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The Rights and Obligations of Those Subject to Inquiry and of Witnesses

David Wayne Scott
Sinclair Stevens Inquiry

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*David W. Scott, Q.C.**

1. INTRODUCTION

There are questions raised from time to time as to the desirability of continued utilization of the public inquiry as we know it. These questions ordinarily arise in the context of a consideration of the issues outlined in this paper, that is to say, the rights and obligations of those subject to inquiry. In a classic description of the public inquiry Mr. Justice Middleton observed as follows:

> 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 individual.

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* Scott & Aylen, Ottawa. Served as Commission Counsel in the Sinclair Stevens Inquiry. The writer is indebted to Fay Brunning-Howard, LL.B. (Queens) for her research assistance.

> 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.[1]

A contrary view, raising questions as to the adequacy of protection of the rights of individuals, has been expressed in an article written by Gordon F. Henderson entitled "Abuse of Power by Royal Commissions".[2]

2. THE POWERS OF COMMISSIONS OF INQUIRY

While the title of this paper identifies the "obligations" of witnesses and those subject to inquiry as one aspect of the study, it is apparent that this really invites an analysis of the extent of the powers of commissioners under inquiry legislation. It is against these powers that the adequacy of safeguards for the protection of individual rights ought to be tested and a balance struck.

(a) The Power to Summon Witnesses

The fundamental power of commissions of inquiry, frequently described as *the* coercive power, is that of summoning witnesses, requiring them to give evidence on oath or by affirmation, whether orally or in writing, and further requiring them to produce such documents and things as the commissioners deem requisite. This power is the hallmark of most inquiries legislation. It is tempered only by the proper exercise of discretion having regard to jurisdictional imperatives dictated by the precise mandate or terms of reference.

The powers described above are outlined in section 4 of the federal *Inquiries Act*.[3] They are matched in one form or another by equivalent powers in all inquiries legislation at the provincial level. The only modest departure from what is found in the sweeping federal power is in the Newfoundland statute.[4] A question arises as to whether the Order in Council establishing the commission must specify a power to compel production of documents or whether the statutory provision is broad enough to encompass this power by reason of its equating a commission to a court of law in terms of its ability to compel the attendance of witnesses. The *Public Inquiries Act* of Prince Edward Island[5] makes no specific provision for compelling testimony under oath. Presumably, the power is inferentially present, again, by way of the equating of commissions of inquiry with courts of record in civil cases.

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1 *Re Children's Aid Society of the County of York*, [1934] O.W.N. 418 at 421 (C.A.).
2 [1979] Spec. Lect. L.S.U.C. 403.
3 R.S.C. 1985, c. I-11.
4 *Public Enquiries Act*, R.S.N. 1970, c. 314.
5 R.S.P.E.I. 1974, c. P-30.

[In public discussion following this paper, Mr. Scott elaborated as follows:]

Dean Christie: Would you address the question of the breadth of the commission's power to issue subpoenas; perhaps you would give us your view on the issuing of subpoenas to judges.

Mr. Scott: Well, I think the test for issuing subpoenas is purely one of relevance. In other words, if a person has evidence to offer which is within the terms of reference in terms of relevance, then they are open to the exercise of subpoena power as is any other citizen. As I understand it, the judges in the Marshall Inquiry are claiming an immunity based on the independence of the judiciary. And if there is such an immunity, then the subpoenas will be quashed. I don't know whether there is or is not. But to me, the subpoena power contemplated in all these statutes is a coercive one and it applies to everybody and there are no exceptions unless there is some public interest or some privilege that excludes the exercise of that power, whether it applies to judges or not. We all have our own ideas as to what's happening here, but whether it will work or not is another question.

Dean Christie: Can I ask a rather more technical question about subpoenas? This comes out of experience as chair of arbitration boards or the labour board. As I understand it, the issue of a subpoena in a court proceeding is pretty much an administrative process that can then be challenged, usually in Chambers. In other contexts, including commissions of inquiry, there is not that same established mechanism for testing whether a subpoena is too broad or impractical. The problem arises particularly with subpoenas that order the bringing of documentation. Can you just explain to us from your experience, how that gets worked out, practically, in commission contexts?

Mr. Scott: The interesting thing about commissions is you read the statute and you see all these powers and then leap ahead and imagine yourself sitting in an office that is not even decorated yet. The commissioner is there and he's got his counsel and a few staff, and you are actually drafting the text of a subpoena and there is nobody there to even serve it, let alone enforce it. So you look at the statute and you see it says you have all the powers of a court of record for enforcing the attendance of witnesses. That to me is a definition of the commission of inquiry's entitlement to demand the attendance of witnesses. But to actually enforce it, you need, in effect, the mechanical process and that to me means the court. And so depending on the jurisdiction, if a witness did not turn up, for example, in a federal inquiry, I would apply *ex parte* as commission counsel in the Federal Court, Trial Division, for an order of the court requiring the attendance of that person before the commission. And I would do that *ex parte* and if the person felt that there was no obligation

to attend or wished to attack the subpoena, that would be done by notice to the commission before the judge or another judge of the court that issued the order.

In other words, it's one thing to say you can enforce the attendance of people, but you need, not only an order, but the mechanical processes in the court, including the sheriff or the constable, or contempt powers. Those simply do not exist in the process, although an attempt is made to create them in jurisdictions like Manitoba and Alberta.

Dean Christie: May I ask one more final question along these lines? I'm thinking of the particular problem that I have encountered with a subpoena, to bring documents, which is unduly broad. It is not that the person upon whom the subpoena is served is not willing to turn up and to bring along appropriate documents, it is just that the order on its face is over broad and there may be documents that arguably are not relevant and he or she does not want to submit them.

Now I take it from what you said that your sense of it would be that it would be the court in Chambers, acting as the enforcing arm of the commission, that would actually determine what the proper definition of the subpoena was. I thought I heard John Sopinka say this morning that there might be some kind of a preliminary proceeding.

Mr. Scott: Oh, I think of course there might be.

Dean Christie: In other words, if you got a subpoena which you said was too broad, the first thing you'd do is attend before the commission, and say to the commissioner, "I believe this is too broad" and make your submissions. Suppose the commissioner disagreed, said it was appropriate and demanded that it be complied with. Then where are you?

Mr. Scott: Where you are is making an application in the courts to quash it. I am also saying that if you reverse that and ask what happens when you do not show up and the commission wants to enforce your attendance, what does the commission do? They do exactly the same thing. The commission applies to the court for an order.

In fact, the Ontario scheme is just that exactly. In other words, the commissioners have all the powers to issue subpoenas, but when it comes to enforcing them, they have to invoke the aid of the court. Thus there is, for example, no contempt by the failure to turn up at a commission of inquiry in Ontario because it can only be contempt once an effective process has been served on you. That results from the stated case exercise. So there's the mechanical step in there. Certainly I agree, as John Sopinka says, there would

be a courtesy call on the commissioner to see whether you could persuade him to change his mind.

Mr. MacKay: If I could just do one quick follow-up what can be subpoenaed? Would there not also be constitutional limits on a provincial inquiry as to who could be subpoenaed and I think the answer to that is yes. This may be a problem area and you may want to duck it. But what's the position of the section 96 judge who operates under a provincial statute in a provincial court but is federally appointed and federally paid?

Mr. Scott: Well, I'll duck that one and leave it to you academics. Obviously, *Keable*[6] is a good illustration of a case where constitutional imperatives determined whether or not the process could be enforced against the Solicitor General. And I think the same kind of criteria would come into play in the problem you pose.

[End of discussion on that topic.]

(b) The Powers of a Court

The coercive force associated with the power to compel testimony emanates from statutory schemes which variously contemplate that commissions of inquiry will have the authority of courts of record in civil proceedings, the power to issue warrants to secure attendance and the power to commit for contempt.

Section 5 of the federal *Inquiries Act* contains the enforcement mechanism. It equates the powers of a commissioner under the statute with those of a court of record in civil cases. However, while commissions of inquiry can issue subpoenas in their own form, they have no infrastructure equivalent to that of a court, sheriff's officers and constables and thus some further step is necessary in order to enforce such powers. Under the federal scheme, this would involve an application to the Federal Court for the issuance of an order enforcing the commission's statutory power.

Further, section 5 of the federal statute speaks only of witnesses and makes no reference to "documents or things" in its likening of its powers to those of a court of record in civil cases. Nonetheless, the authority in section 5 is expressed sufficiently broadly in terms of compellability that the ancillary powers would necessarily be covered by inference.

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6 *A.G. (Que.) and Keable v. A.G. (Can.)*, [1979] 1 S.C.R. 218, (*sub nom. Re Keable and A.G. (Can.)*) 6 C.R. (3d) 145, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161, 24 N.R.I.

The Alberta, British Columbia, Nova Scotia and Yukon statutes[7] all have specific provisions which confer upon commissions or tribunals the powers of courts of record for the purpose not only of the compellability of witnesses, but also the production of documents.

Some provincial legislatures have recognized the cumbersome enforcement situation which federal commissions of inquiry face in the exercise of their powers and have developed more effective schemes. Thus in section 5(1) of the Alberta *Public Inquiries Act*, there is a specific power of committal for contempt when one or more of the commissioners appointed under the *Act* is a judge of the Court of Queen's Bench of the Province. There thus exists a direct power to commit for contempt in the face of the tribunal, eliminating the problem which exists in other jurisdictions that even when the commissioner happens to be a judge, he sits as a statutory appointee and not as a member of the judiciary in court.

In Manitoba, a tribunal may issue a warrant for the arrest of a witness who fails to attend and may commit witnesses for refusal to testify.[8] The legislative scheme contemplates committals to the common jail for up to one month and the utilization of police officers and constables, empowered under provincial legislation, to effect the process.

In New Brunswick, the scheme is equally elaborate. The tribunal may issue a warrant for the non-attendance of a witness under section 5 and may enforce the same by utilizing the services of the sheriff's office or a constable. Under section 6, it may commit a recalcitrant witness to the common jail for contempt for a period of 30 days and from time to time thereafter for refusal to respond to proper questions. Further, there is a specific power to commit for contempt for the non-production of documents.

Ontario has a more restrictive enforcement regime. While the authority to take testimony resides in the commission, there is no likening of its powers to those of a civil court of record. Enforcement depends upon a formal application by way of a stated case to the Divisional Court.

Thus, under section 8, if a witness does not attend at a hearing having been duly summoned, or refuses to answer or submit to the oath, or refuses to produce documents or things or does anything else that would amount to a contempt of court, the commissioner or commissioners may state a case for the opinion of the Divisional Court. The court will then effectively require the party in question to show cause why he or she ought not to be punished for contempt. This represents a significant check on the powers of commissioners

7 *Public Inquiries Act*, R.S.A. 1980, c. P-29, s. 4; *Inquiry Act*, R.S.B.C. 1979, c. 198, s. 5; *Public Inquiries Act*, R.S.N.S. 1967, c. 250, s. 3; *Public Inquiries Act*, R.S.Y. 1986, c. 137, ss. 4, 5.

8 *Evidence Act*, S.M. 1987, c. E150, ss. 92–94.

which exists under other regimes. On this point, Mr. Justice Estey (as he then was) in *Re Yanover and Kiroff* noted as follows:

> [T]he powers of a commission now are essentially, if not exclusively, investigatory and are not judicial. When the authority of a commission to do any act or thing is called into question the power vested in the commission is limited to stating or refusing to state a case for the opinion of the Divisional Court. Nor has a commission the power it enjoyed under the former Act, now repealed, to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things 'as is vested in any court in civil cases'. Specifically a commission no longer has the power to adjudge the conduct of a witness before it to be punishable contempt and to impose punishment for such conduct.
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> Notwithstanding the removal from a commission of the power of punishing for contempt of it, it continues to be recognized that for the proper discharge of its duties under a commission issued under the Act, it is essential that the disobedience to or defiance of the lawful requirements of the commission attract punishment of the nature that Courts have traditionally meted out to those in contempt of Court. Nevertheless the legislation has denied to a commission any punitive power.[9]

The only modest departure from this regime is to be found under section 16 of the *Act* which provides that, in situations in which Part III of the statute is declared to apply to the specific inquiry, the commission may make an *ex parte* application to a district court judge to issue a warrant to apprehend a witness if he or she does not appear. This introduces an element of convenience into an otherwise cumbersome process.

The Ontario regime, therefore, lends itself to a practical form of judicial review, generally casting the onus on the commission to invoke the powers of the court and thereby affording aggrieved parties an opportunity to test the commission's jurisdiction before extraordinary powers are exercised against them.

(c) The Power of Inspection of Public and Private Facilities

Part II of the federal statute deals with departmental inquiries. Under section 7 this Part, the commissioners may conduct searches and inspections in public offices and institutions. There is no equivalent power under Part I. In Alberta, provided the Order in Council declares section 6 to be applicable to the inquiry in question, the commission may view a public building and seize any document or thing therein in the course of the exercise of its jurisdiction. In Manitoba, the power is even more extensive. Under section 91 of the *Evid-*

9 (1974), 6 O.R. (2d) 478 at 482–483, 22 C.C.C. (2d) 81, 53 D.L.R. (3d) 241 (C.A.).

ence Act, the commission may enter upon and view any building or property whether public or private.

(d) The Power of Search and Seizure in a Private Facility or Place

Other than the Province of Ontario, no statutory scheme contemplates search and seizure in private premises. The Ontario power is restricted. Under section 15, assuming that Part III has been declared in force by the terms of the Order in Council, an *ex parte* order may be made by a judge of a District Court, on the usual grounds for which warrants are issued, authorizing a commission investigator, appointed for the purpose and assisted by the police if necessary to enter and search buildings, receptacles or places and there seize documents or things relevant to the inquiry. This is an extraordinary and rarely used power. The failure of other schemes to provide an equivalent power is both noteworthy and deliberate.

The above represent, broadly, the powers of commissions of inquiry against which the obligations and related rights of witnesses and persons subject to investigation must be measured. To the extent that there are powers, there is a duty to respect them and thus there is a duty to attend, when properly subpoenaed, to give evidence on oath and, if required, to produce documents and things and to cooperate with the commission in the proper discharge of its mandate as defined by its formative instrument.

3. THE RIGHTS OF WITNESSES AND THOSE SUBJECT TO INQUIRY

In this section an attempt will be made to assess, in outline form, certain of the fundamental rights which witnesses and those subject to inquiry might claim in the face of the exercise of the powers of inquiry offices. No attempt is made to analyze judicial review regimes in force at the provincial level or to digest process protections found in statutory schemes relating to evidence. The analysis is limited to the federal and provincial inquiries legislation and the jurisprudence associated with it.

(a) The Right to Counsel

In the first place, the right to counsel must be contrasted, compared and related to the right to participate in the inquiry process which will be dealth with in the ensuing section. What is spoken of here is the statutory right and not a right which may be dictated by common law jurisdictional requirements for procedural fairness, nor a *Charter*[10] right.

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10 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

There are five basic statutory approaches. First, the simplest and broadest expression of the right is in the province of Alberta where "anyone appearing" before a commission is entitled to be represented by counsel. A somewhat narrower version of the same idea is to be found in the Yukon where, in a recently enacted provision under section 11 of the statute, any person whose "actions are called into question" is entitled to be represented by counsel.

Third, there is the federal scheme which is reasonably accurately mirrored in British Columbia and Prince Edward Island. Under this scheme (section 12), the tribunal in a public inquiry *may* allow a person whose conduct is being investigated to be represented by counsel and *shall* permit persons to be represented by counsel where a charge is made against them during the inquiry.

Fourth, in the province of Ontario, there is an alignment of the right to counsel with the right to participate. Thus under section 5 anyone who by substantial and direct interest is entitled to claim a right to participate may do so utilizing the services of counsel.

Last, there are those provincial statutory schemes which make no specific provision for counsel as such and this is the situation in Manitoba, New Brunswick, Newfoundland, Nova Scotia, Quebec and Saskatchewan.

There is probably no specific need for a formulated right to counsel in the statute. While the inquiry is investigative, the dictates of procedural fairness would suggest that its process would demand a right to counsel altogether apart from the dictates of the *Charter*.

Nonetheless, a regime such as that in place in Ontario might be interpreted to warrant refusal of counsel for a witness who is merely a witness where, for example, a substantial but only indirect interest could be shown, or, federally, where the witness' conduct was not being investigated and against whom a charge had not been made.

(b) The Right to Participate

Should witnesses or persons subject to inquiry be given limited, full or any standing in the inquiry? What does the right to participate mean? In practical terms, it means the right to be present, to examine and to cross-examine witnesses and to make submissions at the conclusion of the evidentiary phase of the public hearing process. It involves, more specifically, the right to call and examine one's own witnesses, to examine the witnesses called by others and to cross-examine witnesses shown to be adverse in interest. The only statutory regimes which provide for participation as such are Alberta and Ontario. Obviously by implication or necessary intendment, other schemes contemplate similar prerogatives.

In Alberta, under section 11, any *witness* who *believes* his interests may be adversely affected and any *person* who *satisfies* the commission that any

evidence may adversely affect his interest is to be given an opportunity to give evidence on the matter and, subject to the exercise of the inquiry officers' discretion, to call and cross-examine witnesses. This is known in inquiry parlance as "standing". The Alberta practice is somewhat unique.

Ontario's statutory arrangement is different. Under section 5, the commissioner shall accord to any person who shows or satisfies the tribunal that he or she has a *substantial* and *direct* interest in the subject matter of the inquiry an opportunity to give evidence and call and cross-examine witnesses on evidence relevant to his interest.

The basic difference between Alberta and Ontario is that in Alberta the belief of the witness is enough to establish the right to participate. The criteria for testing interest in Alberta is adversity. Ontario posits an objective standard and the right to standing, once granted, is more limited. One's participation is expressly confined to one's interest.

The federal scheme does not speak of standing or participation at all but only the right to be represented under section 12. As earlier indicated, the right to representation is discretionary or mandatory depending upon whether the person is merely one who is being investigated or one against whom a charge is made. Standing flows only by implication from the right to be represented.

In practice, under both the federal and provincial schemes one of the first steps in the public hearing phase of inquiries is to assess who shall be accorded standing. Most public inquiries establish generous criteria, whatever the specific dictates of the statute may be.

In terms of jurisprudence, Mr. Justice Morden noted that standing under the Ontario statute depends upon a showing of a substantial and direct interest and not merely that a finding of misconduct might be made against the applicant.[11] Under sections 12 and 13 of the federal statute and sections 5(1) and 5(2) of the Ontario statute, the participation and the notice provisions under each scheme ought not to be equated one with the other.

In the Sick Children's Inquiry,[12] the Divisional Court in Ontario approved the according of standing to the parents of children for the cause of death portion of the hearing (Phase One), but not for the police investigation portion of the hearing (Phase Two). The court concluded that in the latter phase there was nothing to distinguish the public interest as represented by Commission Counsel from the parents' interest and thus they were denied standing.

11 *Re Royal Commission on Conduct of Waste Management Inc.* (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.).

12 *Parents of Babies Gosselin v. Grange* (1984), 8 Admin. L.R. 250 (Ont. Div. Ct.).

(c) The Right to Respond to a Charge of Misconduct in the Report

This relates to the so-called "section 13 process" derived from the section of the federal Act bearing that number. The right to have notice of and to respond to a charge or allegation of misconduct which the commission or commissioners may make in the report is altogether apart from the right to standing and the right to participate generally. Section 13 and its equivalents in provincial statutes are simple in their language but difficult to manage in practice. Section 13 provides that no report shall be made against any persons until reasonable notice has been given to them of the charge of misconduct *alleged* against them and they have been given an opportunity to be heard.

This section basically means that a commission should not make a finding of misconduct unless the person *had* reasonable notice of the allegation and was given an opportunity to be heard. If he or she did not, in the course of the inquiry, have such an opportunity, jurisdiction to make the report containing the allegation of misconduct against the person depends upon the commissioners then providing such notice and opportunity.

Other statutes have somewhat different arrangements. In Alberta there are two extra elements in section 12. The "opportunity to be heard" of federal section 13 is spelled out in section 12 to include the giving of evidence and, at the discretion of the commissioners, the calling of evidence and this right is expressed to exist even though the person may already have given evidence and called witnesses. This latter provision must surely be interpreted as meaning that the named person had already given evidence and called witnesses but not amounting to a response to the specific allegation of misconduct.

In Ontario, there are two different features under section 5(2) of the Act. Thus the person against whom an allegation of misconduct may be made must have reasonable notice of the *substance* of the misconduct and must be allowed a full opportunity to be heard *during* the inquiry. The implication is that the notice must be given during the inquiry whereas the federal Act implies that the notice and the opportunity to be heard may be given on the eve of delivery of the report and indeed after its preparation although obviously not after its release.

The leading case dealing with section 13 is the judgment of the Federal Court Trial Division in *Landreville v. R. (No. 2)*.[13] That case dealt with the Rand Inquiry whose report was delivered in August 1966. The report, the publication of which ultimately led to the plaintiff's resignation as a judge, was utilized as a basis for a threatened joint address calling for his impeachment. The allegations against Mr. Landreville related to his acquisition, allegedly at no cost, of certain shares in Northern Ontario Natural Gas at a

13 [1977] 2 F.C. 726, 75 D.L.R. (3d) 380 (T.D.).

time when he was the mayor of the City of Sudbury. Chief Justice Rand was appointed a Commissioner to inquire into the issue of misconduct surrounding the acquisition of the shares in question. The language of his mandate was broad enough to encompass allegations of misconduct beyond the mere acquisition of the shares but it was not specific in this connection. The Commissioner was satisfied, and so reported, that the judge was guilty of serious misconduct, *qua* judge, by reason of the manner in which he gave evidence as a witness in certain judicial proceedings arising out of the North Ontario Natural Gas affair. In his judgment, Collier J. concluded that the terms of reference of the Rand Commission were broad enough to encompass the findings of gross contempt which the Commissioner had concluded flowed from the form of Mr. Landreville's evidence in the judicial proceedings, but he also concluded that there was no allegation made, at any time, against him with respect to this specific conduct. Thus he had no notice and no opportunity to respond as contemplated by section 13. Accordingly, some ten years after the report was published, and long after the judge had been forced to resign, it was quashed. The case is an important illustration of the jurisdictional feature of this statutory requirement.

The difficulty with section 13 relates to its administration. How can a commission fairly and at the same time procedurally comply with this provision? If reasonable notice is given during the inquiry, either by specifics in its terms of reference or by allegations during its course, then if the persons affected responded and met the allegations during the course of the inquiry, no special notice need be given under section 13 thereafter. However, if no such notice of allegations of misconduct was given before or during the course of the inquiry, then section 13 must specifically be complied with before the commission's report is delivered. If notice is given literally before the report is released, the opportunity to be heard would be somewhat illusory because the commission would have identified allegations of misconduct in the course of arriving at its conclusion and thus might be said to have effectively made up its mind before notice was given. In such circumstances, one might be forgiven for concluding that the opportunity to be heard was somewhat of a sham. If the commission gives notice after hearing the argument of counsel, the same sort of problem may arise. In any event, in an ideal environment the commission itself should not given notice because the obvious implication is that it may have drawn conclusions in order to draw the indictment. If a formal notice under section 13 is required, it should probably be given privately by commission counsel anticipating all possible findings of misconduct which the commission might make. Further notice can be given if the draft report suggests additional findings of misconduct.

A solution currently in use is to comply with the notice requirement by way of commission counsel's argument. If argument is delivered in writing to all parties and they are given an opportunity to be heard under section 13

thereafter as long as commission counsel's argument is cast broadly enough to include all possible conclusions as to misconduct, then the requisite notice has surely been given. In any event, there is a universal plea for amendment to this clumsy statutory arrangement.

(d) The Right to Insist Upon the Applicability of the Rules of Evidence

It is generally accepted that in ordinary circumstances in the work of public inquiries the conventional rules of evidence are not strictly adhered to. This point has been made repeatedly in many cases. Nonetheless, depending upon the particular finding and its importance, and notwithstanding that compliance with the strict rules of evidence is not required, cogent and reliable evidence may be required.

Most statutory schemes recognize that, as a minimum, the application of conventional evidentiary privileges represent protections which remain in force. Thus, under section 8 of the Alberta statute every person appearing in an inquiry has the same privileges as a witness in court. The statute does provide, however, that public interest immunity, statutory or otherwise, does not apply in public inquiries unless the Attorney General affirmatively certifies in a particular inquiry that it does.

Under section 11 of the Ontario Act, privileges under the law which render evidence inadmissible in court apply to the same effect in an inquiry. This would extend to such principles as the inviolability of solicitor and client communications, trade secrets, etc.

(e) The Right to Demand a Hearing in Public or a Hearing *In Camera*

In the absence of statutory imperatives or circumstances demanding intervention under the doctrine of procedural fairness, the commission will have a discretion to determine whether to hold the inquiry in public or in private. Since the intent in most jurisdictions is to have a *public* inquiry, a powerful argument can be made for conducting proceedings in public. Conversely, since evidentiary privileges at common law are preserved, the protection of confidential information or trade secrets, by way of example, may dictate that a hearing be held *in camera*. The Ontario statute, alone, in the field of public inquiry legislation provides for the exercise of a statutory discretion to make this selection. Under section 4, in the case of intimate personal or financial matters, an *in camera* hearing may be held. Presumably this does not exhaust the occasions for directing that matters be dealt with in private.

I have found that the most interesting area here is with the advent of television. Most commissioners rather like television. Since they cannot have it in court, why not have it in the next public inquiry in which they are involved? The difficulty is that the people who are involved in these public

inquiries perceive a loss of privacy. One of the difficulties is that if you adopt the protocol that a person whose conduct is being inquired into should be entitled to leave his evidence until he or she has heard all the evidence that is tendered by the commission, then it means that it may be months before a person can have his or her opportunity to respond on television to the evidence given earlier. And of course television and the print media play up with headlines what is going on and the poor "victim" has to wait months for the opportunity to respond. This buttresses the development of the idea of holding *in camera* hearings where very sensitive information is given which could damage a person or be prejudicial to a person, and leaving its release to the public until closer to the moment that that person will be entitled himself to give evidence. That arose from time to time in the Stevens' Inquiry and, in accordance with the extraordinary fairness of commission counsel, such requests were on every occasion accommodated.

(f) Procedural Matters, Order of Testifying, Right of Cross-Examination

The right to examine one's own witness and to cross-examine the witnesses called by commission counsel and others, as opposed to having all examinations conducted by commission counsel, was clearly established in *Re Shulman*.[14]

This is again an area in which the exercise of discretion will be required. Persons whose conduct is being inquired into will wish to tender their evidence after commission counsel has presented all of the inquiry evidence. Without a right to proceed in this manner, the requisite opportunity to be heard may be seriously and negatively affected.

The right to cross-examine witnesses should be complete in the sense that anyone who has a legitimate right to do so should be afforded the opportunity; on the other hand, the right of cross-examination should be limited to persons who are, within reasonable limits, adverse to one another in interest.

(g) The Right to Seek Judicial Review of Commission Decisions

Section 6 of the Ontario *Public Inquiries Act* clearly contemplates judicial review by way of a stated case for the opinion of the Divisional Court by persons affected. However, there are limits on the right of judicial review as appears from the decision of Mr. Justice Morden in *Re Royal Commn. Into Metro. Toronto Police Practices and Ashton.*[15] He noted that the earlier inquiry legislation which was under consideration in the Shulman Inquiry

14 [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.).

15 (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 (Div. Ct.).

prescribed ongoing jurisdiction to state a case with respect to the "validity" of any decision of the Commission. The statutory language has changed and the word "authority" has been substituted. In the view of the court in *Ashton*, this amendment has the effect of altering the scope of judicial review to confine it to matters of jurisdiction. Thus the role of the court is supervisory only. It will not substitute its view for that of the commission.

In Ontario, a case must be stated by the commission at the request of a party and, failing the commission's willingness to state a case, the court will direct it to do so. Proceedings on the issue in controversy are stayed pending resolution of the matter. The same general arrangement exists in Manitoba and indeed the entire inquiry is stayed pending judicial review.

Under the law in Quebec,[16] no injunction or writ contemplated by the provisions of Articles 846-850 of the Code of Civil Procedure, or other legal proceedings, shall interfere with or stay the proceeding of the commission. *A.G. Quebec and Keable v. A.G. Canada*[17] illustrates, however, that while the process continues, the evidence sought will not be compelled during the process of judicial review.

The federal statute makes no mention of judicial review. Since it is clear that the tribunal is not functioning in a judicial or quasi-judicial manner, the judicial review is not open to the parties under section 28 of the *Federal Court Act*.[18] Even if it were, it is unlikely that the Court of Appeal would hear an interlocutory application for judicial review. The appropriate approach is to pursue the prohibition remedy under section 18(*a*) of the *Act*.[19]

What the grounds are, of course, is the whole issue. Bias and exceeding the commission's jurisdiction are ones that seem obvious and I would suggest that it will not be long before procedural fairness will be squarely recognized. Look at Lord Denning's judgment in the *Pergamon Press* case,[20] which Mr. Justice Grange cited in the *Abel and Penetanguishene* case.[21] Lord Justice Denning said, speaking of the situation in that case:

> The inspectors can obtain information, likening them to commissions of inquiry, in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said

16 *Public Inquiry Commission Act*, R.S.Q. 1977, c. C-37, s. 17.

17 *Supra*, note 6.

18 R.S.C. 1985, c. F-7.

19 This approach was taken in *Re Copeland and McDonald*, [1978] 2 F.C. 815, 42 C.C.C. (2d) 334, 88 D.L.R. (3d) 724 (T.D.).

20 *Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535, 114 Sol. Jo. 569 (C.A.).

21 *Re Abel and Penetanguishene Mental Health Centre* (1979), 24 O.R. (2d) 279, 46 C.C.C. (3d) 342, 97 D.L.R. (3d) 304 (C.A.).

> against him. They need not quote chapter and verse. An outline of the charge will usually suffice.[22]

That was in a different regime from a public inquiry, but if you look at the statutory requirements for an opportunity to be heard, attend and respond, it's clear that some minimum procedural fairness will be imposed if it has not already been imposed by the courts.

(h) Funding

In contemporary society inquiries are sufficiently expensive and it is frequently argued that the state should fund participation by particular individuals or groups. Thus funding was granted in the Berger Mackenzie Valley Pipeline Inquiry, the Marshall Inquiry and the Sick Children's Hospital Inquiry. Indeed, it has been suggested that in the latter inquiry, standing was denied to parties in Phase Two in view of the extraordinary cost of funding participants. In particular circumstances, the right to participate and to be represented by counsel will be an illusion in the absence of funding. This is particularly so in the case of persons whose conduct is under review in complex and lengthy inquiries. Considerations of public policy and the protection of the rights of individuals insist upon the need for ongoing government recognition of this requirement.

[In discussion following this paper Mr. Scott elaborated as follows:]

I am not sure that the appropriate approach is to make some provision in the statutory regimes because it seems to me that no government would do that. That is really opening the door to a cost that would be absolutely horrendous. I'm not sure whether there should not be some discretionary mechanism in the judge to order funding. How to do it, I do not know. But one thing is certain: as long as we are building on a broad base for public inquiries, unless we come to grips with this issue and develop some criteria, people are going to be hurt. There is no question about it. The cost is horrendous. I just cannot imagine any government saying "we'll provide in this statute that the commission will be the arbiter of whether or not there'll be funding", because obviously the commission's instinct is to grant funding. There is no *contra* instinct other than good management and good sense.

The problem with funding is there's a perception that individuals or institutions that are not part of the commission that is seeking funding are fundamentally going to be irresponsible about the consumption of it. And therefore if you have a good relationship with the commission and there's expert evidence, for example, that you want, the best way you can get it is by

22 *Supra*, note 20 at 539.

having the commission agree to get it and tender it as part of the commission's assembly of information.

Now it may be, as I have heard in the press there have been hints of this in Marshall, that there is a disagreement between the commissioner's view of what may be of value and the views of others who have a very real interest in the future of the process. In that situation, the only process I know is the application to the commission in public, under the glare of the media, with a full developed argument in favour of the need, pointing out the public interest, in ensuring that the commission's mandate is not criticized after it is purportedly discharged. If that doesn't work, then all that's left is practical politics. I cannot see in the near term any government setting up, as a matter of a statutory regime, a scheme which contemplates public funding for participation in these inquiries because I cannot imagine the definition of a formula for controlling it. I think governments probably like it the way it is, namely, you go to the commission and you convince the commissioners and if you cannot convince the commissioners, then that is the commissioners' problem, not the government's problem. The government can deflect any criticism. In the Sinclair Stevens Inquiry, if there had been criticism, which there was not, of Chief Justice Parker's failure to grant funding to the political parties, the criticism would have been of the commission. Now I suppose it might have penetrated through to the government which would certainly have been an attack on the objectivity of the commissioner. But the government surely would be more content with leaving it on an *ad hoc* basis to commissioners than actually setting up a statutory regime.

The traditional method of controlling cost is by length of time. The commission is told "you've got to report within three months". That obviously will control expenses. There's also a very sophisticated budgetary requirement that the government imposes on commissions of inquiry and that budget is pursued and followed on a regular basis and any extending of it is subjected to very careful scrutiny. And I can tell you the most uncomfortable situation is to have the budget of the inquiry made the subject of public debate. There are practical constraints. Whether they are adequate or not, I leave to the public policy theorists.