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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

1979

REPORT

advisory and investigatory commissions

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13

REPORT 13
ADVISORY
AND
INVESTIGATORY
COMMISSIONS

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December, 1979

Senator, The Honourable Jacques Flynn,
P.C., Q.C.,
Minister of Justice,
Ottawa, Canada.

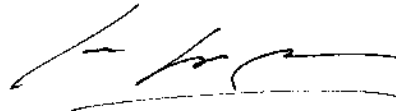
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on the *Inquiries Act*.

Yours respectfully,



Francis C. Muldoon, Q.C.
Chairman



Jean-Louis Baudouin, Q.C.
Vice-Chairman



Gerard V. La Forest, Q.C.
Commissioner



Judge Edward James Houston
Commissioner



Mr. Justice Jacques Ducros
Commissioner

REPORT
ON
ADVISORY
AND
INVESTIGATORY
COMMISSIONS

Commission

Francis C. Muldoon, Q.C., Chairman
Jean-Louis Baudouin, Q.C., Vice-Chairman
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I

Introduction

General

Commissions of inquiry are an important part of Canadian government. As Schroeder J.A. said in *Re The Ontario Crime Commission* [1962] O.R. 872, at 888: "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 . . .".

Since 1867 there have been about 400 public inquiries into matters "connected with the good government of Canada or the conduct of any part of the public business thereof" (section 2 of the present Act). There have been close to 1,500 departmental investigations into "the state and management of the business, or any part of the business, of such department (any department of the Public Service) . . . and the conduct of any person in such service, so far as the same relates to his official duties" (section 6). Some commissions of inquiry, and their reports, have been unnoticed and ineffective; others have encapsulated a controversy of the day, made headlines, and — less often — changed laws or policies. Canadian commissions of inquiry in some measure mirror the concerns of history; part of the national story is found in the reports on federal-provincial relations, health services, freight rates, television

broadcasting, government organization, taxation, bilingualism and biculturalism, the non-medical use of drugs, and so on. And many important and dramatic stories have unfolded in the course of departmental investigations.

And so the *Inquiries Act* is an important statute, worthy of close consideration by anyone concerned with good government. In particular, it requires study since in recent times commissions and their work have been the object of a wide variety of criticism. This criticism has come from diverse quarters — politicians, the press, witnesses who have appeared before commissions, even commissioners and commission counsel. It has been said that some commissions are biased or incompetent; unduly secretive; insensitive to human rights; lacking in the powers required to do a good job; too powerful; and so on. The Law Reform Commission, prompted in part by such comments, undertook a review of the Act and of the institution of commissions of inquiry. It then issued Working Paper 17, in 1977, setting forth its tentative views on the subject.

Considerable consultation took place in the preparation of that paper — with chairmen and counsel of some of the major commissions of inquiry, with a committee selected by the Canadian Bar from various parts of Canada who had had experience with such commissions, and many others. Further consultations were held following the issue of the Working Paper and the Commission received numerous comments from members of the Bar and others. Two members of our Commission also had the benefit of the views of two important ongoing Commissions of Inquiry in Great Britain who confirmed a number of matters tentatively set forth in that Working Paper.

The comments on Working Paper 17 were in general favourable; for example, parts were cited with approval in the Berger Commission Report on the Northern Pipeline. Not surprisingly, then, we have not altered the views the Commission set forth in the Working Paper in any significant way. In making this Report, therefore, the Commission does not propose to set forth the rationale for these views in any detail.

For more detailed discussion of the analysis and reasoning underlying these views, reference should be made to the Working Paper. Here we have attempted to set forth our recommendations in as clear and concise a manner as possible.

Most of these recommendations are incorporated in the proposed new Advisory and Investigatory Commissions Act set forth in this Report. Though the Act differs in form from the working draft which appeared in the Working Paper, it is, for the most part, intended to reproduce the substance of that draft. The new draft reflects an attempt to simplify the form and expression of the law. For ease of reference, we have noted the corresponding sections in the working draft, as well as in the present *Inquiries Act*.

The Reforms Proposed

The proposed Advisory and Investigatory Commissions Act, the Commission believes, effects a number of reforms in the law as it appears in the existing *Inquiries Act*. First of all, the proposed Act more carefully defines the powers of commissions. This is done in a number of ways, for example, by giving different powers to commissions according to whether their functions are advisory or investigatory, and again by setting forth the basic criteria for the admission or rejection of evidence.

The proposed Act also affords greater protection for all who participate in commission proceedings. In a general way, the distinction between the powers of advisory and investigatory commissions is of assistance in achieving this end, but there are specific provisions as well. Thus commission chairmen, commission counsel and persons appearing before them receive protection against harassment by suits for defamation, and the privileges available to witnesses in judicial proceedings are extended to witnesses who testify before commissions.

The proposed Act also contains provisions for encouraging openness and public participation. Thus it expressly provides for unrestricted reporting of commission proceedings. A commission, it is true, may in its discretion hold closed hearings, but the types of criteria governing this discretion — *e.g.* the protection of personal privacy, national security and so on — are spelled out in the Act. Again public participation can be promoted by the discretionary power given to commissions to pay the expenses of persons making representations to them. Openness is further fostered by the provision requiring the commission to release its report within thirty days of its submission to the Governor in Council. However, if there are good reasons for delay, then the Governor in Council may delay its publication.

Some provisions are aimed at increasing the efficiency of commissions. The section authorizing commissions to prepare rules of procedure is of this kind. So is that empowering a commission to obtain a search warrant, but to ensure that the power to search is not abused, a search warrant can be issued only by the ordinary courts, not by the commission itself. Efficiency also underlies the recommendation discussed later in this report, that a guide be prepared to assist commissioners in the performance of their duties.

Finally, we might note that the new Act makes no reference to review of commission proceedings by the courts, a matter canvassed at some length in the Working Paper. This, we think, is a more general question touching judicial review generally. The Commission has already set forth its tentative views on the question in the Working Paper 18 on the Federal Court, and it proposes to set forth its final recommendations in the Report to Parliament on that subject.

Advisory and Investigatory Commissions

The recommendation in the Working Paper which has resulted in the greatest divergence of opinion is that proposing

that commissions now coming under the Act be legally divided into investigatory commissions and advisory commissions, and that each should be given only those powers suitable to its functions. The Commission has given earnest consideration to the arguments of those who hold the contrary opinion, but we have firmly concluded that the tentative views set forth in the Working Paper are sound.

As we said in the Working Paper, careful consideration clearly suggests that commissions of inquiry are of two general types. There are commissions which advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And there are commissions which investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government. Of course, many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy. However, almost every inquiry either primarily advises or primarily investigates.

In their advisory role, commissions of inquiry possess special possibilities. They may be able to do what Parliament cannot. The rightful responsiveness of Parliament to the current concerns of Canadians makes it difficult for legislators to grapple with complex problems which are not of immediate political significance, and which require considerable time, objectivity and expertise for their solution. Still, as democratic as Parliament may be, there remains an important need in Canada for other means of expressing opinions and influencing policy-making — what have been called “institutions of consultation”. As for the executive, it shares the characteristics of the legislature; it, too, needs advice on expert solutions and public opinion. And the public service, a creature of its political master and subject to the master’s disabilities, has no constituency of its own. It is difficult — and perhaps improper — for the public service to gather and transmit public opinion independently.

Investigatory commissions, like advisory commissions, supplement the mainstream institutions of government by performing tasks which these institutions may do less well. Often investigatory commissions are examining government itself. Clearly the public service cannot reasonably perform inquiries of this sort. Parliament and its committees may not be effective investigators; their proceedings are adversarial and partisan in nature, constrained by party discipline and rigorous time-tables, concerned with a multiplicity of subjects, perhaps without easy access to appropriate and expert advice. What of the courts? They adjudicate on alleged facts produced by the investigations of others, and then only when the substantive law is engaged. And as for the police, the legitimate scope of their investigations is limited in our kind of political system and society.

Form should follow function. Our proposed new Act reflects the distinction between advisory and investigatory commissions of inquiry. It requires the Governor in Council to choose between the two sorts and, presumably, justify the choice. It tailors the powers of a commission and the rights of persons affected by a commission's activity to the nature of the task to be performed by the commission.

A commission of inquiry should be regarded as an unusual institution which may seriously affect individual rights. The power to compel people to give evidence under oath to a body appointed by the executive but responsible to no one is not to be given lightly. The inquiry system must provide a means of conducting an inquiry with the least possible danger to individuals or organizations that may be caught up in the process. Many kinds of inquiry do not require strong powers — for example, subpoena or contempt powers. Such inquiries are what we term advisory inquiries, and it is to provide for them that we offer the section on advisory inquiries in our proposed Advisory and Investigatory Commissions Act. At the same time, the Law Reform Commission realizes that many inquiries have an investigatory task which can properly be discharged only if the commission has strong powers. The section on investigatory commissions in our proposed statute gives these powers, but at the same time makes considerable

effort to give those involved a commensurate measure of protection.

Those who argue for the continuation of the present system under which there is only one type of commission — whether its functions are investigatory or advisory — raise a number of considerations. They argue, first of all, that abuse of commission powers is rare. The Law Reform Commission does not think this is a sufficient answer. If a governmental power is not necessary and is capable of abuse, it should not be given. It is argued, again, that the Government would ignore the distinction and create only investigatory commissions, whether their functions were investigatory or advisory. But if a government acted in contravention of the obvious intent of Parliament in this way, it would raise a political issue. The opposition could question whether a commission is truly “of substantial public importance” as required in the proposed Act, and whether it is essentially an investigatory commission. It is also suggested that the proposal would not work because people would not come forward to give their views. This belies the fact that compulsion is now seldom used by commissions whose functions are essentially advisory. All these arguments, in fact, fly in the face of British experience. Most British Commissions to advise and investigate have no formal powers. Members of the Commission spoke to the Commissioners and staff of two recent British Royal Commissions having wide-ranging mandates — one respecting the criminal justice system, another respecting the provision of legal services. Neither had powers of compelling evidence, and neither found it necessary or desirable to have such powers.

Now, while this may be fine in theory and from available practical experience, what, it may be asked, is to be done if an advisory commission finds itself unable to perform its function adequately without stronger powers? We decided to meet this argument. Our answer is that in these circumstances a commission should return to the Governor in Council and request those powers. If the case for stronger powers is sound, our proposed Act provides that the Cabinet should grant them. This too would raise a political question. The

opposition could raise the issue. In a democracy, that should be the situation where there is a questionable grant of powers to compel the citizen to reveal information to a governmental body.

A Guide for Commissioners

The Law Reform Commission has on several occasions stressed that not all law reform takes the form of legislative enactment. Law reform can equally take place, for example, by improving the administration of the law. The following proposal is of this kind.

A person who suddenly finds himself a commissioner has seldom had previous experience with commissions of inquiry or anything resembling them. Even lawyers and judges, used to the workings of the legal system, may know little about the many administrative and legal problems associated with inquiries. A clear and comprehensive statute is necessary, but not sufficient, for the proper workings of a commission; there should be in addition a "guide" or "manual" for the assistance of those involved in an inquiry. Working Paper 17 gives some indication of what the precise contents of such a guide might be. It should provide both legal and administrative guidance.

During our consultations, former commissioners of inquiry and commission counsel underlined the importance of this recommendation. The British Royal Commission already mentioned also stressed the importance of the matter. The general instructions which exist in that country have been found useful and it was thought that fuller instructions would be desirable.

Other Statutes Incorporating Inquiries Powers

Some fifty statutes confer powers of inquiry and refer to the *Inquiries Act*, and more than forty others confer various powers of inquiry without reference to the Act. Lists of these appear in Appendices C and D of the Working Paper. Obviously consequential changes will be required of the statutes referring to the *Inquiries Act*. But we further think that in due course the statutes should be reviewed by those responsible for their administration. As we said in the Working Paper, we are in principle opposed to the granting of powers in one statute by reference to another if the effect of such a grant is either to give inappropriate authority or to prevent easy and full knowledge of powers. It is desirable that powers be tailored to meet exactly the needs of any given office or circumstances; reference to a set of powers given by another statute for another purpose is unlikely to produce this result. Moreover, when powers are granted in this way, it is often difficult, especially for the public at large, to determine exactly who may do what. Ultimately, we would prefer that reference in other statutes to the *Inquiries Act* or its successor be deleted, and that those other statutes explicitly set forth whatever powers and structure are appropriate for the circumstances.

Conclusion

We therefore recommend:

1. *that a new Advisory and Investigatory Act be enacted as set forth in this Report;*

This Act is intended

- to define commission powers more carefully
- to provide better protection for those appearing before commissions

- to make commissions more open and to provide for participation by the public
 - to increase the efficiency of commissions.
2. *that a manual be prepared to provide guidelines for commissioners respecting administrative, legal and other relevant matters;*
 3. *that powers of inquiry in other Acts be carefully thought through so as not to grant unnecessary powers; automatic reference to the powers in the Inquiries Act or its proposed successor should be avoided.*

II

Advisory and Investigatory Commissions Act

A Word on Drafting

The Commission has from its inception been keenly aware of the many problems related to the expression of the law. In particular, in a bilingual country like Canada, it is important that federal statutes be expressed in a form that is suitable to both languages and the two systems of laws. For this reason, the Commission takes special care to draft its proposed legislation in a form that meets the needs of both linguistic communities of Canada.

In structuring the present draft, we have attempted to follow an arrangement capable of easy understanding. Thus the draft moves from the general to the particular, sets forth at an early stage the provisions applicable to both types of commissions (leaving until later the particular provisions applicable only to one type of commission), uses a direct and concise style, eliminating all unnecessary cross-references. In addition, neither the English nor French versions slavishly reproduces the other. Rather each version attempts to express the substance of the provisions in accordance with the spirit of that language.

Finally, the proposed legislative text is preceded by a table of contents and followed by an index. Although we are

not formally recommending the adoption of this course, we believe this mode of presenting statutes could prove useful to the regular, and certainly to the occasional, user of statute books. This merits consideration, particularly in the case of complex statutes. A Table of Contents and an Index as presented in this report would, we think, be useful for every statute.

Advisory and Investigatory Commissions Act

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ESTABLISHMENT OF COMMISSIONS

Advisory commission	1. The Governor in Council may establish
Investigatory commission	(a) advisory commissions to advise him on any matter relating to the good government of Canada, and (b) investigatory commissions to investigate any matter he deems to be of substantial public importance.
Mandate and appointment	2. The Governor in Council shall define the mandate of a Commission, appoint its commissioners and designate its chairman.

GENERAL PROVISIONS

Practice and procedure	3. A commission shall establish and publish its rules of practice and procedure.
Resources	4. A commission may engage the services of counsel, consultants and support personnel, and may arrange for physical facilities, to carry out its mandate.
Public hearings	5. Hearings of a commission are open to the public, but the commission may hold a hearing <i>in camera</i> if it is satisfied that considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in open hearings.

Representation
by counsel

6. Any person who appears before a commission is entitled to be represented by counsel.

Expenses
for making
representations

7. A commission may, in order to promote the full expression of information and opinion, pay any of the expenses or losses incurred by a person for the purpose of making representations.

Immunity of
commissioners
and counsel

8. Commissioners and commission counsel are immune from any action for defamation in the performance of their duties.

Immunity of
witness

9. A witness who testifies under oath before a commission is immune from any action for defamation unless he acts out of malice.

Admissible
evidence

10. (1) All relevant evidence is admissible before a commission except as provided in this Act.

Relevant
evidence

(2) Relevant evidence means evidence that has any tendency in reason to prove a fact in issue that is related to the mandate of the commission.

Excluded
evidence

(3) Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues or undue consumption of time.

Complaint

11. (1) Any person who complains that testimony given before a commission may adversely affect his interests shall be heard on such matter.

Examination
of witnesses

(2) A commission may authorize the complainant to examine witnesses personally or by his counsel.

Reporting	12. (1) Commission hearings may be reported without restriction.
Restriction on reporting	(2) A commission may forbid or restrict the reporting of any matter if it believes that considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in having hearings reported without restriction.
Commission report	13. A commission shall submit its report to the Governor in Council and shall publish it within thirty days of its submission unless the Governor in Council otherwise directs.
Misconduct of a person	14. (1) No report of a commission that alleges misconduct by a person shall be made until reasonable notice of the allegation has been given to that person and he has had an opportunity to be heard.
Witnesses	(2) The commission may give a person against whom misconduct has been alleged an opportunity to call witnesses.

ADVISORY COMMISSIONS

Duty	15. An advisory commission shall hear anyone who satisfies the commission that he has a real interest in any matter relating to its mandate.
Conferring powers of an investigatory commission	16. (1) Upon the application of an advisory commission, the Governor in Council may, if he deems it necessary to enable the commission to carry out its mandate, confer upon it any of the powers of an investigatory commission,

subject to such restrictions and conditions as he deems fit.

Privileges
and protection
of any person

(2) Where any of the powers of an investigatory commission have been conferred upon an advisory commission by the Governor in Council, the privileges and protection afforded to any person who appears before an investigatory commission fully apply.

INVESTIGATORY COMMISSIONS

Powers

17. (1) An investigatory commission may summon or subpoena a person to testify under oath or to produce any document or thing relevant to its mandate.

Form of
summons
or subpoenas

(2) A summons or subpoena shall be in the form set forth in the Schedule and signed by the chairman or a commissioner designated by the commission.

Enforceability

(3) A summons or subpoena has effect throughout Canada.

Travel
advance

18. A person to whom a summons or subpoena is issued shall, at the time of service, be paid such travelling expenses as the commission deems reasonable.

Person
to take
evidence

19. (1) Where circumstances make it advisable, an investigatory commission may authorize a person to take evidence and report to the commission.

Oath

(2) A person authorized to take evidence shall, before doing so, be sworn by a justice of the peace.

Access to institutions and records

20. An investigatory commission shall have access to any public office or institution and any record or papers therein for the purpose of carrying out its mandate.

Search warrant

21. (1) A judge of a superior court of criminal jurisdiction may issue to a peace officer a search warrant at the request of an investigatory commission if he has reasonable ground to believe that there is in the place specified in the request of the commission anything that may be of assistance to the investigation.

Interpretation

(2) In this Act, "judge of a superior court of criminal jurisdiction" and "peace officer" have the meanings given them in the *Criminal Code*.

Form of warrant

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

Possession and delivery

22. A peace officer who makes a search may remove anything that may be relevant to the mandate of the commission, and shall deliver it to the commission.

Custody of thing

23. (1) An investigatory commission may for a period of three months keep custody of anything delivered to it by the peace officer, unless a judge of a superior court of criminal jurisdiction, on application by the commission or any interested person, extend or shorten this period.

Disposal of thing

(2) At the end of the period of custody, the commission shall return the thing to the person entitled to it.

Privileges
of witness

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

Offences

25. (1) Every person who

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

(b) refuses to be sworn,

(c) refuses to answer any proper question,

(d) refuses to produce any document or other thing,

(e) refuses to comply with an order of the commission forbidding or restricting reporting,

(f) disrupts a hearing of the commission,

commits an offence.

Penalties

(2) Any person who is guilty of an offence under this section is liable on summary conviction to a maximum fine of one thousand dollars or to imprisonment for a maximum term of six months, or to both.

FOREIGN COMMISSIONS

Foreign
commissions

26. The Governor in Council may confer any of the powers of a commission under this Act upon an advisory or investigatory body established in a foreign country.

REPEAL

Repeal

27. The *Inquiries Act* is repealed.

SCHEDULE

Form A
(Section 17)

.....
(Name of commission)

S U M M O N S

M
(name)

.....
(no., street)

..... (city, province) (postal code)

You are hereby summoned to attend at a hearing conducted by the
above-mentioned Commission to give evidence concerning
the matters relevant to the mandate of the commission and to bring with you
and produce the following documents and things

.....
.....

Please be present at the time and place indicated below and thereafter until
the hearing is concluded or the commission otherwise orders.

..... 19
(date) (time)

.....
(place)

.....
(no., street)

.....
(city, province)

Signed at
(city)

on 19
(date)

on behalf of the commission.

.....
(signature)

Form B
(Section 17)

.....
(Name of commission)

S U B P O E N A

M
(name)

.....
(no., street)

.....
(city, province)

.....
(postal code)

You are hereby summoned and required to attend at a hearing conducted by the above-mentioned Commission to give evidence concerning the matters relevant to the mandate of the Commission, and to bring with you and produce the following documents and things

.....
.....

Please be present at the time and place indicated below and thereafter until the hearing is concluded or the commission otherwise orders.

.....
(date)

19

.....
(time)

.....
(place)

.....
(no., street)

.....
(city, province)

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

Signed at
(city)

on 19.....
(date)

on behalf of the commission.

.....
(signature)

Form C
(Section 21)

.....
(Name of commission)

S E A R C H W A R R A N T

To the Peace Officers in the
(Territorial Division)

WHEREAS it appears on the oath of
(name of witness)

of the on
(address of witness) (date of testimony)

that there are reasonable grounds for believing that:

.....
(description of things to be searched for and the inquiry in respect of which search is to be made)

are in at
(described premises) (address)

hereinafter called the premises.

This is, therefore, to authorize and require you between the hours of

..... to enter
(as the judge may direct)

into the said premises and to search for the said things and to bring them before the Commission.

GIVEN UNDER MY HAND at
(city)

on 19 ..
(date)

.....
(signature)

.....
(Name of Court)

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III

Comments

Section 1: (Working Paper sections 2 and 6; Inquiries Act† sections 2 and 6)*

ESTABLISHMENT OF COMMISSIONS

	1. The Governor in Council may establish
Advisory commission	(a) advisory commissions to advise him on any matter relating to the good government of Canada, and
Investigatory commission	(b) investigatory commissions to investigate any matter he deems to be of substantial public importance.

Paragraph (a) of the section permits the Cabinet (Governor in Council) to establish a commission to advise, in effect, on any subject (there is little if anything which cannot be described as connected with "the good government of Canada. . ."). Such flexibility is appropriate to the creation of purely advisory commissions. It is impossible to anticipate even broad categories into which the subject-matter of advisory commissions might fall.

*Refers throughout this chapter to Law Reform Commission Working Paper 17 (1977), *Commissions of Inquiry*.

†Refers throughout this chapter to *Inquiries Act*, R.S.C. 1970, Chap. I-13.

Paragraph (b), dealing with the establishment of investigatory commissions, requires the Cabinet to deem the subject to be investigated of "substantial public importance" before a commission with significant powers comes into being. What is of "substantial public importance" is a political question for the Cabinet alone to decide. The "substantial public importance" formula is a good deal stronger than the phrase "expedient to cause inquiry to be made" found in the Ontario *Public Inquiries Act, 1971*, S.O. 1971, c. 49, sup., s. 2, and in the Alberta *Public Inquiries Act, R.S.A. 1970*, c. 296, s. 2. This requires a judgment by the Cabinet that the reasons are substantial.

With the new statute offering a choice between advisory and investigatory commissions, it will be unnecessary to grant every commission strong powers whether it needs them or not.

Section 2: (Working Paper sections 3 and 7; Inquiries Act section 3 — Partially new)

Mandate
and
appointment

2. The Governor in Council shall define the mandate of a Commission, appoint its commissioners and designate its chairman.

This section provides for definition, by the Cabinet, of the Commission's mandate (be it advisory or investigatory) and appointment of the commissioners, one of whom shall be designated chairman.

With respect to investigatory commissions, it is important that the mandate be quite specific and as narrow as is reasonable in the circumstances. It is contrary to the principles behind our form of government and system of law to permit unnecessarily wide-ranging investigation.

The section places no restriction on the number or qualifications of those who sit on an investigatory commission. Flexibility is desirable. There is, however, something to be said, generally speaking, for appointing members of the

judiciary as commissioners. Judges are well acquainted with the process of establishing facts through hearing testimony, while providing appropriate safeguards for witnesses. The public respects judges and regards them as objective. There is, however, danger that such respect may be eroded by frequent or inappropriate appointments of judges to commissions. The Cabinet, in considering the appointment of a judge to an investigatory commission, should bear in mind the dangers of involving a member of the judiciary in what is, or might become, a subject of partisan controversy. This is a determination which we think cannot be made in the light of abstract roles, but must be left to the Cabinet which should weigh the advantages of appointing or not appointing judges in the light of the above considerations.

Section 3: (Working Paper section 15; Inquiries Act section: nil — New)

GENERAL PROVISIONS

Practice
and
Procedure

3. A commission shall establish and publish its rules of practice and procedure.

The section simply requires a commission, of either type, to establish rules of procedure. Preparation of such rules operates in favour of efficiency and their publication affords guidance to the public in dealing with a commission.

Section 4: (Working Paper section 16; Inquiries Act subsection 11(1))

Resources

4. A commission may engage the services of counsel, consultants and support personnel, and may arrange for physical facilities, to carry out its mandate.

This section makes provision for the appointment by commissions of whatever staff they require, together with the

establishment of necessary offices and other facilities. It makes clear the important principle that the appointment of staff is solely within the power of the commission.

Section 5: (Working Paper section 19; Inquiries Act section: nil — New)

Public
hearings

5. Hearings of a commission are open to the public, but the Commission may hold a hearing *in camera* if it is satisfied that considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in open hearings.

An important function of advisory commissions is often to ascertain public sentiment and transmit it in a coherent way to the government, or sometimes to increase general sensitivity towards a particular matter. Investigatory commissions frequently are established to allay public concern about some issues. Clearly, as a matter of principle, commissions of inquiry should function publicly, and this is set forth in this new section.

Sometimes, however, a commission may need to go behind closed doors. The section sets forth the circumstances which may require *in camera* hearings – when “considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in open hearings”. This formulation expressly recognizes the public interest in open hearings and sets forth criteria a commission should employ in determining to hear some or all matters behind closed doors.

Section 6: (Working Paper section 18; Inquiries Act section 12 — Partially new)

Representation
by counsel

6. Any person who appears before a commission is entitled to be represented by counsel.

It is desirable that a new statute formally express the principle that “any person who appears before a commission is entitled to be represented by counsel”. This fundamental right, set forth in this new section, applies equally to advisory and investigatory commissions.

Section 7: (Working Paper subsections 4(2) and 8(6); Inquiries Act section: nil — New)

Expenses
for appearance

7. A commission may, in order to promote the full expression of information and opinion, pay any of the expenses or losses incurred by a person for the purpose of making representations.

The present *Inquiries Act* provides only that, for departmental inquiries, reasonable travelling expenses shall be paid “to any person . . . summoned at the time of service of the subpoena, request or summons”. Nothing permits even a witness fee to be paid, let alone all or part of the legal fees or other expenses, such as research expenses, “incurred by a person for the purpose of making representations”. There are occasions, too, when a person in giving assistance to a commission may have to incur losses in earnings or otherwise beyond what he should normally be expected to incur.

It is important, particularly with respect to advisory commissions, that the expression of opinion be facilitated. It may be in some cases that appropriate intervention or representation should be made possible, and the quality of the intervention or representation promoted, by complete or partial funding by the commission of those involved. The criteria for funding would be subject to the discretion of the commission. Section 7 permits such funding to take place.

In the case of investigatory commissions, there may be occasions when the commission wishes to pay some of the expenses — for example, the legal fees — of a witness. For example, a commission may wish to do so when someone

comes to the commission to refute false and irresponsible allegations made against him by another witness.

Section 8: (Working Paper section 17; Inquiries Act section: nil — New)

Immunity
of
commissioners
and counsel

8. Commissioners and commission counsel are immune from any action for defamation in the performance of their duties.

The section provides that “commissioners and commission counsel are immune from any action for defamation in the performance of their duties”. The intention of the section is to provide commissioners and commission counsel with the same immunities possessed by a judge of the superior court. Thus, no action lies for words spoken in the ordinary course of proceedings. There is absolute privilege, provided that what is said relates to the proceedings. Clearly such protection is desirable; the work of a commission, be it advisory or investigatory, should not be impeded by fear of frivolous civil suits.

Section 9: (Working Paper section 17; Inquiries Act section: nil — New)

Immunity
of witness

9. A witness who testifies under oath before a commission is immune from any action for defamation unless he acts out of malice.

The section is intended to give witnesses who are testifying on oath before a commission an immunity similar to that enjoyed by witnesses in judicial proceedings, except that it is made clear the protection does not extend to words spoken in malice. The protection afforded witnesses is therefore somewhat less than that afforded commissioners and commission counsel. This permits recourse to those who may be the object of malicious remarks by witnesses before a commission. It should be noted that section 11 provides an opportunity for those whose interests have been adversely affected by testimony before a commission to appear before the commission and to be heard.

Section 10: (Working Paper section: nil — New; Inquiries Act section: nil — New)

Admissible evidence

10. (1) All relevant evidence is admissible before a commission except as provided in this Act.

Relevant evidence

(2) Relevant evidence means evidence that has any tendency in reason to prove a fact in issue that is related to the mandate of the commission.

Excluded evidence

(3) Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues or undue consumption of time.

There is no provision in the existing *Inquiries Act* respecting what is admissible in evidence. Commissions are not required to follow the rules of evidence in judicial proceedings but in practice commissioners who are members of the legal profession will naturally tend to rely on their experience with those rules of evidence in determining whether evidence is relevant, what weight should be attached to it, and so on.

The essential, for the purposes of advisory and investigatory commissions, can be reduced to the general rules of relevancy and exclusion set forth in sections 4 and 5 of the Evidence Code proposed in this Commission's Report on Evidence. That Report commented that "the basic axiom of any rational fact finding process must be that all information relevant in determining the issues is admissible" with "relevancy" described as "a relationship between an offered item of evidence and a proposition sought to be proved". Section 10, therefore, incorporates, with appropriate modifications, in the proposed Advisory and Investigatory Commissions Act, sections 4 and 5 of the Evidence Code. Section 87 of the Code would automatically have applied these sections to such commissions. There is, subject to what is said in the next paragraph, no reason to incorporate the other rules of evidence. Obviously, lawyers and judges who sit as commissioners will

continue to rely on their experience in applying these rules. For the layman the rules set forth the basic criteria for the admission of evidence.

One defect in the existing situation is that privileges to refuse to testify in judicial proceedings do not automatically apply to testimony given on oath before commissions. This is dealt with by section 24 of our proposed statute. That section provides that the normal privileges enjoyed by a witness in judicial proceedings protect someone giving evidence to an investigatory commission. It is unnecessary (apart from the situation described in section 16) to extend this protection to those appearing before an advisory commission, since advisory commissions are not concerned with the investigation of wrong-doing, and since under the proposed new statute such commissions have no subpoena or contempt powers.

Section 11: (Working Paper section 13; Inquiries Act section: nil — New)

Complaint

11. (1) Any person who complains that testimony given before a commission may adversely affect his interests shall be heard on such matter.

Examination
of witnesses

(2) A commission may authorize the complainant to examine witnesses personally or by his counsel.

This section is new. It permits a person to comment before a commission on any testimony that he complains may adversely affect his interests. The commission is required (by the word "shall") to hear the comment. Whether or not such a person, or his counsel, may examine witnesses, is a matter left to the discretion of the commission. In exercising this discretion the commission should have regard for the importance of the interest affected and the need to proceed expeditiously with the commission's work.

The section is necessary to protect someone who is the object of allegations or attack by a commission witness. In

fairness, the person who is the object of adverse remarks must have the opportunity to reply. And it may be necessary to allow him or his counsel to examine witnesses.

Section 12: (Working Paper section 19; Inquiries Act section: nil — New)

Reporting **12. (1)** Commission hearings may be reported without restriction.

Restriction
on
reporting **(2)** A commission may forbid or restrict the reporting of any matter if it believes that considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in having hearings reported without restriction.

This section, also new, expresses the principle that news media may report commission hearings without restriction, while permitting a commission to forbid or restrict such reporting in certain circumstances.

Advisory commissions often have as an important purpose the gathering and expression of public sentiment on some point. Investigatory commissions are often intended to allay public concern. It follows that whenever possible commissions should operate in the full glare of publicity. Schroeder J.A. observed of organized crime in *Re The Ontario Crime Commission* that “inquiry and publicity are both powerful weapons in coping with this and other characteristic modern social evils”. Subsection 12(2) gives a commission discretion to issue an appropriate order to the media, and gives some guidance as to how that discretion should be exercised.

Section 13: (Working Paper section 21; Inquiries Act section: nil — New)

Commission
report **13.** A commission shall submit its report to the Governor in Council and shall publish it within thirty days of its

submission unless the Governor in Council otherwise directs.

This section is new. In order to protect their independence, commissions should have the clear power themselves to publish their report, except in highly unusual circumstances when the Governor in Council may prohibit publication. Much of the value of a commission lies in its independence which is promoted and publicized by self-publication.

Section 14: (Working Paper section 20; Inquiries Act section 13 — Partially new)

Misconduct
of a person

14. (1) No report of a commission that alleges misconduct by a person shall be made until reasonable notice of the allegation has been given to that person and he has had an opportunity to be heard.

Witnesses

(2) The commission may give a person against whom misconduct has been alleged an opportunity to call witnesses.

Both advisory and investigatory commissions may, in their reports, allege misconduct by a person. However, elementary fairness and basic principles underlying our system of law require that any such person be given reasonable notice of the allegation and an opportunity to be heard concerning it. Generally speaking, that will mean a person who has already been a witness reappearing before the commission. Subsection 14(1) of the proposed Advisory and Investigatory Commissions Act — a modified version of section 13 of the present *Inquiries Act* — provides for this process.

Subsection 14(2) gives a commission discretion to permit a person who is the object of a misconduct allegation the opportunity to call witnesses. In some circumstances, that person will be able to address himself meaningfully to those allegations only if he is permitted to present witnesses to the commission.

Section 15: (Working Paper subsection 4(1); Inquiries Act section: nil — New)

ADVISORY COMMISSIONS

Duty

15. An advisory commission shall hear anyone who satisfies the commission that he has a real interest in any matter relating to its mandate.

This section helps promote the full expression of appropriate opinion before any advisory commission. It requires such a commission to hear anyone who has satisfied the commission that he has a real interest in any matter relating to its mandate. Generally, we would expect a commission to refuse to hear testimony which clearly would be highly frivolous or absolutely irrelevant; that is, “real interest” should be interpreted broadly. It should be remembered that generally a major function of an advisory commission is to hear public opinion and transmit it to the Governor in Council. Section 7 of our proposed statute, in the General Provisions, permits a commission at its discretion to pay some or all of the expenses, and even losses, incurred by a person presenting evidence to the commission.

Section 16: (Working Paper section 5; Inquiries Act section: nil — New)

Conferring powers of an investigatory commission

16. (1) Upon the application of an advisory commission, the Governor in Council may, if he deems it necessary to enable the commission to carry out its mandate, confer upon it any of the powers of an investigatory commission, subject to such restrictions and conditions as he deems fit.

Privileges and protection of any person

(2) Where any of the powers of an investigatory commission have been conferred upon an advisory commission by the Governor in Council, the

privileges and protection afforded to any person who appears before an investigatory commission fully apply.

Subsection 16(1) allows the Governor in Council, upon the application of an advisory commission, to confer upon it some or all of the powers of an investigatory commission, subject to such restrictions and conditions as he deems fit, if the Governor in Council deems that necessary for the advisory commission to carry out its mandate effectively. This subsection recognizes that on occasion an advisory commission, as its work develops and is defined, may discover that stronger powers are necessary. The subsection requires a political decision to be made — presumably one that can be justified — to grant extra powers.

Subsection 16(2) stipulates that where any extra powers are granted, “the privileges and protection afforded to any person who appears before an investigatory commission fully apply”. The powers of an investigatory commission and the protection afforded its witnesses are indivisible.

Section 17: (Working Paper subsections 8(1), 8(2), 8(3), 8(4); — Inquiries Act subsection 8(1))

INVESTIGATORY COMMISSIONS

Powers	17. (1) An investigatory commission may summon or subpoena a person to testify under oath or to produce any document or thing relevant to its mandate.
Form of summons or subpoenas	(2) A summons or subpoena shall be in the form set forth in the Schedule and signed by the chairman or a commissioner designated by the commission.
Enforceability	(3) A summons or subpoena has effect throughout Canada.

An investigatory commission, to function effectively, must have the power to summon or subpoena a person to testify under oath or to produce any document or thing relevant to the commission's mandate; such summons or subpoena has effect throughout Canada. The schedule of the proposed statute sets forth the form of a summons or subpoena. Section 17 is a modified form of subsection 8(1) of the present *Inquiries Act*.

Section 18: (Working Paper subsection 8(5); Inquiries Act subsection 8(2))

Travel
advance

18. A person to whom a summons or subpoena is issued shall, at the time of service, be paid such travelling expenses as the commission deems reasonable.

This section requires payment of "such travelling expenses as the commission deems reasonable" to a person to whom a summons or subpoena is issued. Payment is to be made at the time of service.

Section 19: (Working Paper section 9; Inquiries Act section 9)

Person
to take
evidence

19. (1) Where circumstances make it advisable, an investigatory commission may authorize a person to take evidence and report to the commission.

Oath

(2) A person authorized to take evidence shall, before doing so, be sworn by a justice of the peace.

On occasion it may be advisable for an investigatory commission to authorize a person to take evidence and report back to the commission. For example, it may be both unreasonable and unnecessary to expect some witnesses to travel great distances to attend commission hearings or to expect the whole commission to travel to the witnesses. Delegation of evidence-taking is the obvious answer. This section does not give this person the full powers of an investigatory

commission — for example, the issuing of summons and subpoenas.

Subsection 19(2) requires that a person authorized to take evidence shall, before he does so, be sworn by a justice of the peace.

Section 20: (Working Paper section 11; Inquiries Act section 7)

Access to
institutions
and records

20. An investigatory commission shall have access to any public office or institution and any record or papers therein for the purpose of carrying out its mandate.

Section 20 grants an investigatory commission “access to any public office or institution and any record or papers therein for the purpose of carrying out its mandate”. A similar power exists under section 7 of the present *Inquiries Act*.

Section 21: (Working Paper subsections 12(1), 12(5); Inquiries Act section: nil — New)

Search
warrant

21. (1) A judge of a superior court of criminal jurisdiction may issue to a peace officer a search warrant at the request of an investigatory commission if he has reasonable ground to believe that there is in the place specified in the request of the commission anything that may be of assistance to the investigation.

Interpretation

(2) In this Act, “judge of a superior court of criminal jurisdiction” and “peace officer” have the meanings given them in the *Criminal Code*.

Form of
warrant

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

This section makes search warrants available to an investigatory commission under certain circumstances. But this new power is put in the hands of the courts. The search warrant is issued to a peace officer by a judge of a superior court of criminal jurisdiction at the request of an investigatory commission; the judge must have “reasonable ground to believe that there is in the place specified . . . anything that may be of assistance to the investigation”. Search warrants are to be in the form set forth in the Schedule.

Section 22: (Working Paper subsection 12(2); Inquiries Act section: nil — New)

Possession
and delivery

22. A peace officer who makes a search may remove anything that may be relevant to the mandate of the commission, and shall deliver it to the commission.

The section follows from section 21 and is self-explanatory.

Section 23: (Working Paper subsections 12(3), 12(4); Inquiries Act section: nil — New)

Custody
of thing

23. (1) An investigatory commission may for a period of three months keep custody of anything delivered to it by the peace officer, unless a judge of a superior court of criminal jurisdiction, on application by the commission or any interested person, extend or shorten this period.

Disposal
of thing

(2) At the end of the period of custody, the commission shall return the thing to the person entitled to it.

This section describes the fate of anything delivered to the commission pursuant to section 22. The commission may keep anything so delivered for three months “unless a judge of a superior court of criminal jurisdiction, on application by

the commission or any interested person, extend or shorten this period". At the end of the period of custody, the commission is required to return the thing to the person entitled to it. An earlier return could of course be made.

Section 24: (Working Paper subsection 14(2); Inquiries Act section: nil — New)

Privileges
of witness

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

The section supplements, for investigatory commissions, the general provision regarding evidence found in section 10 of the proposed Act. It provides the additional protection necessary when a person's actions are subject to investigation.

These privileges must be available, for they are based on considerations of public policy which extend beyond judicial proceedings. If state secrets, the marital relationship, trade secrets and so on constitute valid reasons for refusing to give testimony in court, this is equally true of investigatory commissions. The Law Reform Commission has given its full views on privileges in its proposed Evidence Code. If the Code were adopted, the privileges therein set forth would, by virtue of section 87 of the Code, automatically apply to investigatory commissions.

Section 25: (Working Paper section 10; Inquiries Act section 10 — Partially new)

Offences

25. (1) Every person who
(a) fails without valid excuse to appear as required by subpoena,
(b) refuses to be sworn,
(c) refuses to answer any proper question,

(d) refuses to produce any document or other thing,

(e) refuses to comply with an order of the commission forbidding or restricting reporting,

(f) disrupts a hearing of the commission,

commits an offence.

Penalties

(2) Any person who is guilty of an offence under this section is liable on summary conviction to a maximum fine of one thousand dollars or to imprisonment for a maximum term of six months, or to both.

This is the enforcement section. Much of it is based on section 10 of the present *Inquiries Act*. Paragraphs (e) and (f) are new; a penalty must be available for a person who refuses to comply with an order forbidding or restricting reporting, or who disrupts proceedings. A further change is provision for imprisonment as well as a fine.

The section does not permit a commission itself to punish for "contempt". Rather, an information must be laid before the ordinary courts. It is desirable, in the interests of civil liberties, to retain normal procedures.

Section 26: (Working Paper section 22; Inquiries Act section 14 — Partially new)

FOREIGN COMMISSIONS

Foreign
commissions

26. The Governor in Council may confer any of the powers of a commission under this Act upon an advisory or investigatory body established in a foreign country.

The section deals with foreign advisory or investigatory bodies, and permits the Governor in Council to grant such

bodies any of the powers of a commission under the proposed Act. Section 26 is a version of section 14 in the present *Inquiries Act*; that section was added in 1934 as a measure of international comity. The provision refers to foreign commissions, and not “international” commissions as the present Act does; this is obviously what is meant in the existing provision.

Section 27: (Working Paper section: nil — *New*; *Inquiries Act* section: nil — *New*)

REPEAL

Repeal

27. The *Inquiries Act* is repealed.

Self-explanatory.