear lawyers", that is for them, he says, and it is not for the courts to interfere.

I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an inquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. Even a prisoner can have his friend. The general principle was stated by STIRLING, J. in *Jackson & Co. v. Napper, Re Schmidt's Trade Marks* [(1886), 35 Ch.D. 162 at p. 172]:

> "... that, subject to certain well-known exceptions, every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right."

This was applied to a hearing before an assessment committee in the case of *R. v. St. Mary Abbotts, Kensington Assessment Committee* [[1891] 1 Q.B. 378]. It was held that a ratepayer had a right to have a surveyor to appear for him. Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.

I am aware that MAUGHAM, J. once expressed a different view. In *Maclean v. Workers Union* [[1929] All E.R. Rep. 468 at p. 471] speaking of domestic tribunals, he said:

> "Before such a tribunal counsel have no right of audience and there are no effective means of testing by cross-examination the truth of the statements which may be made."

All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. (*Re Macqueen and Nottingham Caledonian Society* [(1861), 9 C.B.N.S. 793], seems to have been such a case.) The dictum does not apply, however, to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor.

Davies, L.J., said the following at p. 551:

> I agree, for the reasons that LORD DENNING, M.R. has stated, that in the circumstances of an inquiry such as this, which may mean a great deal to a person who is licensed by the club as to his future and livelihood, unless express words are there denying him the right of representation, he should be entitled to have it. At any rate, there is a prima facie arguable case that he should be entitled to have it.

When the case came on for trial before Lyell, J., he declined to follow the decision of the Court of Appeal because of an intervening decision of the Privy Council in *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631, in which, in his view, the phrase "principles of natural justice" was equated with the phrase [at p. 639] ". . . those elementary and essential principles of 'fairness' which must, as a matter of necessary implication, be treated as applicable in the discharge of the vice-chancellor's admittedly quasi-judicial functions . . .". He said: "I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs." For that reason, he held that the plaintiff was not entitled to be represented by counsel at the hearing in question.

With much deference to Lyell, J., I do not find persuasive his reason for holding that legal representation before a tribunal can never be essential to natural justice.

Lord Denning returned again to his judgment in the *Pett* case in *Enderby Town Football Club Ltd. v. Football Ass'n Ltd. et al.*, [1971] 1 All E.R. 215, in which there was a rule against representation of the club by counsel on an appeal to the football association, and in which the Court held that the points of law which the club wished to raise on its appeal would be more appropriately raised in an action. Foster, J., refused an injunction and the Court of Appeal dismissed the appeal from his decision. Lord Denning said at p. 218:

> Although it is open to the club to come to the court to decide the points, it has not done so. It is sticking to its appeal to the FA. It asks that the points be decided by that body. It wants to have counsel and solicitor to argue them before the FA. The FA declines.
>
> The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled *as of right* to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the *discretion* of the tribunal. It is master of its own procedure; and, if it, in the proper exercise of its discretion, declines to allow legal representation, the courts will not interfere. Such was held in the old days in a case about magistrates: see *Collier v. Hicks* [(1931), 2 B & Ad 663]. It is the position today in the tribunals under the Tribunals of Inquiry (Evidence) Act 1921. I think that the same should apply to domestic tribunals, and for this reason: in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game. But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: "We will *never* allow anyone to have a lawyer to appear for him." The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart. See *R v Port of London Authority* [[1919] 1 K.B. 176 at p. 184], as applied in this court in *Shmidt v Secretary of State for Home Affairs* [[1969] 1 All E. R. 904 at p. 908, [1969] 2 Ch. 149 at p. 169] and by the House of Lords in *British Oxygen Co Ltd v Ministry of Technology* [p. 165, *ante*, [1970] 3 W.L.R. 488]. That is the reason why this court intervened in *Pett v Greyhound Racing Association Ltd* [[1968] 2 All E.R. 545, [1969] 1 Q.B. 46]. Mr. Pett was charged with doping a dog — a most serious offence carrying severe penalties. He was to be tried by a domestic tribunal. There was nothing in the rules to exclude legal representation, but the tribunal refused to allow it. The reason was because it never did allow it. This court thought that that was not a proper exercise of its discretion. So we intervened and granted an injunction. Natural justice required that Mr. Pett should be defended, if he so wished, by counsel or solicitor. Subsequently Lyell J thought we were wrong. He held that Mr. Pett had no right to legal representation: see *Pett v Greyhound Racing Association Ltd (No 2)* [[1969] 2 All E.R. 221, [1970] 1 Q.B. 46]. But I think we were right. Maybe Mr. Pett had no positive right, but it was a case where the tribunal in its discretion ought to have allowed it. And, on appeal, the parties themselves agreed it. They came to an arrangement which permitted the plaintiff to be legally represented at the inquiry. The long and short of it is that, if the court sees that a domestic tribunal is proposing to proceed in a manner contrary to natural justice, it can intervene to stop it.

Returning to the facts in the case at bar, it appears from the material that the factual issues involved in the arbitration are of considerable age and complexity, and that the arbitration will involve questions of law other than those on which the learned arbitrator gave leave to counsel to file written argument and to present further argument at the conclusion of the hearing. In view of the vital importance of the controversy to the applicant company, and the apparent complexity of the matter both in fact and in law, natural justice, in my view, requires that the applicants be represented by legal counsel at the arbitration hearing without any limitation, even if the applicants had no absolute right thereto. For this reason, the learned arbitrator, in my judgment, was in error on the second issue as well.

For the foregoing reasons, the application is allowed. There will be an order quashing the ruling of the learned arbitrator, and declaring that the appellants are entitled to be represented by legal counsel in the arbitration proceedings. The applicants are entitled to their costs of the motion, to be paid by the respondent union.

Ruling quashed.

Since we have concluded that s. 28(2) is *ultra vires*, there is no need for us to express an opinion on the validity of s. 222 of the *Municipal Act*, R.S.O. 1980, c. 302; nor is there any need for us to express an opinion on whether nude burlesque dancing is a form of expression coming within "freedom of expression" in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

The appeal will be allowed with costs here and below. The judgment below will be set aside and in its place there will be a declaration that s. 28(2) of sch. 38 of By-law 107-78 is *ultra vires*. There will be no order as to costs with respect to the intervention of the Attorney-General of Ontario.

Appeal allowed.

REFERENCE RE SECTION 94(2) OF THE MOTOR VEHICLE ACT

Supreme Court of Canada, Dickson C.J.C., Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ. December 17, 1985.

Constitutional law — Charter of Rights — Fundamental justice — Provision of Motor Vehicle Act (B.C.) providing that offence of driving while licence suspended absolute liability offence — Offence carrying minimum jail sentence of seven days — Meaning of principles of fundamental justice — Not restricted to procedure and natural justice — Combination of possibility of imprisonment and absolute liability violating principles of fundamental justice irrespective of nature of offence — Not established that infringement reasonable limit — Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94 — Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitutional law — Charter of Rights — Interpretation — Admissibility of minutes of proceedings of Special Joint Committee — Evidence adduced before Special Joint Committee considering amendment to Constitution admissible but of little weight — Comments of public servants and others could not be determinative of interpretation of s. 7 of Charter — Canadian Charter of Rights and Freedoms, s. 7.

The Lieutenant-Governor in Council of British Columbia referred the following question to the British Columbia Court of Appeal: "Is s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act*, 1982, consistent with the *Canadian Charter of Rights and Freedoms*?" Section 94(2) provides that the offence created by s. 94(1) "creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension". Section 94(1) provides that a person who drives a motor vehicle while he is prohibited from driving or while his driver's licence is suspended commits an offence and is liable on first conviction to a fine and to imprisonment for not less than seven days and not more than six months. The British Columbia Court of Appeal answered the question in the negative. On appeal by the Attorney-General for British Columbia, **held**, the appeal should be dismissed.

Per Lamer J., Dickson C.J.C., Beetz, Chouinard and Le Dain JJ. concurring: A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights. Section 7 protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The interests which s. 7 was intended to protect are life, liberty and security of the person. The principles of fundamental justice are not a protected interest, but rather a qualifier on the right not to be deprived of life, liberty and security of the person. As a qualifier, the phrase "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. Accordingly, the term "fundamental justice" cannot be interpreted as being synonymous with natural justice since to do so would strip the protected interests of much, if not most, of their content and leave the right to life, liberty and security of the person in a sorely emaciated state. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14 which are themselves illustrative of deprivations of

those rights to life, liberty and security of the person in breach of the principles of fundamental justice. Sections 8 to 14, in fact, provide an invaluable key to the meaning of the phrase "principles of fundamental justice". The rights guaranteed by ss. 8 to 14 have all been recognized as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law. The principles of fundamental justice are to be found in the basic tenets of the legal system. While many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees. While the minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution were admissible, the testimony of various federal civil servants to the effect that the principles of fundamental justice in s. 7 were limited to procedural due process or natural justice was of limited weight. Like speeches made in the Legislature the testimony before the Special Joint Committee was inherently unreliable as a guide to interpretation of the provisions of the Charter. The Charter was not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. The further danger of casting the interpretation of s. 7 in terms of the comments made at the Special Joint Committee is that in so doing the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Similarly, the case-law interpreting the phrase "principles of fundamental justice" in s. 2(*e*) of the *Canadian Bill of Rights* is of limited assistance having regard to the context in which the phrase was used in s. 2(*e*). In s. 7, the words "principles of fundamental justice" are placed in the context of, and qualify the fundamental rights of life, liberty and security of the person, unlike s. 2(*e*) where the phrase "principles of fundamental justice" was placed explicitly in the context of and qualified a right to a fair hearing.

The imposition of absolute liability in penal law offends the principles of fundamental justice and thus a law enacting an absolute liability offence will violate s. 7 of the Charter if and to the extent that it has the potential of depriving a person of life, liberty or security of the person. Imprisonment, including probation orders, deprives persons of their liberty. An offence has that potential from the moment it is open to the judge to impose imprisonment and there is no need that imprisonment, as in s. 94(2), be made mandatory. Thus, the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can only be constitutional if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7. It was not shown that s. 94(2) was a reasonable limit. While it is highly desirable that bad drivers be kept off the road, it was not demonstrated that the risk of imprisonment of a few morally innocent persons is a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence.

Per McIntyre J.: The term "fundamental justice" as used in s. 7 involves more than natural justice and includes as well a substantive element. On any definition of the term "fundamental justice" the imposition of a minimum term of imprisonment for an offence in respect of which no defence can be made, and which may be committed unknowingly and with no wrongful intent, deprives or may deprive a person of liberty and therefore offends the principles of fundamental justice.

Per Wilson J.: The phrase "in accordance with the principles of fundamental

justice" in s. 7 is not a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Rather, its purpose is to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice. Section 7 does not however affirm a right to the principles of justice *per se*. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the inquiry ends there and the limit cannot be sustained under s. 1. A limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice cannot be either reasonable or demonstrably justified in a free and democratic society. The Legislature can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and even if it meets that test, it still has to meet the tests in s. 1. An absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person and thus absolute liability offences do not *per se* offend s. 7. Section 7 is not limited to protection against procedural injustice. If a citizen is to be guaranteed his right to life, liberty and security of the person, one of the most basic rights in a free and democratic society, then he is not to be deprived of it by means of a violation of a fundamental tenet of our justice system. Attaching a mandatory term of imprisonment to an absolute liability offence as has been done in s. 94(2) of the *Motor Vehicle Act* violates the principles of fundamental justice. The conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. Such a penalty is totally disproportionate to the offence and quite incompatible with the objective of a penal system to keep punishment to the minimum necessary to achieve the objectives of the system. It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence. It must be a fit sentence proportionate to the seriousness of the offence. A mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. It is not required to reduce the incidence of the offence and it is beyond anything required to satisfy the need for "atonement". Accordingly, such a sanction offends the principles of fundamental justice embodied in our penal system.

R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, **discd**

Curr v. The Queen (1972), 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, [1972] S.C.R. 889, 18 C.R.N.S. 281; *Re Singh and Minister of Employment & Immigration and 6 other appeals* (1985), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177, 58 N.R. 1, 14 C.R.R. 13; *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, 53 N.R. 169, 8 C.R.R. 193; *Churchill Falls (Labrador) Corp. Ltd. et al. v. A.-G. Nfld. et al.* (1984), 8 D.L.R. (4th) 1, [1984] 1 S.C.R. 297, 53 N.R. 268, *sub nom. Reference re Upper Churchill Water Rights Reversion Act*, 47 Nfld. & P.E.I.R. 125; *Reference re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452, [1976] 2 S.C.R. 373, 9 N.R. 541; *Reference re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554, [1981] 1 S.C.R. 714, 37 N.R. 158; *Reference re Legislative Authority of Parliament to Alter or Replace Senate* (1979), 102 D.L.R. (3d) 1, [1980] 1 S.C.R. 54 *sub nom. Reference re Authority of Parliament in Relation to Upper House*; *A.-G. Can. v. Canadian National Transportation, Ltd. et al.* (1983), 7 C.C.C. (3d) 449, 3 D.L.R. (4th) 16, [1983] 2 S.C.R. 206, 76 C.P.R. (2d) 1, 38 C.R. (3d) 97, [1984] 1 W.W.R. 193, 28 Alta. L.R. (2d) 97, 49 A.R. 39, 47 N.R. 241; *Harding v. Price*, [1948] 1 K.B. 695, **consd**

Other cases referred to

Amax Potash Ltd. et al. v. Government of Saskatchewan (1976), 71 D.L.R. (3d) 1, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 11 N.R. 222; *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 1 N.R. 322; *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 85 C.L.L.C. para. 14,023, 58 N.R. 81, 13 C.R.R. 64; *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, *sub nom. Director of Investigation & Research of Combines Investigation Branch et al. v. Southam Inc.*, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 84 D.T.C. 6467, 27 B.L.R. 297, 55 N.R. 241, 9 C.R.R. 355; *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 98, 40 Sask. R. 122, 32 M.V.R. 153, 59 N.R. 122, 13 C.R.R. 193; *Re Caddedu and The Queen* (1982), 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629, 40 O.R. (2d) 128, 32 C.R. (3d) 355, 3 C.R.R. 312; appeal abated 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653, 41 O.R. (2d) 481, 8 C.R.R. 244; *Re Latham and Solicitor-General of Canada et al.* (1984), 12 C.C.C. (3d) 9, 9 D.L.R. (4th) 393, 39 C.R. (3d) 78, [1984] 2 F.C. 734, 10 C.R.R. 120; *Re Mason and The Queen* (1983), 7 C.C.C. (3d) 426, 1 D.L.R. (4th) 712, 43 O.R. (2d) 321, 35 C.R. (3d) 393, 7 C.R.R. 293; *R. v. Holman* (1982), 28 C.R. (3d) 378, 16 M.V.R. 225; *Gosselin v. The King* (1903), 3 S.C.R. 255; *Reference re Wartime Leasehold Regulations*, [1950] 2 D.L.R. 1, [1950] S.C.R. 124; *Duke v. The Queen* (1972), 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129, [1972] S.C.R. 917, 18 C.R.N.S. 302; *McNabb v. U.S.* (1942), 318 U.S. 332; *Beaver v. The Queen* (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193; *R. v. MacDougall* (1982), 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 54 N.S.R. (2d) 562, 44 N.R. 560, 18 M.V.R. 180; *Proprietary Articles Trade Ass'n v. A.-G. Can.* (1931), 55 C.C.C. 241, [1931] 2 D.L.R. 1, [1931] A.C. 310, [1931] 1 W.W.R. 552; *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1965-69] 3 N.S.R. 1

Constitutional law — Charter of Rights — Fundamental justice — Application — Fundamental justice not itself protected interest but rather qualifier to right to life, liberty and security of the person — Quaere, whether section applicable to human beings only and not corporations — Canadian Charter of Rights and Freedoms, s. 7.

Statutes referred to

Canadian Bill of Rights, s. 2(*e*)
Canadian Charter of Rights and Freedoms, ss. 1, 7 to 14, 33
Constitution Act, 1982, s. 52
Constitutional Question Act, R.S.B.C. 1979, c. 63, s. 1
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94 (rep. & sub. 1982, c. 36, s. 19)

APPEAL by the Attorney-General of British Columbia from a judgment of the British Columbia Court of Appeal, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 33 C.R. (3d) 22, [1983] 3 W.W.R. 756, 42 B.C.L.R. 364, 5 C.R.R. 148, 19 M.V.R. 63, on a reference submitted by the Lieutenant-Governor in Council of British Columbia as to the validity of s. 94(2) of the *Motor Vehicle Act* (B.C.), as amended by the *Motor Vehicle Amendment Act, 1982* (B.C.).

A. M. Stewart, Q.C., for appellant, Attorney-General of British Columbia.

C. G. Stein, for those contending for a negative answer.

G. R. Garton, for intervenor, Attorney-General of Canada.

I. A. MacDonnell and *M. D. Lepofsky*, for intervenor, Attorney-General of Ontario.

A. J. Petter and *J. C. MacPherson*, for intervenor, Attorney-General of Saskatchewan.

W. Henkel, Q.C., and *D. Kinloch*, for intervenor, Attorney-General of Alberta.

J. J. Camp and *P. G. Foy*, for intervenor, British Columbia Branch of Canadian Bar Association.

DICKSON C.J.C. and BEETZ J. concur with LAMER J.

MCINTYRE J.:—I agree wiih Lamer J. that s. 94(2) of the *Motor Vehicle Act* R.S.B.C. 1979, c. 288, as amended by the *Motor Vehicle Amendment Act*, 1982 (B.C.), c. 36, s. 19, is inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*. I agree that fundamental justice, as the term is used in the Charter, involves more than natural justice (which is largely procedural) and includes as well as substantive element. I am also of the view that on any definition of the term "fundamental justice" the imposition of minimum imprisonment for an offence in respect of which no defence can be made, and which may be committed unknowingly and with no wrongful intent, deprives or may deprive of liberty and it offends the principles of fundamental justice.

I would accordingly dismiss the appeal and answer the constitutional question in the negative.

CHOUINARD J. concurs with LAMER J.

LAMER J.:—

INTRODUCTION

A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, as enacted by the *Canada Act*, 1982 (U.K.), c. 11).

In other words, absolute liability and imprisonment cannot be combined.

The facts

On August 16, 1982, the Lieutenant-Governor in Council of British Columbia referred the following question to the Court of Appeal of that province, by virtue of s. 1 of the *Constitutional Question Act*, R.S.B.C. 1979, c. 63:

> Is s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act*, 1982, consistent with the *Canadian Charter of Rights and Freedoms*?

On February 3, 1983, the Court of Appeal handed down reasons in answer to the question in which it stated that s. 94(2) of the Act is inconsistent with the *Canadian Charter of Rights and Freedoms*: 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 33 C.R. (3d) 22, [1983] 3 W.W.R. 756, 42 B.C.L.R. 364, 5 C.R.R. 148, 19 M.V.R. 63. The Attorney-General for British Columbia launched an appeal to this Court.

The legislation

Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94, as amended by the *Motor Vehicle Amendment Act*, 1982, c. 36, s. 19:

> 94(1) A person who drives a motor vehicle on a highway or industrial road while
>
> (*a*) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1, or
>
> (*b*) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the *Motor Vehicle Amendment Act, 1982*,
>
> commits an offence and is liable,
>
> (*c*) on a first conviction, to a fine of not less than $300 and not more than $2 000 and to imprisonment for not less than 7 days and not more than 6 months, and
>
> (*d*) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2 000 and to imprisonment for not less than 14 days and not more than one year.
>
> (2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

Canadian Charter of Rights and Freedoms; Constitution Act, 1982:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> . . . . .
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . . . .
>
> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> . . . . .
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The judgment of the Court of Appeal of British Columbia

The court was of the view that the phrase "principles of fundamental justice" was not restricted to matters of procedure, but extended to substantive law, and that the courts were "therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation" [see p. 249 C.C.C., p. 546 D.L.R.].

Relying on the decision of this Court in *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, the Court of Appeal found [at pp. 249-50 C.C.C., p. 546 D.L.R.] "that s. 94(2) of the *Motor Vehicle Act* is inconsistent with the principles of fundamental justice". They did not heed the invitation of counsel opposing the validity of s. 94(2) to declare that, as a result of that decision by our Court, all absolute liability offences violated s. 7 of the Charter and could not be salvaged under s. 1. Quite the contrary, the Court of Appeal said that "there are, and will remain, certain public welfare offences, *e.g.*, air and water pollution offences, where the public interest requires that the offences be absolute liability offences". Their finding was predicated on the following reasoning [at p. 251 C.C.C., p. 547 D.L.R.]:

> The effect of s. 94(2) is to transform the offence from a *mens rea* offence to an absolute liability offence hence giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. Rather than placing the burden to establish such facts on the defendant and thus making the offence a strict liability offence the Legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment.

It can therefore be inferred with certainty that, in the court's view, the combination of mandatory imprisonment and absolute liability was offensive to s. 7. It cannot however be ascertained from their judgment whether the violation was triggered by the requirement of minimum imprisonment or solely by the availability of imprisonment as a sentence.

Section 7

1. *Introduction*

The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the Charter as well as the appropriateness of various techniques of constitutional interpretation. I shall deal first with these questions of a more general and theoretical nature as they underlie and have shaped much of the discussion surrounding s. 7.

2. *The nature and legitimacy of constitutional adjudication under the Charter*

The British Columbia Court of Appeal has written in the present case that the *Constitution Act, 1982* has added a new dimension to the role of the courts in that the courts have now been empowered by s. 52 to consider not only the *vires* of legislation but also to measure the content of legislation against the constitutional requirements of the Charter.

The novel feature of the *Constitution Act, 1982*, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the *vires* of legislation. The initial process in such adjudication has been characterized as "a distillation of the constitutional value represented by the challenged legislation" (*Laskin's Canadian Constitutional Law*, 3rd ed. Rev. (1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman, editor, *The Courts and the Canadian Constitution* (1966), p. 186), and "an abstract of the statute's content" (Professor Abel, 19 U. of T. L.J. 487 (1969), p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.

The truly novel features of the *Constitution Act, 1982* are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.

In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. et al. v. Government of Saskatchewan* (1976), 71 D.L.R. (3d) 1 at p. 10, [1977] 2 S.C.R. 576 at p. 590, [1976] 6 W.W.R. 61, continue to govern:

> The Courts will not question the wisdom of enactments . . . but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

In this respect, s. 7 is no different than other Charter provisions. As the Attorney-General for Ontario has noted in his factum:

> Section 7, like most of the other sections in the *Charter*, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation.

Yet, in the context of s. 7, and in particular of the interpretation of "principles of fundamental justice", there has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to "question the wisdom of enactments", to adjudicate upon the merits of public policy.

From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial Legislatures and the electorate. The Attorney-General for Ontario, in his written argument, stated that,

> . . . the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has, in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.

The concerns with the bounds of constitutional adjudication

explain the characterization of the issue in a narrow and restrictive fashion, *i.e.*, whether the terms "principles of fundamental justice" have a substantive or merely procedural content. In my view, the characterization of the issue in such fashion preempts an open-minded approach to determining the meaning of "principles of fundamental justice".

The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the United States Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two Constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended same, have to some extent distorted the discussion surrounding the meaning of "principles of fundamental justice". This has led to the spectre of a judicial "super-Legislature" without a full consideration of the process of constitutional adjudication and the significance of ss. 1, 33 and 52 of the *Constitution Act, 1982*. This in turn has also led to a narrow characterization of the issue and to the assumption that only a procedural content to "principles of fundamental justice" can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words "principles of fundamental justice" refer to procedure only.

But I do not share that assumption. Since way back in time and even recently the courts have developed the common law beyond procedural safeguards without interfering with the "merits or wisdom" of enactments (*e.g.*, *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729, entrapment, non-retrospectivity of offences, presumptions against

relaxing the burden of proof and persuasion, to give a few examples).

The task of the court is not to choose between substantive or procedural content *per se* but to secure for persons "the full benefit of the Charter's protection" (Dickson C.J.C. in *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 at p. 424, 18 D.L.R. (4th) 321 at p. 360, [1985] 1 S.C.R. 295 at p. 344), under s. 7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation (to use the words in *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181 at p. 192, 26 D.L.R. (3d) 603 at p. 614, [1972] S.C.R. 889 at p. 899) of "objective and manageable standards" for the operation of the section within such a framework.

I propose therefore to approach the interpretation of s. 7 in the manner set forth by Dickson C.J.C. in *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145, and *R. v. Big M Drug Mart Ltd.*, *supra*, and by Le Dain J. in *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613. In *Big M Drug Mart Ltd.*, Dickson C.J.C. wrote, at pp. 423-4 C.C.C., pp. 359-60 D.L.R., p. 34 S.C.R.:

> In *Hunter et al. v. Southam Inc.* (decision rendered September 17, 1984) [since reported 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145] this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

3. *The principles of fundamental justice*

I would first note that I shared the views of Wilson J. in her statement in *Re Singh and Minister of Employment & Immigration and 6 other appeals* (1985), 17 D.L.R. (4th) 422 at pp. 458-9, [1985] 1 S.C.R. 177 at p. 205, 58 N.R. 1, that "it is incumbent upon the court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right'

contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only deprivation of liberty was considered in these proceedings and that no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this Court, to determining the scope of the words "principles of fundamental justice", I will not attempt to give any further content to liberty nor address that of the words life or security of the person.

In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, *supra*), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

Given that, as the Attorney-General for Ontario has acknowledged, "when one reads the phrase 'principles of fundamental justice', a single incontrovertible meaning is not apparent", its meaning must, in my view, be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning give to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual": *Re Cadeddu and The Queen* (1982), 4 C.C.C. (3d) 97 at p. 109, 146 D.L.R. (3d) 629 at p. 641, 40 O.R. (2d) 128 at p. 139.

For these reasons, I am of the view that it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney-General of British Columbia and others have suggested. To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of Charter rights in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, *per* Estey J. and *Hunter v. Southam Inc.*, *supra*.

It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8 to 14 greater content than the general concept from which they originate.

Sections 8 to 14, in other words, address specific deprivations of the "right" of life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a "[n]arrow and technical" manner for the sake of congruity, is out of the question: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 488 C.C.C., p. 168 D.L.R., p. 366 S.C.R.

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental

justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections, the oft-utilized provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III), and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term "natural justice", a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.

Whatever may have been the degree of synonymy between the two expressions in the past (which in any event has not been clearly demonstrated by the parties and intervenants), as of the last few decades this country has given a precise meaning to the words "natural justice" for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.

It is, in my view, that precise and somewhat narrow meaning

that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

4. *Proceedings and evidence of the special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*

A number of courts have placed emphasis upon the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution in the interpretation of "principles of fundamental justice", *e.g.*, *Re Latham and Solicitor-General of Canada et al.* (1984), 12 C.C.C. (3d) 9, 9 D.L.R. (4th) 393, 39 C.R. (3d) 78 (Fed. Ct. T.D.); *Re Mason and The Queen* (1983), 7 C.C.C. (3d) 426, 1 D.L.R. (4th) 712, 35 C.R. (3d) 393 (Ont. H.C.J.); *R. v. Holman* (1982), 28 C.R. (3d) 378, 16 M.V.R. 225 (B.C. Prov. Ct).

In particular, the following passages, dealing with the testimony of federal civil servants from the Department of Justice, have been relied upon:

Mr. Strayer (Assistant Deputy Minister, Public Law):

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.
>
> This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.
>
> . . . . .
>
> Mr. Strayer: The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

Mr. Tassé (Deputy Minister) also said of the phrase "principles of fundamental justice" in testimony before the committee:

> We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal of specific meaning to the concept of natural justice. We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness.
>
> Courts have been developing the concept of administrative fairness in recent years and they have been able to give a good deal of consideration, certainly to these sorts of concepts and we would expect they could do the same with this.

The Honourable Jean Chrétien, then federal Minister of Justice, also indicated to the committee that, while he thought "fundamental justice marginally more appropriate than natural justice" in s. 7, either term was acceptable to the government.

(a) *Admissibility*

The first issue which arises is whether the Minutes of the Proceedings and Evidence of the Joint Committee may even be considered admissible as extrinsic aids to the interpretation of Charter provisions. Such extrinsic materials were traditionally excluded from consideration in constitutional adjudication: *e.g.*, *Gosselin v. The King* (1903), 33 S.C.R. 255 at p. 264; *Reference re Wartime Leasehold Regulations*, [1950] 2 D.L.R. 1, [1950] S.C.R. 124.

In *Churchill Falls (Labrador) Corp. Ltd. et al. v. A.-G. Nfld. et al.* (1984), 8 D.L.R. (4th) 1 at p. 18, [1984] 1 S.C.R. 297 at p. 317, 53 N.R. 268, *sub nom. Reference re Upper Churchill Water Rights Reversion Act*, however, McIntyre J. stated that,

> The general exclusionary rule formerly considered to be applicable in dealing with the admissibility of extrinsic evidence in constitutional cases has been set aside or at least greatly modified and relaxed.

Indeed, in the *Reference re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 at p. 468, [1976] 2 S.C.R. 373 at p. 389, 9 N.R. 541, Laskin C.J.C. stated:

> . . . no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and . . . the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought adduce such evidence.

This approach was adopted by Dickson J. (as he then was) in *Reference re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554, [1981] 1 S.C.R. 714, 37 N.R. 158, and McIntyre J. in *Churchill Falls (Labrador) Corp. Ltd. et al. v. A.-G. Nfld. et al.*, *supra*, in which he stated, at p. 19 D.L.R., p. 318 S.C.R.: "It will therefore be open to the court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation."

It is to be noted, however, that McIntyre J.'s remarks are in relation to the interpretation of the challenged statutory enactment rather than the interpretation of the Constitution itself. The same is true of the remarks of Laskin C.J.C. and Dickson J. (as he then was).

With respect to the interpretation of the Constitution, however, such extrinsic materials were considered, in at least two cases, by this Court.

In *Reference re Legislative Authority of Parliament to Alter or Replace Senate* (1979), 102 D.L.R. (3d) 1 at p. 9, [1980] 1 S.C.R. 54 at p. 66 *sub nom. Reference re Authority of Parliament in Relation to Upper House*, the court stated:

> It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in the following passages in speeches delivered in the debates on Confederation in the Parliament of the Province of Canada . . .

The other case is *A.-G. Can. v. Canadian National Transportation, Ltd. et al.* (1983), 7 C.C.C. (3d) 449, 3 D.L.R. (4th) 16, [1983] 2 S.C.R. 206. Laskin C.J.C., in that case, referred to the pre-Confederation debates in the course of interpreting ss. 91(27) and 92(14) of the *Constitution Act, 1867* (at p. 464 C.C.C., p. 31 D.L.R., p. 225 S.C.R.).

I would adopt this approach when interpreting the Charter. Consequently, the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution should, in my view, be considered.

(b) *Weight*

Having said that, however, I none the less believe that the logic underlying the reluctance to allow the use of materials such as speeches in Parliament carries considerable force with respect to the minutes of the committee as well.

In *Churchill Falls (Labrador) Corp. Ltd. et al. v. A.-G. Nfld. et al.*, *supra*, McIntyre J. wrote, at p. 20 D.L.R., p. 319 S.C.R.:

> . . . I would say that the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence. They represent, no doubt, the considered views of the speakers at the time they were made, but cannot be said to be expressions of the intent of the Legislative Assembly.

Professor J. Magnet has written, in "The Presumption of Constitutionality", 18 Osg. Hall J. 87 at p. 99 (1980):

> In an administrative law setting, "The admissibility of [factual] evidence [or the issue of legislative intent] seems so clear as not to require authority".
>
> . . . . .
>
> The transposition of the administrative law principle to a constitutional context is problematic. In the administrative law cases, the issue of intent concerns the intent of a specific person. In the constitutional cases, the issue of intent concerns the legislature, an incorporeal body made up of hundreds of persons. It may be said that such a body, like a corporation, is a legal fiction and has no intention in the relevant sense. It would follow that legislative intent, in the constitutional setting, is a hollow concept.

> Largely in consideration of this argument, Canadian courts have developed the rule that, in scrutinizing legislative intent for the purpose of determining constitutional validity, statements by members of the legislature during passage of the challenged Act are irrelevant and inadmissible.
>
> Several explanations of the rule have been put forward. Strayer has argued that the rule is sound because legislative motive is irrelevant to constitutional validity: "The essential factual issue here is that of effect . . ." More convincingly, it has been argued that, considering the way in which the Canadian process of enactment differs from that of the United States, "Hansard gives no convincing proof of what the government intended . . ." Moreover, by allowing ambiguities in the statute to be resolved by statements in the legislature, ministers would be given power in effect to legislate indirectly by making such statements. "Cabinets already have powers enough without having this added unto them."

If speeches and declarations by prominent figures are inherently unreliable (*per* McIntyre J. in *Churchill Falls (Labrador) Corp. Ltd. et al. v. A.-G. Nfld. et al.*, *supra*, at p. 20 D.L.R., p. 319 S.C.R.) and "speeches made in the Legislature at the time of enactment of the measures are inadmissible as having little evidential weight" (*per* Dickson J. (as he then was) in *Reference re Residential Tenancies Act*, *supra*, at p. 561 D.L.R., p. 721 S.C.R.), the Minutes of the Proceedings of the Special Joint Committee, though admissible, and granted somewhat more weight than speeches, should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the Charter of Rights rather than a statute.

Moreover, the simple fact remains that the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the joint committee proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the

moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the Charter debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the Charter, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth. As Estey J. wrote in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481 at p. 488, 9 D.L.R. (4th) 161 at p. 168, [1984] 1 S.C.R. 357 at pp. 366-7:

> Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court.

5. *The Canadian Bill of Rights*

The appellant states that s. 7 "is a blend of ss. 1(a) and 2(e) of the *Canadian Bill of Rights*". Considerable emphasis is then placed upon the case of *Duke v. The Queen* (1972), 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129, [1972] S.C.R. 917, in which this Court interpreted the words "principles of fundamental justice" in s. 2(*e*) of the Bill. Fauteux C.J.C. noted, at p. 479 C.C.C., p. 134 D.L.R., p. 923 S.C.R.:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity adequately to state his case.

However, as Le Dain J. has written in *R. v. Therens* (1985), 18 C.C.C. (3d) 481 at pp. 500-1, 18 D.L.R. (4th) 655 at p. 675, [1985] 1 S.C.R. 613 at p. 638, with the implicit support of the majority:

> In my opinion, the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.

And after, at p. 501 C.C.C., pp. 675-6 D.L.R., pp. 638-9 S.C.R.:

> Although it is clear that in several instances, as in the case of s. 10, the framers of the Charter adopted the wording of the *Bill of Rights*, it is also clear that the Charter must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection.
>
> . . . . .
>
> In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the Charter, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the Charter was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, and *Hunter v. Southam Inc., supra.*

This view was also put forward by Wilson J. in her judgment in *Re Singh and Minister of Employment & Immigration and 6 other appeals* (1985), 17 D.L.R. (4th) 422 at pp. 461-2, [1985] 1 S.C.R. 177 at p. 209, 58 N.R. 1, with which Dickson C.J.C. and Lamer J. concurred:

> It seems to me rather that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined.

In any event, the *Duke* case is of little assistance in the interpretation of s. 7 of the Charter. Section 2(*e*) of the *Canadian Bill of Rights* states:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . . .
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

In s. 2(*e*) of the *Bill of Rights*, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify a "right to a fair hearing". Section 7 of the Charter does not create the same context. In s. 7, the words "principles of fundamental justice" are placed in the context of, and qualify much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

Conclusion

I have, in this judgment, undertaken a purposive analysis of the term "principles of fundamental justice in s. 7 of the Charter in accordance with the method established by this Court in *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295. Accordingly, the point of departure for the analysis has been a consideration of the general objectives of the Charter in the light of the general principles of Charter interpretation set forth in *Skapinker, supra*, and *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145. This was followed by a detailed analysis of the language and structure of the section as well as its immediate context within the Charter.

The main sources of support for the argument that "fundamental justice" is simply synonymous with natural justice have been the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution and the *Bill of Rights* jurisprudence. In my view, neither the minutes nor the *Bill of Rights* jurisprudence are persuasive or of any great force. The historical usage of the term "fundamental justice" is, on the other hand, shrouded in ambiguity. Moreover, not any one of these arguments, taken singly or as a whole, manages to overcome in my respectful view the textual and contextual analyses.

Consequently, my conclusion may be summarized as follows:

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frank-

furter J. wrote in *McNabb v. U.S.* (1942), 318 U.S. 332 at p. 347, "the history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor Tremblay has written, "future growth will be based on historical roots": 18 U.B.C.L. Rev. 201 at p. 254 (1980).

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principles within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

I now turn to such an analysis of the principle of *mens rea* and absolute liability offences in order to determine the question which has been put to the court in the present reference.

Absolute liability and fundamental justice in penal law

It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in latin *actus non facit reum nisi mens sit rea*.

As Glanville Williams said:

> There is no need here to go into the remote history of *mens rea*; suffice it to say that the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go. "If one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*."

(Glanville Williams, *Criminal Law, The General Part*, 2nd ed. (1961), p. 30, London, Stevens & Sons Limited.)

One of the many judicial statements on the subject worth mentioning is of the highest authority, *per* Lord Goddard C.J. in *Harding v. Price*, [1948] 1 K.B. 695 at p. 700, where he said:

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood* ((1946), 62 T.L.R. 462, 463): "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

This view has been adopted by this Court in unmistakable terms in many cases, amongst which the better known are *Beaver v. The Queen* (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193, and the most recent and often-quoted judgment of Dickson J. (as he then was), writing for the court in *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299.

This Court's decision in the latter case is predicated upon a certain number of postulates one of which, given the nature of the rules it elaborates, has to be to the effect that absolute liability in penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson J., to the effect that "there is a generally held revulsion against punishment of the morally innocent" [at p. 363 C.C.C., p. 170 D.L.R., p. 1310 S.C.R.]. He also stated [at p. 363 C.C.C., p. 171 D.L.R., p. 1311 S.C.R.] that the argument that absolute liability "violates fundamental principles of penal liability" was the most telling argument against absolute liability and one of greater force than those advanced in support thereof.

In my view, it is because absolute liability offends the principles of fundamental justice that this Court created presumptions against Legislatures having intended to enact offences of a regulatory nature falling within that category. This is not to say, however, and to that extent I am in agreement with the Court of Appeal, that, as a result, absolute liability *per se* offends s. 7 of the Charter.

A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty or security of the person.

Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.

I am therefore of the view that the combination of imprisonment and of absolute liabilty violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

As no one has addressed imprisonment as an alternative to the

non-payment of a fine, I prefer not to express any views in relation to s. 7 as regards that eventuality as a result of a conviction for an absolute liability offence; nor do I need to address here, given the scope of my finding and the nature of this appeal, minimum imprisonment, whether it offends the Charter *per se* or whether such violation, if any, is dependent upon whether it be for a *mens rea* or strict liability offence. Those issues were not addressed by the court below and it would be unwise to attempt to address them here. It is sufficient and desirable for this appeal to make the findings I have and no more, that is, that no imprisonment may be imposed for an absolute liability offence, and, consequently, given the question put to us, an offence punishable by imprisonment cannot be an absolute liability offence.

Before considering s. 94(2) in the light of these findings, I feel we are however compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependent upon the content given to the words "security of the person". That issue was and is a live one. Indeed, though the question as framed focuses on absolute liability (s. 94(2)) in relation to the whole Charter, including the right to security of the person in s. 7, because of the presence of mandatory imprisonment in s. 94(1) only deprivation of liberty was considered. As the effect of imprisonment on the right to liberty is a foregone conclusion, *a fortiori* minimum imprisonment, everyone directed their arguments, when discussing s. 7 to considering whether absolute liability violated the principles of fundamental justice, and then subsidiarily argued *pro* or *contra* the effect of s. 1 of the Charter.

Counsel for those opposing the validity of s. 94(2) took the position in this Court that absolute liability and severe punishment, always referring to imprisonment, violated s. 7 of the Charter. From the following passage of the judgment in the Court of Appeal it would appear that counsel for those opposing the validity of the section took the wider position in that court that all absolute liability offences violated s. 7 because of "punishment of the morally innocent" [at p. 250 C.C.C., p. 546 D.L.R.]:

> In seeking to persuade the court to that conclusion counsel opposing the validity of s. 94(2) contended all absolute offences are now of no force and effect because of s. 7 of the Charter and that the provisions of s. 1 of the Charter should not be invoked to sustain them. In support of this submission counsel relied upon the view expressed by Mr. Justice Dickson in *Sault Ste. Marie* that there was "a generally held revulsion against punishment of the morally innocent". They contended that had the Charter been in effect when *Sault Ste. Marie* was decided all absolute liabilty offences would have been struck down.
>
> We accept without hesitation the statement expressed by the learned justice but do not think it necessarily follows that because of s. 7 of the Charter this category of offence can no longer be legislated. To the contrary, there are, and will remain, certain public welfare offences, *e.g.*, air and water pollution offences, where the public interest requires that the offences be absolute liability offences.

While I agree with the Court of Appeal, as I have already mentioned, that absolute liability does not *per se* violate s. 7 of the Charter, I am somewhat concerned with leaving without comment the unqualified reference by the Court of Appeal to the requirements of the "public interest".

If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liabilty offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the court as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the Charter if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.

In this latter regard, something might be added.

Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.

Of course, I understand the concern of many as regards corporate offences, specially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our vital environment and our natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.

Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results from that of balancing public interest and the liberty or security of the person of a human being.

Indeed, the public interest as regards "air and water pollution offences" requires that the guilty be dealt with firmly, but the seriousness of the offence does not in my respectful view support the proposition that the innocent *human* person be open to conviction, quite the contrary.

Section 94(2)

No doubt s. 94(2) enacts in the clearest of terms an absolute liability offence, the conviction for which a person will be deprived of his or her liberty, and little more, if anything, need be added. However, I should not want to conclude without addressing an argument raised by the appellant in this Court and considered by the British Columbia Court of Appeal.

The appellant argues that, as a result of the case of *R. v. MacDougall* (1982), 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216, [1982] 2 S.C.R. 605, s. 94(2) (the absolute liability provision) is of limited effect. Hence, the section raises "a false impression of a potential for wholesale injustice", says the appellant. In my view, this argument is of little relevance to the determination of this appeal. Whether the provision is of broad or of "limited" effect does not change its nature nor lead to a different characterization for the purpose of determining a violation of s. 7. The question is whether the provision offends s. 7 of the Charter *at all*, rather than whether it does so in "limited" or "wholesale" fashion. At best, this argrument may be considered under s. 1.

The appellant summarizes the decision in *MacDougall* as establishing that

> where an accused is charged with driving a motor vehicle while his licence was cancelled (contrary to a provincial statute), ignorance by the accused of the fact that his licence was revoked is ignorance of law and cannot provide the basis for an acquittal.

The respondent, however, distinguishes the *MacDougall* case from the case at bar on two grounds. First, the offence under consideration in *MacDougall* was one of strict liability rather than absolute liability. Secondly, while *MacDougall*

> dealt only with a suspension by operation of law, s. 94(2) encompases Court imposed suspensions (s. 90(2)), suspensions arising under the "old law" in the absence of the accused, and suspensions imposed by administrative review by the Superintendent of Motor Vehicles requiring delivery of notice ("old" act, Section 82(3)).

Thus, the respondent concludes that there are

> at least three classes of morally innocent persons who are, by section 94(2) deprived of the opportunity to present a defence of the type outlined by Dickson J. in *Regina v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1326:
>
> > "The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."

In the final analysis, it seems that both the appellant and the respondent agree that s. 94 will impact upon the right to liberty of a limited number of morally innocent persons. It creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons. To me, that is sufficient for it to be in violation of s. 7.

Section 1

Having found that s. 94(2) offends s. 7 of the Charter there remains the question as to whether the appellants have demonstrated that the section is salvaged by the operation of s. 1 of the Charter. No evidence was adduced in the Court of Appeal or in this Court. The position in that regard and the argument in support of the operability of s. 94(2) is as follows in appellant's factum:

> If this Court rules that s. 94(2) of the Motor Vehicle Act is inconsistent with S. 7 (or S. 11(d)) of the Charter, then it is submitted that S. 1 of the Charter is applicable. It is submitted that Laskin J. (as he then was) made it clear in *Curr v. The Queen*, supra, that it is within the scope of judicial notice for this Court to recognize that a statutory provision was enacted as part of a legislative scheme aimed at reducing the human and economic cost of bad driving. S. 94 is but part of the overall scheme laid out in the Motor Vehicle Act by which the Legislature is attempting to get bad drivers off the road. S. 94 imposes severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended.
>
> It is submitted that if S. 94(2) is inconsistent with one of the above-noted provisions of the Charter, then S. 94(2) contains a "reasonable limit, etc." within the meaning of S. 1 of the Charter.

I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with

the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the Government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.

As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.

In the result, I would dismiss the appeal and answer the question in the negative, as did the Court of Appeal, albeit for somewhat different reasons, and declare s. 94(2) of the *Motor Vehicle Act*, as amended by the *Motor Vehicle Amendment Act, 1982*, inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*.

Having come to this conclusion, I choose, as did the Court of Appeal, not to address whether the section violates the rights guaranteed under ss. 11(*d*) and 12 of the Charter.

WILSON J.:—I agree with my colleague, Mr. Justice Lamer, that s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, violates s. 7 of the *Canadian Charter of Rights and Freedoms* and is not saved by s. 1. I reach that result, however, by a somewhat different route.

I start with a consideration of statutory "offences". These are divisible into offences for which *mens rea* is required and those for which it is not. Statutory offences are subject to a presumption in favour of a *mens rea* requirement as a matter of interpretation, but the courts have increasingly come to accept the proposition that Legislatures may create non-*mens rea* offences provided they make it clear that the *actus reus* itself is prohibited. This is typically so in the case of the so-called "regulatory" or "public welfare" offences. There is no moral delinquency involved in these offences. They are simply designed to regulate conduct in the public interest.

Two questions, therefore, have to be answered on this appeal. The first is: do absolute liability offences created by statute *per se* offend the Charter? The second is: assuming they do not, can they be attended by mandatory imprisonment or can such a sanction only be attached to true *mens rea* offences? Certainly, in the

absence of the Charter, Legislatures are free to create absolute liability offences and to attach to them any sanctions they please. Does s. 7 of the Charter circumscribe their power in this regard?

1. *Absolute liability offences*

Section 7 affirms the right to life, liberty and security of the person while at the same time indicating that a person may be deprived of such a right if the deprivation is effected "in accordance with the principles of fundamental justice". I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Its purpose seems to me to be the very opposite, namely, to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

Section 7 does not, however, affirm a right to the principles of fundamental justice *per se*. There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the inquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the Legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.

Assuming that I am correct in my analysis of s. 7 and its relationship to s. 1, an absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person. It cannot violate s. 7 because it offends the principles of fundamental justice because they are not protected by s. 7 absent an impairment of the s. 7 right. Leaving aside for the moment the

mandatory imprisonment sanction, I cannot find an interference with life, liberty or security of the person in s. 94 of the *Motor Vehicle Act*. It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. It would be my view, therefore, that absolute liability offences of this type do not *per se* offend s. 7 of the Charter.

2. *Absolute liability plus mandatory imprisonment*

The real question, as I see it, is whether s. 7 of the Charter is violated by the attachment of a mandatory imprisonment sanction to an absolute liability offence. Clearly, a s. 7 right is interfered with here in that a person convicted of such an offence automatically loses his liberty.

In what circumstances then may the citizen be deprived of his right to liberty? Clearly, not if he was deprived of it through a process which was procedurally unfair. But is s. 7 limited to that?

I would assume that one of the reasons for the rider attached to the right to liberty affirmed in s. 7 is to accommodate the criminal justice system. It will be through the criminal justice system that citizens will typically lose their liberty at the hands of government. The system must not, therefore, cause them to lose their liberty in violation of the principles of fundamental justice. The system must reflect those principles and the validity of the penal provisions must be assessed in relation to them.

Since s. 94(2) of the *Motor Vehicle Act* imposes a limit prescribed by law on the s. 7 right, we must determine whether fundamental justice is offended by attaching mandatory imprisonment to an absolute liability offence. Given that we can have statutory non-*mens rea* offences, what is repugnant to fundamental justice in imprisoning someone for their commission?

At common law imprisonment was reserved for the more serious *mens rea* offences. However, we are dealing here with statutory offences and the legislation must stand unless it violates s. 7. We cannot, in my view, simply state as a bald proposition that absolute liability and imprisonment cannot co-exist in a statutory context. Legislatures can supersede the common law. The Legislature may consider it so important to prevent a particular act from being committed that it absolutely forbids it

and, if it is committed, may subject the offender to a penalty whether he has any *mens rea* or not and whether or not he had any intention of breaking the law. Prior to the Charter such legislation would have been unassailable. Now it must meet the test of s. 7. Where the Legislature has imposed a penalty in the form of mandatory imprisonment for the commission of an absolute liability offence and has done so in clear and unambiguous language, can the legislation survive an attack under s. 7? It is suggested that such legislation cannot survive because it offends the principles of fundamental justice and, in particular, the principle that punishment is inappropriate in the absence of moral culpability.

The common law distinguished sharply the conduct of the wrongdoer from his state of mind at the time. Hence the famous maxim referred to by my colleague — *actus non facit reum nisi mens sit rea*. The important thing to note, however, is that while the maxim has always been viewed as identifying the essential ingredients of a crime at common law, its meaning has been subject to a process of historical and juridical development, particularly the concept of *mens rea*. In the earliest beginnings of criminal liability the mental state of the wrongdoer was not considered at all; it was enough that he had done the fell deed: see Holdsworth, *A History of English Law* (1923-1938), vol. II, p. 50 *et seq.* At a later stage the accused's state of mind was considered for two distinct purposes, namely (1) to determine whether his conduct was voluntary or involuntary, and (2) to determine whether he realized what the consequences of his conduct might be. But the first purpose was viewed as the key one. It was considerably later in the development of the law of criminal responsibility that the emphasis changed and an appreciation of the consequences of his act became the central focus. The movement towards the concept of the "guilty mind" was not, however, a sudden or dramatic one. This is understandable. The judges of the day found the new rule hard to apply because it was difficult to look into the state of a man's mind. The ecclesiastical authorities, however, had no such problem and legal historians seem to agree that the ecclesiastical influence was largely responsible for moving the focus to the mental element in common law crime: see Holdsworth, p. 259.

The introduction of concepts of morality into criminal responsibility inevitably led to a sharp distinction between crimes which were *mala in se* and crimes which were merely *mala prohibita*. Blackstone describes crimes which were *mala in se* as offences

against "those rights which God and nature have established" (*Blackstone's Commentaries on the Laws of England*, 17th ed. (1830), p. 53, by E. Christian), and crimes which were *mala prohibita* as breaches of "those laws which enjoin only positive duties, and forbid any such things as are not *mala in se* . . . without any intermixture of moral guilt" (Blackstone, *ibid.*, p. 57). This distinction is now pretty well discredited: see Archbold's *Criminal Pleading, Evidence & Practice*, 30th ed., p. 900 (1938); Allen, *Legal Duties* (1931), p. 239. While it is undoubtedly a fact that certain crimes evoke feelings of revulsion and condemnation in the minds of most people, those feelings are now generally perceived as dependent upon a number of variable factors such as environment, education and religious prejudice and are no longer seen as providing a secure basis for the segregation of crimes into two different categories. Quoting from *Kenny's Outlines of Criminal Law* (1952), pp. 22-3, ed. J.W.C. Turner:

> Among the members of any community at a given period, certain offences are by general agreement regarded as especially serious and excite deep moral reprobation, whereas other transgressions are regarded as venial and are more or less condoned, especially when they infringe rules of law which are unpopular. It is indeed inevitable that this apportionment of blame should be made. Yet the vague and fluctuating line which in everyday life is drawn between the one group and the other only marks a variation in degree; it is not a boundary which separates things fundamentally alien in kind. Ethical reprobation of homicide, homosexuality, libel, adultery, bigamy and slave trading, to take a few examples, is not the same in all countries, and indeed may vary from section to section of the people in the same country.
>
> . . . . .
>
> This defective classification of crimes clearly formed an unsound premise from which to draw any jurisprudential conclusion but it has an insidious attraction, and in the form of English phrases such as "in itself unlawful" it has penetrated into one or two modern judgments with vitiating effects upon the logic and clarity of the argument.

Accepting that a guilty mind was an essential ingredient of a crime at common law, it does not, of course, follow that the same is true of a "crime" created by statute. I have already referred to the presumption against absolute liability as a matter of statutory interpretation. This undoubtedly reflects the common law approach to the nature of crime. It is, however, only a presumption. Provided it does so in clear and unambiguous terms the Legislature is free to make a person liable for the *actus reus* with or without *mens rea*.

In *Kenny's Outlines of Criminal Law*, p. 4, the author highlights the difficulty in identifying any essential characteristics of crimes created by statute. He points out that such crimes

originate in the government policy of the day and that, so long as crimes continue to be created by government policy, the nature of statutory crime will elude definition. Lord Atkin adverted to the same difficulty in *Proprietary Articles Trade Ass'n v. A.-G. Can.* (1931), 55 C.C.C. 241, [1931] 2 D.L.R. 1, [1931] A.C. 310. He stated at p. 250 C.C.C., p. 10 D.L.R., p. 324 A.C.:

> . . . the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

In *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 at p. 199, 12 D.L.R. (3d) 591 at p. 597, [1971] S.C.R. 5 at p. 13, Ritchie J., speaking for the majority of this Court, said:

> Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption.

There seems to be no doubt that in s. 94 of the *Motor Vehicle Act* the Legislature of British Columbia has created such an offence. Subsection (2) expressly precludes the application of any presumption in favour of a *mens rea* requirement. However, as already indicated, I do not believe that any principle of fundamental justice is offended by the creation of an absolute liability offence absent an impairment of the s. 7 right.

Is fundamental justice offended then by the attachment of a mandatory term of imprisonment to the s. 94 offence? Is there something repugnant about imprisoning a person for the commission of an absolute liability offence? Presumably, no objection can be taken to attaching penal consequences such as a fine to a validily enacted absolute liability offence, only to penal consequences in the form of imprisonment if this gives rise to a violation of s. 7 of the Charter. If it does, then the court is not only empowered, but obligated by the Constitution, to strike the section down.

I have already indicated that in my view a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive. This is not, of course, to say that no limits can be put upon the right to life, liberty and security of the person. They clearly can, but only if they are imposed in accordance with the principles of fundamental justice and survive the tests in s. 1 as being reasonable and

justified in a free and democratic society. Nor is the government precluded from resort to s. 33 of the Charter in order to dispense with the requirements of fundamental justice when, in a case of emergency, it seeks to impose restrictions on the s. 7 right. This, however, will be a policy decision for which the government concerned will be politically accountable to the people. As it is, s. 94 cannot, in my view, be saved by s. 1 if it violates s. 7. The sole question is whether it violates s. 7.

My colleague, in finding that s. 94 offends the principles of fundamental justice, has relied heavily upon the common law which precluded punishment in the absence of a guilty mind. We are not, however, dealing with a common law crime here. We are dealing with a statutory offence as to which the Legislature has stated in no uncertain terms that guilt is established by proof of the act itself.

Unlike my colleague, I do not think that ss. 8 to 14 of the Charter shed much light on the interpretation of the phrase "in accordance with the principles of fundamental justice" as used in s. 7. I find them very helpful as illustrating facets of the right to life, liberty and security of the person. I am not ready at this point, however, to equate unreasonableness or arbitrariness or tardiness as used in some of these sections with a violation of the principles of fundamental justice as used in s. 7. Delay, for example, may be explained away or excused or justified on a number of grounds under s. 1. I prefer, therefore, to treat these sections as self-standing provisions, as indeed they are.

I approach the interpretive problem raised by the phrase "the principles of fundamental justice" on the assumption that the Legislature was very familiar with the concepts of "natural justice" and "due process" and the way in which those phrases had been judicially construed and applied. Yet they chose neither. Instead, they chose the phrase "the principles of fundamental justice". What is "fundamental justice"? We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice"? I am not entirely sure. We have been left by the Legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of the person — surely one of the most basic rights in a free and democratic society — then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.

It has been argued very forcefully that s. 7 is concerned only with procedural injustice but I have difficulty with that proposition. There is absolutely nothing in the section to support such a limited construction. Indeed, it is hard to see why one's life and liberty should be protected against procedural injustice and not against substantive injustice in a Charter that opens with the declaration:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

and sets out the guarantee in broad and general terms as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system. Certainly, the rule of law acknowledged in the preamble as one of the foundations on which our society is built is more than mere procedure. It will be for the courts to determine the principles which fall under the rubric "the principles of fundamental justice". Obviously, not all principles of law are covered by the phrase; only those which are basic to our system of justice.

I have grave doubts that the dichotomy between substance and procedure which may have served a useful purpose in other areas of the law such as administrative law and private international law should be imported into s. 7 of the Charter. In many instances the line between substance and procedure is a very narrow one. For example, the presumption of innocence protected in s. 11(*d*) of the Charter may be viewed as a substantive principle of fundamental justice but it clearly has both a substantive and a procedural aspect. Indeed, any rebuttable presumption of fact may be viewed as procedural, as going primarily to the allocation of the burden of proof. Nevertheless, there is also an interest of substance to be protected by the presumption, namely, the right of an accused to be treated as innocent until proved otherwise by the Crown. This right has both a societal and an individual aspect and is clearly fundamental to our justice system. I see no particular virtue in isolating its procedural from its substantive elements or *vice versa* for purposes of s. 7. A similar analysis may be made of the rule against double jeopardy protected in s. 11(*h*).

How then are we to decide whether attaching a mandatory term of imprisonment to an absolute liability offence created by statute

offends a principle of fundamental justice? I believe we must turn to the theory of punishment for the answer.

3. *Punishment and fundamental justice*

It is now generally accepted among penologists that there are five main objectives of a penal system: see Nigel Walker, *Sentencing in a Rational Society* (1969). They are:

(1) to protect offenders and suspected offenders against unofficial retaliation;

(2) to reduce the incidence of crime;

(3) to ensure that offenders atone for their offences;

(4) to keep punishment to the minimum necessary to achieve the objectives of the system, and

(5) to express society's abhorrence of crime.

Apart from death, imprisonment is the most severe sentence imposed by the law and is generally viewed as a last resort, *i.e.*, as appropriate only when it can be shown that no other sanction can achieve the objectives of the system.

The Law Reform Commission of Canada, in its Working Paper 11 — Imprisonment and Release (*Studies on Imprisonment*, 1976), states at p. 10:

> Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective.

Because of the absolute liability nature of the offence created by s. 94(2) of the *Motor Vehicle Act* a person can be convicted under the section even though he was unaware at the time he was driving that his licence was suspended and was unable to find this out despite the exercise of due diligence. While the Legislature may as a matter of government policy make this an offence, and we cannot question its wisdom in this regard, the question is whether it can make it mandatory for the courts to deprive a person convicted of it of his liberty without violating s. 7. This, in turn, depends on whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproprotionate to the offence and quite incompatible with the objective of a penal system referred to in para. (4) above.

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system. This is not to say that there is an inherently appropriate relationship between a particular offence and its punishment but rather that there is a scale of offences and punishments into which the particular offence and punishment must fit. Obviously, this cannot be done with mathematical precision and many different factors will go into the assessment of the seriousness of a particular offence for purposes of determining the appropriate punishment but it does provide a workable conventional framework for sentencing. Indeed, judges in the exercise of their sentencing discretion have been employing such a scale for over 100 years.

I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. It is not required to reduce the incidence of the offence. It is beyond anything required to satisfy the need for "atonement". And society, in my opinion, would not find abhorrent an unintentional and unknowing violation of the section. I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system. Section 94(2) is accordingly inconsistent with s. 7 of the Charter and must, to the extent of the inconsistency, be declared of no force and effect under s. 52. I express no view as to whether a mandatory term of imprisonment for such an offence represents an arbitrary imprisonment within the meaning of s. 9 of the Charter or "cruel and unusual treatment or punishment" within the meaning of s. 12 because it is not necessary to decide those issues in order to answer the constitutional question posed.

I would dismiss the appeal and answer the constitutional question in the negative.

LE DAIN J. concurs with LAMER J.

Appeal dismissed.