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THE ROYAL COMMISSION AND ITS USE

BY THE GOVERNMENT OF CANADA

IN THE 1960's

by

Thomas A. Ladany, B.Comm., C.A.

A thesis submitted to Carleton University
in partial fulfilment of the requirements
for the degree of Master of Arts in Public
Administration.

School of Public Administration

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IN THE 1960'S

Thomas A. Ladany, B. Comm., C.A.

Abstract

Part I of this thesis attempts to describe systematically and in detail the Royal Commission on the basis of behavioural and legal studies of Canadian Federal Royal Commissions since 1867.

Part II offers a classification and discussion of most Canadian Federal Royal Commissions of the 1960's.

Part III comments on current trends regarding the use of the Royal Commission; on the emergence of the Task Force as an alternative instrument of executive inquiry; on the future role of the Royal Commission; and it opposes the adoption of any uniformity in its application and procedures. It argues that the Royal Commission's role should not be restricted by the codification of reform proposals.

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P A R T I.

THE ROYAL COMMISSION

1.

Introduction

Royal commissions of inquiry can trace their origin back to Norman times. The "Writ for an Inquest of Lands at Ely" (1080) and another writ for "The Inquest of the Sheriffs" (1170) ¹ are amongst the earliest ancestors of today's royal warrant formally creating a royal commission. The device was used with varying frequency through the centuries that followed, acquiring greater sophistication as part of the developing (mainly unwritten) English Constitution. It responded to the de facto changes in the Constitution by having become "successively the instrument of King, Parliament and Cabinet." ² The Golden Age of the Royal Commission in Britain was the Nineteenth Century. There were decades when hardly any legislation of any significance was passed by Parliament without first appointing a royal commission to investigate the subject-matter. "The peak in Britain was reached during the decade of the 1850's with over eight royal commissions set up each year." ³

Royal commissions have always been a subject of controversy. Their most vocal opponent in the Nineteenth Century was J. Toulmin Smith, an English barrister, who published a book in 1849 entitled

-
1. Reproduced in H. McD. Clokie and J.W. Robinson's Royal Commissions of Inquiry (Stanford U. Press, California, 1937).
 2. Ibid, p. vi.
 3. Hodgetts, J.E., "The Role of Royal Commissions in Canadian Government", in Hodgetts and Corbett, ed., Canadian Public Administration (Macmillan, Toronto, 1960), p. 472.

"Government by Commissions - Illegal and Pernicious".⁴ Smith's book is worth mentioning only because for many years it stood as the only major work on the subject and it is also the first thorough codification of most of the abusive terms that have been used to describe royal commissions to this very day.⁵

In spite of its advanced age and periodical pronouncements of imminent death the Royal Commission is still surprisingly vigorous in England (two per annum) and in Canada (three federally appointed ones per annum), but it is also surprising that one of the longest-surviving institutions in our entire Western civilisation has failed to inspire most authors in political science and law. The whole existing literature on the subject is limited to a handful of third-rate books and another handful of considerably better, but far from exhaustive short studies and essays 'periodically' appearing in periodicals. The main reason for this poverty of sources may be that to speak of the Royal Commission as a homogeneous, easily definable institution, legal device, investigative technique, or instrument of policy formulation would be a gross misrepresentation of the relevant facts. Perhaps the only significant similarity that all the thousands of royal commissions that have been created in England, Canada and other Commonwealth countries throughout the ages have in common is that they have all been called royal commissions.⁶ The innumerable

4. Published by S. Sweet, London, 1849.

5. Some of the headings in the book: Commissions of inquiry a violation of the law; Commissions of inquiry opposed to truth-seeking; How to coerce public opinion; Manufactured 'Reports'; How to manufacture evidence; etc.

6. Although even this is no longer true, since Canadian governments in the sixties have begun appointing 'task forces', some of which are hardly distinguishable from concurrently functioning royal commissions.

differences were due to the stage of constitutional development, the constitutional status of parliament and the government (especially in a formerly colonial and presently federal state, such as Canada); the subject inquired into; the limits imposed in the terms of reference; the prevailing political and economic climate; the number of commissioners and their backgrounds; the financial resources made available; the unique procedural features adapted by individual commissions; and so on.. But in spite of the many differences, it is still possible to identify a number of sufficiently similar features that at least enable us to speak of various representative types of royal commissions. In the following chapters we shall discuss the various features of these different types of royal commissions and at the same time give a brief historical account of the most significant period of their development, which was, from our point of view, the last century and a half.

History of Federal Executive Inquiry Legislation in Canada

Canada was the subject of the inquiry of a royal commission several years before the creation of the first royal commission of her own. In fact, the one-man Durham Commission (1838) was set up by the British Parliament even before Canada was born. Lord Durham was sent to North America to report on the state of the British colonies and to recommend solutions regarding "certain weighty affairs to be adjusted in the said Provinces of Lower and Upper Canada."¹ The resulting Report was the principal source of information available to the legislators when they were asked to consider legislation concerning the North American colonies for years to come (from the Union Act of 1840 to the British North America Act of 1867). It is probably fair to state that the Durham Commission was at least instrumental in the slow and painful, but eventually successful, birth of the Canadian Nation. This fact alone may be sufficient reason for Canadians to regard royal commissions with awe and respect (although not always in a positive sense), but the main reason is probably rooted in the inseparable constitutional traditions of Britain and her former colonies. The statement in the preamble of the British North America Act of 1867 to the effect that the newly created federal state's Constitution be "similar in principle to that of the United Kingdom" was more than a command, it was an expression of popular sentiment favouring the British form of government, its philosophy and institutions.

1. From Lord Durham's Commission (U.K. Parliamentary Papers, XVII, No. 3, 1839).

The first statute authorising commissions of inquiry in Canada was enacted in colonial times, in 1846, in the then Province of Canada. This first "Inquiries Act" was subsequently adopted virtually unchanged during the first session of the Parliament of the new Dominion of Canada (1867-68 session). Even today, "Part I of the Inquiries Act, R.S.C. c. 99, is practically the text of the 1846 statute." ² The only significant difference between the pre-Confederation statute and Part I of the one in force today is that the latter is somewhat restricted by the division of powers between federal and provincial legislative bodies (the administration of justice, for instance, has been placed under provincial jurisdiction). The purpose of this first statute is outlined in its preamble as follows:

"Whereas it frequently becomes necessary for the executive Government to institute inquiries on certain matters connected with the good government of this Province; And whereas the power of procuring evidence under oath in such cases would greatly tend to the public advantage as well as to afford protection to Her Majesty's subjects from false and malicious testimony or representations." ³

The Inquiries Act was enlarged by what was originally a separate statute enacted in 1880 (Statutes of Canada, 1880, chapter 12) and is now Part II of the Act, dealing with departmental inquiries carried out by commissions appointed by the ministers concerned, although still subject to cabinet authorisation. "Such commissions apparently do not issue under the Great Seal but under the seal of the department concerned. Now at times such commissioners have been termed 'royal commissioners'." ⁴ Regardless of the terminology used, the significance

2. Sellar, Watson, "A Century of Commissions of Inquiry," The Canadian Bar Review, Vol. XXV, 1947, p. 3

3. Statutes of the Province of Canada, 1846, Chapter 38.

4. Hodgetts and Corbett, "Canadian Public Administration," p. 472.

of the addition of Part II. lies in the fact that its enactment resulted in a sharp increase of minor "investigations of the conduct of individuals." 5

Part III of the Inquiries Act (added in 1912) did not create yet another type of inquiry. Its concern was centered upon the rights of individuals being heard or investigated by commissions set up under the Act, and provided for the appointment of counsel and deputy commissioners, the latter being authorised to carry out functions under powers delegated to them by the commissioners.

Part IV, added in 1934, deals with international Commissions and Tribunals.

No discussion of royal commissions in Canada would be complete without mentioning that all our provinces have their own Public Inquiries Acts, and commissions have been appointed thereunder with varying frequency. However, since most of these commissions have tended to be rather insignificant or inconsequential compared to the many major federally appointed commissions, and since it is necessary to limit the scope of our inquiry, our discussion will be restricted to those in the latter category.

5. Callard, K.B., Commissions of Inquiry in Canada, 1867-1949, unpublished submission to the Privy Council, Ottawa, 1949, p. 4.

3.

Objectives of Commissions of Inquiry.

"Investigation can advance the objectives of good government in at least three ways. Responsive, responsible, and pure administration may be fostered by independent probes, executive legislative formulation of policy may be based on wider knowledge and information uncovered by investigators; and investigative agencies may bring the public into closer relations with the government." 1

It is unfortunate but unavoidable, that these constructive objectives have been and must still be perverted by objectives dictated by partisan political considerations, the best known of which are that royal commissions are used to 'take the heat off' the government and muffle the opposition by referring a pressing issue to a commission and thus delaying or avoiding decision-making; to transfer the responsibility for a politically risqué piece of legislation by basing it on a commission's report, usually obtained by the appointment of commissioners who are likely to produce the type of report desired; etc.

Looking for the purposes of royal commissions in an unbiased manner, determined to ignore value-judgements of any obvious sorts, we are able to isolate the following objectives:

1) To create public awareness of a given issue, to awaken general concern about it, to 'educate' the public about the alternative

1. J.E. Hodgetts, "Royal Commissions of Inquiry in Canada," Public Administration Review, (Winter, 1949), p. 22.

courses of action available to the government in order to solve it (inaction may be one such alternative), and thus gathering popular support behind the government in pressing for a favoured solution, and putting pressure on those opposing it.

2) To compile all the information the government feels it requires before action can be taken. All interested parties as well as disinterested experts usually present briefs or give their opinions by testifying and the evidence so gathered will be evaluated by a more or less impartial body (the commission).

3) To gauge the reaction of interest groups, pressure groups and the general electorate. The commission can be a trial balloon helping to decide whether legislative action should be taken or not.

4) To delay action until the storm of opposition to controversial legislation passes. When the government is determined to go ahead with controversial legislation regardless of public opinion, appointment of a commission which will predictably produce the kind of report resembling the proposed legislation can cause the storm of public reaction to be spent by the time legislation is actually introduced, the commissioners having served as scapegoats for it.

5) To gain time if a decision cannot be made due to political, economic or other reasons, or if the government feels that in spite of heavy pressure it would be unwise to initiate action of any kind, or if the government feels that the time is not yet ripe for action.

6) To check the pulse of the public on basic social and economic issues as a guide of general policy, to serve as a 'safety-valve' or as a channel of upward communication through which grievances,

disenchantment, dissent, and indeed new constructive ideas may reach the government.

7) To investigate the governmental machinery or parts thereof, crown corporations, individual civil servants, or the conduct of interest and pressure groups and individuals outside the public service, where the public interest is or may be affected.

8) To investigate the 'third branch of government' (the judiciary) without being accused of undue partisan political interference in the affairs of that 'holy' and 'sacred' branch that has so far been able to survive in a democracy without allowing the main principles of democratic government to penetrate into its own sphere.

9) To serve as an arbiter in certain disputes involving the public interest, whether the parties thereto are in the private or the public sectors, and where the regular channels of judicial or juridical (quasi-judicial) adjudication are unacceptable or unsuitable for resolving the issue.

In addition to these objectives there may be situations where the government is simply helpless, it does not know what to do, has no solutions of its own and at the same time is anxious to do something. The setting up of the Royal Commission on Publications was said to be due to this reason. According to the Globe and Mail "the decision to launch the commission ... follows an unsuccessful year-long effort by a Cabinet-committee under Postmaster-General William Hamilton to devise some effective way of protecting Canadian magazines from U.S. competition that did not interfere with freedom of the press nor create a Canadian

monopoly." ² A solution was found by the commission, although it remains a matter of opinion whether the solution was in any way consistent with the stated aims; but since the solution was produced by an 'independent', 'unbiased' commission, the public could hardly blame the government for it. Only a small segment of the public was familiar with Gratton O'Leary's strong protectionist views. That small segment included the members of the Cabinet, and Senator O'Leary's choice as chairman of the commission can hardly be labelled as a decision totally unrelated to this fact.

2. September 19, 1960, p. 1

4.

Types of Commissions of Inquiry.

Commissions of inquiry may be classified according to the legal authority under which they are brought into existence. In the United Kingdom each commission is created under a separate bill which defines the entire legal framework within which it must operate; consequently, classification on this basis would leave all English royal commissions in one class. Canada's Inquiries Act (see Chapter Two) distinguishes at least two types of commissions (those under Parts I and II) and the legal framework under which they must operate is rather well, although not narrowly, defined. Ironically then, each English royal commission may potentially be different as far as its legal authority is concerned, while all Canadian commissions possess similar investigative powers, and yet the former can all be lumped into one category while the latter must be divided into at least two, not counting Parliament's unquestionable power to ignore the Inquiries Act and appoint a commission based on the English pattern (which has been done several times), thus creating a third group.

Perhaps a more useful way of classifying commissions would be one based on a functional analysis:

- 1) Ad hoc commissions deal with non-recurring problems and emergencies, although there are some non-recurring problems and emergencies that do recur infrequently, such as economic crises and major catastrophies (fortuitous events or acts of will). At any rate, the circumstances in each case tend to be sufficiently different or even unique to warrant the appointment of a special investigative body (e.g. the commission

investigating the fire on Parliament Hill in 1914.

2) Commissions of experts are often needed to assist the government in devising or revising legislation in fields requiring an unusual amount of expertise due to the special nature of the subject of proposed legal regulation or to the fact that the complexity of creating bodies of rules to be enacted often requires detailed expert studies of all possible implications. The task of the Royal Commission on Taxation required the number and kinds of experts that the Departments of National Revenue, Finance and Justice would not have been able to provide without discontinuing many of their routine functions for a few years. One of the reasons for its creation, therefore, was that the government had to rely on outside experts.

3) 'Impartial commissions' are desirable when a government finds it necessary or is pressured into examining its own affairs. The history of inquiries into the vast machinery of the public service is a rather long one. The first royal commission appointed after Confederation was of this type and the latest general inquiry of the public service was concluded in the early sixties (the Glassco Commission). Of course, for every major investigation of the governmental machinery as a whole there are many minor investigations concerning the activities of various departments, agencies and individuals. Most of these minor matters are dealt with by commissions appointed under Part II of the Inquiries Act (departmental investigations).

4) Special commissions must be created for the investigation of certain specified topics, situations or circumstances as stipulated

in a number of Acts of Parliament. In such cases the commission is not an optional device available to the government, but a matter of procedure prescribed by law. Such inquiries must be set up in accordance with the provisions of the Judges Act, the Combines Act, the Canada Shipping Act, and so on. Whether these and many other types of commissions should really be called royal commissions is largely irrelevant, since their appointment, procedure, and other aspects are in no way different from some royal commissions set up under the Inquiries Act.

5) Recurring major social and cultural problems are periodically investigated by royal commissions, whether the government has its own machinery to evaluate and handle the problem or not. These commissions create the impression that the government is deeply concerned about the issues and at the same time provide independent evaluations of problem-areas. Departments may have developed rigid attitudes towards pressing problems or may be committed to certain views by having a vested interest in preserving the status quo.

6) Some commissions are set up by the government as a direct result of being indirectly compelled by pressure groups to do so. These commissions may serve neither the interests of the general public nor those of the appointing body. Most notable amongst such groups are labour unions. "The royal commission has been a method favoured very much by labour for investigating industrial disputes. Even with the provisions for more permanent devices of conciliation and arbitration, the royal commission remains a significant supplementary device." ¹

1. Hodgetts and Corbett, "Canadian Public Administration", p. 473.

7) "Another category of subject relates to the Canadian economy: here ... we find some of our most important and comprehensive investigations. Our...fisheries...grain trade, railways and freight rates, provincial claims for better terms,...newsprint, pulpwood, combines, canals, banking, natural resources, price spreads, textiles" ² have all been investigated.

Yet another way of classifying Canadian royal commissions by their functions is simply to list some major classes of inquiries. K.B. Callard's brief study on royal commissions ³ list the following groups:

- a) Major inquiries - public policy.
- b) Fact finding - details.
- c) Rights and claims.
- d) Charges and irregularities.
- e) Charges of political partisanship.
- f) Naturalization certificates.
- g) Judges Act.
- n) Combines investigations.
- i) Industrial disputes
- j) Fact finding.
- k) Dominion Lands Act.
- l) Shipping Act.

This list excludes of course some unique types of inquiries such as the one created in 1935 to investigate 'Abusive Language', or

2. Ibid, p. 473.

3. "Commissions of Inquiry in Canada," p. 8.

the 1946 inquiry on 'Espionage in Government Service', which enjoyed powers and followed procedures that were quite unprecedented in English or Canadian constitutional history.

5.

The Terms of Reference.

Having reached the decision that a royal commission should be established for a given purpose, the Privy Council (the Cabinet) is theoretically ready to pass an order in council under which a royal warrant would be issued authorising the formation of the commission (unlike in Great Britain, parliamentary approval is not required). The warrant, bearing the Great Seal of Canada, contains the authority under which it has been issued (Parts I or II of the Inquiries Act or some other acts), the terms of reference, the names of the commissioners (the name of the chairman is to be singled out), the powers they are to possess (in addition to those granted under the Act authorising the issuance of the order in council), special instructions, and other extraordinary items - if any.

The degree of success to which the royal commission is able to perform the functions and produce the results for which it was created depends overwhelmingly on the several things listed as being part of the royal warrant. Realising this, governments usually exercise great care in defining the terms of reference, selecting the commissioners, and so forth. In fact, the wording of the warrant is so important that the Cabinet usually selects the chairman of the commission and the warrant is drafted on the basis of prior consultations with him. In this chapter we propose to discuss the terms of reference. The remaining parts of royal warrants will be covered in the chapters that follow.

The government does not irrevocably commit itself by anything

contained in the royal warrant, since it can, at any time, issue another warrant revising the provisions of an earlier one. Nevertheless, the political implications of such revisions can be grave. It is difficult to fend off charges of partisan political interference into the conduct of the 'independent' royal commission, regardless of the reasons necessitating the amendment. An amending warrant can be looked upon with suspicion as one somehow reflecting government interference. Such considerations obviously point to the need for drafting terms of reference broad enough in scope, so that no subsequent revision would be necessary. However, an excessively broad, general or vague definition of the terms of reference can cause problems of a different but equally undesirable kind. It is generally unwise to allow more room than is necessary for an investigative body due to the fact that most investigations in some ways interfere with or unfavourably affect common law rights ('civil rights') of individuals. Consequently the inquiry should be restricted from doing more 'inquiring' than is absolutely necessary in order to serve the purpose for which the Cabinet originally decided to bring the royal commission into being. Another reason for the need for restricting its terms of reference is that the commission's activities are financed by public funds. The most convincing argument against broad terms of reference is, however, the oft-proven result, namely, findings or recommendations by the commission that are equally broad, vague, and general, and consequently not adequately answering the usually specific need for which the commission was created.

Should the terms of reference then be narrow? A narrowly defined scope calls for great care in wording and a detailed, often itemised description of exactly what the commission is supposed to achieve. This can mean virtually tying the hands of the commissioners. Being overly restricted will again bring cries of political partisanship, damaging the reputation of the government and lessening the credibility of the commission's report which is based on the findings of men who were not allowed to gather evidence as they saw fit. Another objection to excessive specificity is that royal commissions often tend to ignore restrictions if they feel that the proper evaluation of the subject being investigated requires that they look into areas outside their prescribed limits of inquiry. It is difficult for the government to object in such cases since it might invite the label of 'being opposed to truth-seeking'. Alternatively, some commissions conveniently hide behind restrictions, using them as excuses for not pursuing a relevant line of inquiry any further, in effect backing away from 'truth-seeking'.

"A compromise between specificity and generality is to state the scope of the inquiry in broad terms and then include a list of suggested topics for detailed examination." ¹

The clarity of the language used is also significant, especially where the terms of reference are not very broadly defined, since they must be interpreted by the commissioners and should any subsequent explanation or elaboration be required during the proceedings, any such clarification by the government might again be interpreted as interference.

1. J.E. Hodgetts, "Royal Commissions of Inquiry in Canada", Canadian Public Administration, (Winter, 1949), p. 24.

Another area of potential trouble rooted in the scope of inquiry outlined in the terms of reference is the constitutional jurisdiction of the subject touched upon by the commission. According to the Inquiries Act a commission may investigate "any matter connected with the good government of Canada or the conduct of any part of the public business thereof." ² However, the Inquiries Act is an Act of the Parliament of Canada, and is not part of the Constitution. Parliament can legislate only within its own sphere of competence and can amend the Constitution only where such amendment does not affect specific provincial jurisdictions defined by the B.N.A. Act. This limitation, of course, applies equally to the provinces. Unfortunately, it is often unavoidable that investigations reach into overlapping or distinctly different jurisdictions and it is unlikely that hard and fast rules will ever be made concerning this problem, simply because each situation involving jurisdictional boundaries is in some ways unique. How can a royal commission investigating certain matters involving the judiciary remain within either federal or provincial jurisdiction, when the administration of justice and civil rights are within provincial jurisdiction, while criminal law and the appointment of judges in provincial and federal courts are within the jurisdiction of the Parliament of Canada? Some guidance might, however, be obtained from a decision handed down by the Supreme Court of British Columbia in *re Gartshore*: ³

2. Section 2.

3. Western Weekly Reports, 1919, Vol. I, No. 372, p. 376.

"A Legislature, with limited powers, cannot create a coercive tribunal to examine into matters over which it has no jurisdiction. I do not understand the principle established by that case (Attorney General for Australia v. Colonial Sugar Refining Co., P.C. 1914, A.C. 237, the precedent used by the court) to be one of absolutely rigid and unyielding character. For instance, a commission to inquire into the working and efficiency of the grand jury system, might, I think, be validly issued by the provincial government even although it was called on to examine into some aspects of the system which... are under Dominion control. But where... the commission is directed to inquire into matters that are exclusively under the control of the Dominion Parliament, I think the principle applies with the result that the commission is void."

The decision in effect declared the B.C. Inquiries Act ultra vires to the extent to which it authorised investigation of matters outside the B.C. Legislature's jurisdiction. No doubt, the same argument could be used in order to obtain judicial restriction of inquiry authorised under the federal Act.

Another jurisdictional problem may arise as a result of authorising a commission to trespass on fields of jurisdiction assigned to the judiciary. Although the courts in England and Canada claim to possess inalienable rights according to the 'unwritten constitution' in respect of protecting certain basic common law rights of citizens, the supremacy of Parliament is unchallenged in Britain. In other words, when Parliament specifically directs a royal commission to do something, there is no other recognised authority (including the courts) that can question its right to issue such a direction. In Canada the Constitution (not Parliament) reigns supreme. In a manner similar to the allocation of powers between federal and provincial legislative bodies, certain adjudicative functions have been allocated to the courts and cannot be exercised by other bodies,

including royal commissions. However, provincially appointed commissions are more likely to be affected by this restriction due to the allocation of the power of appointment of judges to the federal authorities. Should such a commission be granted powers similar to those enjoyed by federally appointed judges, the royal warrant authorising the exercise of those powers would be ultra vires to the extent of that authorisation. Regardless of the terminology used or the description of the person designated ('commissioner'), only the Dominion Parliament has the constitutional authority to vest such powers in individuals.

"A special problem is created where the inquiry involves dominion-provincial relations. Normally, the terms of reference have to be worked out by formal negotiation at the executive level, occasionally involving, as in the case of the transfer of the natural resources of the western provinces, a statutory agreement." ⁴

4. Hodgetts, "Royal Commissions", p. 24.

6.

The Commissioners.

"Ideally, Commissioners should have proved themselves competent; they should have shown the knowledge, experience, and sagacity to master the intellectual problems of their subject and to deliver a judgement on which a whole society can rely. They must be persons of unimpeachable integrity." ¹ Perhaps IBM et al will soon be able to produce electronic computers that can live up to this ideal model and eliminate the dilemmas the government must face in deciding whom to appoint. Of course, it would be rather naive to assume that such perfect 'computer-commissioners' would be preferred by the government in a great many cases. As we shall see, expertise, intellectual capacity, integrity and an over-all image of innocence are far from being the only, or indeed, the most important attributes a would-be commissioner must possess. At any rate, so far these perfect specimens powered by electricity have not yet appeared on the market, and governments have had to restrict themselves to making their selection from the available inventory, consisting solely of imperfect varieties of the old 'Garden of Eden Model'.

The most important consideration, not surprisingly, is a political one. "A Cabinet is always careful to see that the dice are not loaded against it, and the surest way to take care of that eventuality is to load them slightly in its own favour. In other words, a Cabinet will never choose a Commission which is likely to prove

1. C.J. Hanser, Guide to Decision: The Royal Commission, (The Bedminster Press, Totawa, N.J., 1965), p. 167.

antagonistic; and it will try, if possible, to secure commissioners who, although they will not be partisan, are nevertheless in general sympathy with the Government's policies." 2

Aside from this, the first and most obvious characteristic of the average commissioner has to do with his educational background. Until recently most commissions were issued to individuals having legal training not only because of the conceited views of people having been so trained to the effect that they somehow possess a monopoly on the essentially intellectual capacity to obtain, select, weigh and evaluate evidence and draw fair and impartial conclusions therefrom, but also because of the special status of the members of the Bar in our political institutions. Since "approximately one-third of the members of Parliament, 60% of the federal cabinet, and two-thirds of the 'political elite' have come, traditionally, from the legal profession ... one should hardly express surprise at the continuance of the practice of regularly appointing judges to serve on royal commissions." 3 In addition to the obvious bias in their favour, the following reasons are sometimes mentioned in favour of appointing judges:

1) Judges are already on government-payroll and their remuneration cannot exceed the amount they are receiving already (although overly generous living allowances may be paid to them).

2. R. MacGregor Dawson, The Government of Canada, (U. of T. Press, Toronto, 1963), p. 215.

3. J.C. Courtney, "In Defence of Royal Commissions," Canadian Public Administration, (Vol. XXI, 1969), p. 207.

2) Although many courts are overloaded with work (especially in Quebec and Ontario) judges can be shifted freely to commission-work and back to the bench, whereas other prominent figures (with the exception of university professors) cannot so easily leave their posts to take on temporary assignments.

3) The high prestige of the judiciary is transplanted unto the commission (traditionally, the judiciary has been the only branch of government respected by the labour movement, which makes it almost mandatory to appoint judges on commissions where labour's interest is touched upon).

4) The conduct of some types of investigations requires legal qualifications.

5) By virtue of their prior appointment to the bench, judges are supposed to have divested themselves of all biases and tangible interests (mainly financial) so that the possibility of a conflict of interest is greatly reduced.

Some of the objections raised are equally convincing:

1) The prestige and integrity of the judiciary may be seriously impaired by drawing judges into the mud of the political arena. Some suggestions have been made not to appoint judges to commissions investigating potentially politically explosive issues; however, practically any issue being investigated might unexpectedly become the subject of partisan political controversy.

2) Matters arising from the findings of a commission may subsequently come before the courts and prove very embarrassing (particularly where members of the Supreme Court are appointed

commissioners, since there is no further appeal from the decision of that court). The 1946 Commission on Espionage was chaired by two justices of the Supreme Court.

3) Royal commissions often resemble trial courts as a result of their domination by legally trained commissioners. For some types of investigation this may have advantages, but the aims of royal commissions are usually positive, participatory and constructive, as opposed to the largely negative role of the court, usually restricted to deciding between two opposing and equally biased views and presentations of evidence.

4) Theoretically judges, once appointed, are independent from political pressure. This is largely true, since they would probably have to be proven criminally insane or be accused of something equally extreme before their removal from the bench would even be considered by the Cabinet, and even then it would require a joint resolution by both Houses of Parliament. Nevertheless, ambition never dies, and the promotion of judges is also a Cabinet decision. An Exchequer Court judge may want to please the government, hoping for an eventual appointment to the Supreme Court; a justice of the Supreme Court may one day hope to become Chief Justice, or even Governor General; and so on.

Other wider sources of commissioners include the following:

1) University teachers are an untapped reservoir of talent, possessing most of the advantages of judicial appointments without most of their disadvantages. They are independent from both government and major economic interests (being usually poor), universities are

usually ready to grant the required leaves of absence, they can provide expertise in every conceivable field, including law (and not just law, as in the case of judges and lawyers), and so forth.

2) Civil servants are usually well qualified to investigate matters concerning their own agencies or departments, but they may be bringing with them an excessive amount of bias in favour of the government's point of view or they may be reluctant to 'rock the boat' of their employer. This conflict of interest disqualifies them for the purposes of certain types of inquiries.

3) Professionals and businessmen are not really a homogeneous group, but they are generally valuable members - if not chairmen - of commissions. They can provide expertise in different fields, they can often add the prestige that goes with being an 'outstanding citizen', and can contribute fresh ideas not stifled by the atmosphere within the grey walls of Osgoode Hall.

4) Members of the House of Commons may be well known public figures recognised as possessing considerable integrity, but party-affiliation can never be entirely discounted. If their recommendations were at odds with the ruling party's policy, the matter could be politically disastrous, especially if a commissioner were a cabinet minister.

5) Members of the Senate possess the Olympian qualities of judges. While most of them are old, disinterested or known to harbour ultra-conservative biases, some Senators are competent and highly dedicated. However, the dedicated few are occupied in Senate committees, and some current trends emphasize the need for an increased activity

of these committees and of Senate investigations, leaving few Senators of stature for outside activities.

The pre-eminence of the chairmen of commissions is an important characteristic of their make-up. It is the chairman who dominates every activity of the commission, it is usually the chairman whose advice is sought even in the selection of other commissioners, and it is the chairman whose views dominate the Report. Indeed, it is the report bearing the signature of the chairman that is recognised as The Report even though it may only reflect a minority view. It is unavoidable at this stage to refer to the large number of judges appointed as chairmen. At one time many believed that all chairmen should be judges. When the Senate was debating the addition of Part III of the Inquiries Act in 1912, amendments were suggested and debated at some length in the Red Chamber to the effect that all non-political inquiries be chaired by judges. However, this remained a minority view.

7.

Size and Representation.

Size and representation are inseparable factors in considering how many commissioners should be appointed to a commission. Obviously, a small commission - especially a one-man commission - can hardly include representatives of the various interests that may be affected by the inquiry. Exceptions, where the interests affected are easily discernible and few, are not very numerous. The traditional practice in England has been to appoint large commissions. Their memberships have on occasion run into the twenties. It is possible that one of the reasons for this was the English tradition of presenting commissioners with a silver inkstand instead of a cheque for services rendered (with some exceptions), but the official reason was the theoretical consideration that fairness and representativeness go hand in hand.

In his review of Paul Van Riper's History of the United States Civil Service, Professor D.C. Rowat writes that "the emphasis upon merit in selection has been beneficial, but too much stress upon the notion of neutrality obscures the fact that, in a pluralistic society, the basic objective must be to create a r e p r e s e n t a t i v e bureaucracy." ¹ This idea of representativeness as being part of the ideological framework in which democratic institutions should operate is obviously part

1. D.C. Rowat, 'Representativeness does not include partisanship', D.C. Rowat, ed., Basic Issues in Public Administration, (Macmillan, Toronto, 1961), p. 440.

of the reason for preferring representative royal commissions in Britain, even though it was Britain, as opposed to the United States, where this view's applicability to the bureaucracy was rejected. Equally curious is the fact that in Canada, where American ideas have always found fertile ground, the propriety of representativeness in appointing royal commissions never gained anywhere near the degree of acceptance that the principle enjoyed in Britain. The key word - although not necessarily the key to action - in Canada has been neutrality.

What are the arguments in favour of large, representative commissions?

1) If most appointments are thought to be motivated by partisan political considerations anyway, then a government might as well make all appointments representing partisan interests, balancing one against another.

2) A representative commission assures that the views of all sides will somehow be reflected in the Report. If an interested group is not represented on the commission, then its views can be easily ignored or misrepresented or misinterpreted, no matter how convincing a case it may make *b e f o r e* (and not within) the commission.

3) A large representative commission can always be counted on to give a 'watered down' version of the prevailing group's view in its findings. There is no danger of suggesting any extremist remedies to problems. Only slight shifts in the alteration of the status quo would usually be recommended. It should be noted, however, that the situation may call for more drastic solutions.

4) The large commission can be counted on as a usually reliable delaying device. From the start it must concern itself with working out compromises. Staffing, procedure, the choice of places and length of hearings, the choice of experts and other witnesses, and the writing of the Report must all be based on arriving at some degree of cooperation between members representing conflicting views and interests. All this takes time.

A convincing case against large, representative commissions was made by the Balfour Committee on Royal Commission Procedure in 1910, concluding that the representatives of various interests belong in the witness box and not behind the commissioners' bench. This view perhaps overemphasises the adjudicative function of the commissioner, but supported by other considerations it does seem to be the more reasonable choice:

1) Internal divisiveness handicaps effective and efficient work.

2) The resulting recommendations are usually more clear and specific. A 'stand' is usually taken by small commissions, whereas large ones have a tendency toward vague compromise.

3) With some notable exceptions small commissions proceed with their work at 'deliberate speed'.

4) The likelihood of minority reports is greatly reduced. Minority reports tend to destroy the effectiveness and credibility of the main Report, leaving the government in a position similar to that which led to the appointment of the commission, namely, being presented

with alternatives that ~~must~~ be evaluated and distilled into one major, hopefully generally acceptable policy recommendation.

Canada has clearly ~~opted~~ for the small, 'impartial' commission. The difference between the British and Canadian practice has also diminished in the last decades by a notable decrease in the size and increase in the 'impartial' ~~membership~~ of U.K. commissions as well.

The favoured sizes in Canada are one- and three-member commissions, depending on the subject of the inquiry. Relatively simple investigations into charges and allegations or into subjects of a 'local' nature (geographically or otherwise), not affecting nation-wide interests or major policy-decisions, or matters requiring the services of an 'impartial arbiter' (industrial disputes, etc.) can usually be handled satisfactorily by single-member commissions.

The three-member ~~commission~~ still bears one major characteristic of the large commission: it is often preferred to a one-man commission simply because representativeness is believed to be desirable. The reason, or rather the necessity for this, can be found in some of the unique features of the Canadian federal state:

- 1) A transcontinental giant in the geographic sense and a midget in the demographic sense, Canada has developed regional interest-polarisation. Each region ~~must~~ be represented if the terms of reference imply that conflicting regional interests are to be considered by the commissioners.

- 2) Legally created regionalism (interest-polarisation by provinces) has to be treated similarly to the kind of regionalism discussed under item 1. above.

3) The multi-racial, multi-lingual and multi-cultural make-up of the citizenry also calls for representation in order to 'preserve and safeguard' acquired rights and privileges, especially those of minority groups. (However, it thus perpetuates heterogeneity and retards the development of a genuine Canadian identity.)

Small commissions can often be classified as expert versus lay commissions. Ignoring legal expertise, the implications of which have been dealt with in the previous chapter, the appointment of experts in the field of the inquiry is yet another subject of disagreement concerning the make-up of the 'ideal' royal commission. Experts and specialists can easily grasp complex problems concerning their field of specialty, they know where to look for problems, whom to approach in connection therewith, they cannot be swayed by spectacular arguments of superficial significance or by half-truths that may have a serious influence on laymen, nor can they be confused by highly technical language. In spite of these attractive attributes of experts, the Canadian preference has tended towards laymen, the reason being that experts are notorious for favouring their own views and preconceived notions about issues and men in their field. Their views have usually been crystallized (hardened may be a better word for it) over decades of constant exposure to the problems they are asked to investigate, and are unlikely to be shaken by miscellaneous views expressed by witnesses and other experts (often rivals) in the space of a few short weeks of public hearings. Having unshakeable views, they often insist on writing minority reports as well. The Balfour Committee's recommendation seems to apply to experts as well: their place is in the witness box.

8.

Staff and Administration.

Organisational efficiency is an ever-present problem in every organisation. After designing a suitable organisation structure and completing the staffing in accordance with it, the original design usually requires constant revision and adjustments, not to mention the variety of problems which later arise in staffing. Such is the case in a 'normal' organisation, created with a specific purpose in mind, usually comparable to other similar entities, and designed to remain in existence theoretically forever.

Devising and implementing the organisation to facilitate the work of the royal commission and the hiring of its staff must be considered by first recognising the initial disadvantages a commission has to face as opposed to a newly-established permanent organisation:

1) The task of each commission may call for special facilities and talent to be employed in unprecedented ways.

2) While the task of the commission may be clearly spelled out in the terms of reference, the way of carrying it out may be quite unpredictable and may call for drastic 'mid-course adjustments' regarding structural form and type of personnel.

3) There is no guarantee that sufficient funds will be provided by the government to finance the kind of administrative and other types of support machinery desired.

4) Personnel possessing the required qualifications and background may not be available on short notice, and those available may be

reluctant to accept temporary employment of uncertain duration.

5) The turnover of personnel may be high, especially in the final stages of the commission's work, when hiring new employees is even more difficult and can actually hinder its work.. The reason for the high turnover is that employees can hardly be expected not to accept offers of permanent employment at a time when their jobs are soon to disappear anyway.

Most commissions being small alleviates some of these problems to a large extent. The organisation is usually flexible, to some degree even informal, and the early departure of any one individual does not necessarily result in the loss of a 'vital link', as may well be the case in large commissions, where a departing research-assistant, coordinator, administrator or key expert can cause a considerable upset in its functioning (not unlike the confusion caused by the death of a key witness just before the trial).

Although public servants are not the ideal candidates for positions where they can directly influence the outcome of the inquiry (legal counsel, researchers, coordinators arranging the hearing of witnesses, those 'editing' material coming before the commission, etc.), they are ideal for some - mainly routine - functions. Stenographers and other clerical staff are easily available everywhere, but by relying on a pool of civil servants with previous royal commission experience, the commission's secretarial staff can be 'ready for business' in no time at all. This is especially true when the dissolution of one major commission coincides with the formation of another one (e.g. the Carter Commission took over the whole administrative staff of the Glassco Commission in 1962).

In Britain "the chief advisor to a royal commission is the secretary, usually a senior civil servant...In contemporary Canada ... (we) use a variety of terms such as executive director, executive secretary, and research director for the head of the staff organisation." ¹ Another and more meaningful departure from the English pattern is that the Canadian executive director is recruited from outside the public service with increasing frequency. His position on the commission is perhaps next to no one with the exception of the chairman. He is usually selected at an early stage, sometimes simultaneously with, but always with the approval of the chairman. If a civil servant, his experience is most valuable in dealing with the civil service informally and in maintaining formal liason with it. Often he will have previous commission experience as well. If not a civil servant, his relations with the commission's potential 'public' may be equally valuable. In either case, he has to be an experienced, efficient administrator who possesses some additional skills and experience somehow related to the subject of the inquiry. The significance of his role lies, among other things, in that "he will inevitably become to some degree a buffer between the administrative and research staff on the one hand and the commissioners on the other. Provided the rules of access and protocol do not become too rigid, this can have beneficial effects that outweigh its disadvantages." ² From setting up

1. H.R. Hanson, "Inside Royal Commissions", Canadian Public Administration, (Vol. XII, 1969), p. 358.

2. Ibid, p. 359.

the administrative, research and other supporting units of the organisation, including the hiring of staff, everything the commission ever does must be cleared with or through him. Some activities are initiated, while others may be blocked, by him. He can influence what is brought before the commission and what is suppressed, what is emphasized and what is understated. Running the 'business' of the commission on a full-time basis, he is usually better-informed and even more competent to participate in the writing of the report than some commissioners are.

The other influential figure on the staff of the commission is the legal counsel. Judicially-oriented commissions tend to rely on their legal counsel to such an extent that the result has often been their complete domination of the proceedings of the inquiry. Some overly enthusiastic counsellors have been known to conduct themselves in a manner resembling that of the D.A. questioning Perry Mason's client on the witness-stand.

Of course, in the final analysis it is up to the commissioners, and especially to their chairman, to define the limits of the influence that these key staff-members can or should have. De Jure and de facto the commission is independent and can insist on its own way of doing things, provided it is determined to do so, which is not always the case. Meaningful control over the activities of the executive director is at times just another legal fiction. The lay commissioner can easily become a pawn in the hands of a competent executive director, a shrewd legal counsel or an expert deputy commissioner (deputy commissioners are appointed under authority granted by the Inquiries Act to delegate commissioners' powers to, at the option of the commissioners).

Although the chief administrative officer is not always a public servant in Canada, in order to help his work of a routine nature and to maintain effective liason with the government, all federally appointed commissions are now assigned "a senior civil servant as secretary to handle the administrative work of commissions...Commissioners unused to the horrors and details of government administration and unaware of 'the little chick in Treasury who handles that' need all the help they can get to prevent administration from consuming their thoughts and energies." 3

There is no budgetary restriction on the amount of money a commission may spend. Any restriction imposed on the commission due to the shortage of funds is a political decision on the part of the government. Experience shows that it is more economical to employ civil servants as executive directors and counsel than outsiders. The civil servant usually continues to receive his regular salary, while lawyers and accountants employed for these functions demand high professional fees. The financial statements of a large number of commissions indicate that legal fees are responsible for a good chunk of the cost of the 'running' of the average royal commission.

Generally speaking, the organisation supporting the work of a royal commission does not conform to any rigid patterns, and the staff it employs should ideally be made up of flexible individuals capable of adaptation, the performance of non-routine functions, and at times 'improvisation.'

3. Ibid, p. 360.

9.

Procedure

The Inquiries Act specifies the powers of commissioners. Any additional powers necessitated by circumstances are given in the royal warrant. The commission can summon witnesses, documents and other tangible evidence. It can compel witnesses to testify under oath through its power to apply sanctions if they refuse to do so. Although these formal powers are similar to those accorded to courts of law, they are seldom exercised or needed. Witnesses usually appear voluntarily. As they are mostly the spokesmen of the various interests affected by the inquiry, they are most anxious to be heard. It is only in cases concerning misconduct or crime that certain parties have to be coerced into appearing and testifying. The Smith Commission in Quebec (1967) had a good share of this problem in trying to determine who controlled a certain Bermuda company which had pocketed a huge, illegally obtained profit from land-transactions involving the Quebec Liquor Board.

A good part of the commission's work is done informally, without relying on the threat of applying legal sanctions. The interested parties and experts are often approached individually via correspondence or a personal visit by a deputy commissioner or investigator or other employees of the commission. Informal conversations can be more revealing than testimonies under oath and in the presence of legal counsel and the press. Valuable information may be obtained this way 'anonymously' by guaranteeing not to reveal the source.

Interested parties are also approached 'en bloc' by issuing and publicizing a general invitation to make submissions to or appear before the commission. By travelling throughout the country they can encourage and facilitate the voluntary appearance of witnesses who could not otherwise offer their views and intelligence.

As far as the public is concerned, the hearing is the most important phase of the commission's work. Most hearings are open to the public, though closed hearings may be justified on grounds similar to those given by ordinary courts (secrets involving national security; intimate personal circumstances; professional reputation; etc.).

In England the chairman usually conducts a good part of the questioning of witnesses and the other commissioners also participate. Witnesses are allowed considerable latitude in 'mixing fact with fiction'. Opinionated discourses are allowed if they have some degree of relevance. This is not in accordance with court-room procedure of course, but enlightened commissioners (with or without legal training) realise that public inquiries are held at public expense and presumably in the public interest with the ultimate aim of contributing to executive policy-formulation, and government policies do not and should not be based solely on 'facts' and 'iron logic' but also on beliefs, opinions, surviving cultural traditions and prevailing 'moods' of the public. The rigid one-way communication between counsel and witness in the court is probably appropriate for the purpose of bringing out the relevant facts that a definite decision must be based on. One of the roles of the public hearing being the solicitation of information, this requires

effective two-way communication between the witness and the commission. Being shouted down, interrupted and otherwise intimidated by the legal counsel is hardly conducive to achieving two-way communication. The commission should be interested not only in what counsel wants to hear, but also in what the witness wants to say.

Unfortunately, in Canada the influence of court-room procedure has traditionally been great. As mentioned in previous chapters, the chairmen of most commissions have been judges who continued to view their role in the commission as such due to habit, convenience and probably a genuine conviction regarding the superiority of the court-room procedure over other alternatives. Some may find it astonishing that even in the mid-sixties a justice of the Supreme Court of Canada (Spence) should view the role of the judge as commissioner in this restricted sense: "It is the essence of his duty to consider impartially the evidence adduced and the submissions of counsel based thereon." ¹

"The judge and the lawyer have a ready technique of interrogation, which is perfectly understood by them and their 'learned friends'. It is not surprising that the lay members of a commission should often find themselves swept away during the initial meetings by a display of forensic competence. By the time they have recovered their breaths, the room is filled with counsel, one of whom is probably beginning a sentence with the word 'If your Lordship pleases'." ²

Of course, a good case can be made against the laxity of not applying any rules. "In the realm of oral evidence there are occasions when chairmen allow an inquiry to become pathetically unproductive by an unfortunate disinclination to curb irrelevant examinations and cross-examinations by well-meaning Commissioners." ³

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1. Report of the Commission of Inquiry on Matters Relating to one Gerda Munsinger, Queens Printer, 1966, p. 84.
 2. Callard, "Royal Commissions", p. 25
 3. Clokie & Robinson, "Royal Commissions", p. 179.

Experience in England and in Canada shows that the most productive way of examining witnesses is by restricting their testimony to questions regarding previous written submissions concerning their views. In this way, two-way communication is served better, since the written submission must first be read and discussed if questions are to be based on it. The main complaint about this procedure is that it turns public hearings into semi-public ones, since the spectator who has not had a chance to read and evaluate the submission is often at a loss when questions based on it are discussed.

The role of the chairman and the legal counsel is especially significant at this stage. In addition to the original determination of who is to be heard, they determine the questions to be asked as well. The other commissioners also have a say in these matters, but in practice the degree of their participation is not as large. All commissioners, of course, have the right to question witnesses (no one else has this right with the exception of the appointed counsel), so that alert members of the commission can counterbalance the domination of the hearing by the chairman and the counsel. Another remedy open to a commissioner is to conduct his own investigation if the lines of investigation suggested by him are rejected by the majority.

The most controversial aspect of the hearing concerns the rights of witnesses and of those investigated or affected directly or by implication. Section 12 of the Inquiries Act seems to cover this problem:

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

The problem with Section 12 is its vagueness. The rights of counsel are not specified to any extent. Theoretically, the meaning of the Section could be reduced to guaranteeing a silent presence of counsel. The right to cross-examine, the witness' right to refuse to testify, especially if he is likely to incriminate himself (the 'Fifth Amendment' has no application in Canada), and the general right to insist that 'the other side of the story be heard', have not, to this date, been crystallized into definite rules. There are many examples where some of these rights have been recognized or denied.

It seems reasonable to expect that present-day commissions, whether legally required to do so or not, observe the three basic principles laid down by 'The Committee on Administrative Tribunals and Enquiries' in Britain (The Franks Committee, 1957). They are openness, fairness and impartiality, which the committee interpreted as follows:

"Openness appears to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject matter of their decisions." 4

Although the specific application of the principles here concerns administrative tribunals, their relevance to royal commissions can hardly be denied. The recommendations have in fact been incorporated in the English 'Tribunals and Inquiries Act' of 1958.

It would be a gross omission to ignore some other sources of information and opinion on which the commission will base its findings.

4. H.W.R. Wade, Administrative Law (Clarendon Press, Oxford, 1967) p. 243.

It usually has access to previous studies submitted to or prepared and accumulated by various government departments. Often there was a previous royal commission (sometimes several) dealing with the same topic. Foreign countries may have conducted investigations or even adopted legislation concerning the subject and in the latter case can be viewed as testing laboratories where actual results can support or reject given alternatives that may be recommended at home. Parliamentary committee investigations may also have covered the subject. There is now a wealth of official information published regularly by the Dominion Bureau of Statistics and all Departments and other agencies in every conceivable field, which makes the research assistants' work easier. University research projects and unpublished theses and research papers by graduate students can also be valuable sources.

A Commission may solicit evidence from Departments and non-governmental organizations and individuals. It may commission experts (e.g. university professors) to prepare studies or do research. The most important individual source of information, of course, is the commission's own research team, which, in addition to doing its own research, consolidates the information received from all other sources as well, and supplies the commissioners with coherently arranged alternatives for their consideration prior to the commencement of the writing of the Report. (Although before the end of the 1930's the procedure was more court-like - to gather 'evidence'. The current procedure was introduced by the Rowell-Sirois Commission in Canada.)

10.

The Report.

Once - hopefully - all the evidence is in, the commissioners can retire from public view and begin the often lengthy last phase of their work: producing their report. The Inquiries Act does not make any specific reference regarding the nature or form of the report. In fact, it does not even compel the commission to present one. Any reference, preference, or other instructions regarding it are frequently included in the royal warrant. As a general rule the commission can exercise almost unlimited freedom in determining the length, style, content and form of the report. The report-writing is also the stage where each member, if he so wishes, can make his influence felt by presenting strong arguments in an attempt to win support for his views amongst his fellow-commissioners.

Generally speaking all reports "incorporate description, evaluation and prescription." ¹ Some royal warrants attempt to describe the problem in detail, and to some extent they all must do so if the terms of reference is to make any sense at all. However, it is an inevitable result of the commission's work that new problems, or new and more complex aspects of the initially recognized problems are uncovered. The description of the newly and more precisely described problems is followed by their evaluation in the light of the evidence gathered. This part of the report usually deals with lengthy discussions

1. Hauser, "Guide to Decision", p. 201

of the principal alternative solutions available. The last part is the most important one for it is in prescribing a given course of action that the commission's work is justified. It is always the recommendations made that the government and the public look for. A recommendation, once made, becomes a major permanent landmark in the field it concerns. It may be accepted, modified, rejected, applauded or attacked but it cannot be ignored for a long time to come. It becomes a standard source of reference and a rich fountain of ideas concerning all official or unofficial consideration of the subject matter of the report.

While most commissions commence drafting their report upon the conclusion of the hearings, in a number of cases the process of drafting begins almost as soon as the commission sets out to perform its task. While it may be premature to write a report before all the required information has been collected, it may be argued that this method saves time, effort and money. The simultaneous writing of the first draft by the secretary and staff tends to give a definite direction to the work of commissioners and researchers. Their work becomes goal-oriented, the completed parts of the draft concerning the problems and the alternatives (never actual recommendations) can be looked upon as a scoreboard. Irrelevant research work and lines of questioning can be eliminated and all efforts can be concentrated in or restricted to areas not yet adequately explored.

Ideally the report should be the product of genuine group effort. In fact, many times the chairman and not infrequently the secretary is responsible for the greater part, if not all, of it. This is not necessarily a weakness, since no member of the commission is

ordinarily as thoroughly familiar with every piece of evidence, every testimony, submission, research-finding and opinion expressed, as the chairman and the secretary are (and sometimes the legal counsel). In any case, the commissioners still have the opportunity to analyse, criticise and insist on amending the draft so prepared. It is indeed easier and more efficient to have one or two qualified persons write a complete, coherent report than to try to put one together by a group of often disagreeing people. The latter method can result in a confusing hodgepodge lacking consistency in logic and form, while the former method allows commissioners to concentrate on the probably few, even if vital, areas of disagreement and limits group activity to partial rewriting (a process which may be termed 'report-writing by exception').

Unanimity amongst the commissioners is a desirable but not always achievable goal concerning the content of the report. The Balfour Committee "urged chairmen to do everything reasonable to minimize the differences among their colleagues on the grounds that a unanimous finding would be fruitful while a mere record of divided opinion would be 'absolutely useless'." 2

On the other hand, "if commissioners cannot arrive at consensus save by some artificially forced, lowest-common-denominator kind of agreement, it may be more serviceable to ultimate truth to bring into the open the differences in judgement and thus stimulate further thought. Commissioners should therefore have the right to make a dissenting

2. Ibid, p. 200.

report; and it has happened that minority rather than majority reports have come to be implemented." 3

Unresolved disagreements have not occurred in the vast majority of cases in Britain and Canada. Where they have occurred, they were manifested in the following ways:

- 1) One or more minority reports.
- 2) No report produced (very rare).
- 3) Brief interim reports not followed by final report.
- 4) 'Reservations' on the part of certain members incorporated in the report.
- 5) Concurring or dissenting additional opinions by members added as an appendix to the report.
- 6) Minority views disclosed and 'replied to' by the majority in the report.
- 7) Refusal to sign the report.

One interesting and perhaps useful but almost certainly unenforceable recommendation of the Balfour Committee was that minority reports should only be allowed to be released if they are based on evidence obtained by the commission, so that partisan interests would not be granted undue publicity and prestige at government expense.

A significant statutory restriction must be observed by commissioners investigating charges of misconduct. Section 13 of the Inquiries Act states:

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

3. Ibid, p. 200.

Although attempts have been made in the courts to interpret Section 13 in a way that would tie the hands of commissioners, judicial interpretations refused to endorse such attempts. While notice must be given and the person involved must be heard, the commission is not required to keep him informed of the commencement and progress of the investigation or to allow him to be present at every stage thereof (either in person or through his legal counsel.) ⁴

The length of the report is also determined at the discretion of the commission. Reports can run anywhere from a dozen or so to several thousand pages. It is at times unavoidable to write long reports, but it is considered unwise to do so. Few people can or wish to spend the time required to study a long report. The result is that the public will receive second hand information which may result in misinterpretation, oversimplification, omission, misplaced emphasis or deliberate distortion. A compromise solution is to produce an abbreviated 'short report' or summary as well.

Interim reports are produced occasionally, but there is often an undesirably long time lag between the release of the various parts of the report, causing confusion, forcing inaction and affecting the relevance of the final part when that is finally released. There can also be an embarrassing lack of consistency between the various parts.

The finished product is presented to the Governor in Council or to one of the Department heads or (rarely) to a minister without portfolio if the subject matter concerns a task assigned to him by the

4. W. Sellar, "A Century of Commissions...".

Cabinet. This is done in accordance with the instruction normally forming part of the royal warrant.

Although the government cannot force the commission to speed up the completion of the report, it often expresses concern (or veils relief) over delays. Financial sanctions at this stage do not work either. By cutting off funds from the commission the government would simply prevent it from completing the report, which would attract cries of 'foul' from the opposition side of the house, breed unfavourable public opinion and could indeed amount to political suicide if the issue considered in the report is sensitive enough. In practice, however, the government's powers of persuasion are in most cases considerable. After all, the commissioners are its own appointees and as such cannot be expected to be hostile to the interests of the government or to risk the possibility of losing the chance of future appointments or benefiting from other types of indirect favours. Since often the report is an important catalyst of policy formulation and implementation, the government is naturally anxious to be able to release it at a strategic moment. Requests in the form of 'hints' for delaying or accelerating the work of report-writing often produce the desired result.

Tabling in the House of Commons is a rigidly observed tradition in England. In Canada it is not compulsory, but the tradition is followed faithfully nevertheless.⁵ To release a report to the press before tabling it in the House would be considered an affront to the latter. It would make little sense for the government to alienate members in this

5. Ibid, p. 27.

manner. In some recent cases reporters have been 'locked up' in closely guarded premises a few hours before the tabling in the House to allow them time to study the report and be able to comment on it the moment it is released to the M.P.'s.

The commissioners are not forced to maintain secrecy by any legal sanction, but the tradition of secrecy is well established and honoured by all. Members are expected to withhold information concerning the report until the government decides to release it. Publication is the responsibility of the government.⁶ It may or may not publish the report, the evidence, or any part thereof. Usually, however, only secret evidence is prevented from being released. In fact, the commission may refuse to release it even to the government itself.

If it is desired that the report should be made a 'bestseller', a short report or abridged or summarised version of the long report, if prepared by the commission itself, is published by the Queen's Printer. Commercial methods, such as the use of an intriguing cover design, can also help to arouse the interest of browsers. (A good example of this is the interesting design used on the report of the Commission on Prices, published in 1949.)

6. Ibid, p. 27.

11.

Miscellaneous Matters. ¹

The work of a royal commission may be interrupted, influenced, delayed, accelerated or otherwise affected by the following:

1. Resignations.
2. Replacement of a commissioner.
3. Removal without replacement.
4. Appointment of additional commissioners.
5. Inability of a commissioner to act.
6. Acting commissioner appointed during the absence of a regular commissioner.
7. Death.

There have been at least twenty resignations from Canadian federal royal commissions since 1867. The resignation of a chairman, however, is rare. Alfred Bishop Morine, chairman of the three-member Commission to Inquire Into the Public Service resigned in 1912. More recent examples are the resignations of Guy Favreau from the Commission on Patents, Copyrights, Trade Marks and Industrial Design in 1959, and of Wallace McCutcheon from the Commission on Health Services in 1962, both for the apparent prospect of higher political appointment (McCutcheon was appointed Senator and admitted to the Diefenbaker Cabinet forthwith). Ill health, other engagements and various personal reasons have been the most common reasons. Political pressure, incompatibility and conflict of interests may have played part in a number of resignations but such reasons customarily remain undisclosed.

1. The information contained in this Section is based on original research carried out by the author.

Replacement generally follows resignation, death or removal. In the case of a single-member commission this in effect means the appointment of a new commission. In 1896 John Idington was replaced by John Crerar as the single member of a Commission Inquiring Into an Election Irregularity in Algoma Riding. Similarly, H.G. Carrol was replaced by F.X. Langelier to conduct an inquiry concerning certain railway claims in 1904. Another one-member commission inquiring into a certain railway matter in 1923 had its commissioner, F.T. Congolon replaced by F.H. Honeywell. Such replacements, if resulting from government pressure on the single commissioner to resign, can be viewed as the cancellation of a royal commission and the appointment of a new one without the political embarrassment that would result from such a step.

Removal without replacement can also significantly alter the character of a commission by increasing the relative weight of the opinions of remaining members. The Commission to Inquire Into the Treadgold and Other Concessions in the Yukon Territory appointed in 1903 had three members: B.R. Moffat, J.E. Hardman, and B.T.A. Bell. Hardman was soon removed by an Order in Council and Bell died later, leaving Moffat with the task of completing the job, without any replacement.

Fewer than ten commissioners had died in Canada while their commissions were sitting, three of them having been chairmen. The deceased chairmen were usually replaced by other commissioners, who were in turn replaced by new appointees.²

2. J.X. Perrault was the only Secretary of a commission who died 'in office', in 1905 (Commission on Transportation of Canadian Products to the Markets of the World through Canadian Ports, 1903-05).

Another way to upset the 'balance of power' among the members is to appoint additional commissioners... There have been at least ten such appointments since Confederation. A.J. McKenna was appointed to a single member 'Commission to Negotiate a Treaty with Certain Indians' in July, 1906. He produced a report in January, 1907, which apparently failed to please the government. In April of the same year T.A. Borthwick was appointed as the second member of the Commission. A second report of the Commission was produced in October, 1907, bearing the signature of the new commissioner only. This was a unique way of in effect rejecting the report of a commission and appointing a new commission.

Due to various - mainly personal - reasons a handful of commissioners have been unable to act, although they remained commissioners. The commissions having such inactive members have generally been larger ones, so that their work was not seriously impaired.

In at least two cases acting commissioners have carried out the work of absent appointees. In the first case a member of a four-member commission investigating 'Certain Claims Arising Out of the Recent Outbreak and Rebellion in the North West Territories' was so replaced (1885). A more recent case involved an absent chairman whose role was assumed by an acting commissioner instead of appointing one of the three other regular commissioners ('Commission to Investigate Complaints... Regarding Pension and Treatment Services', 1947-48).

In at least one case the commissioners themselves were authorised to effect the appointment of a new commissioner. The 'Commission to Consider and Report Upon the Claims of the Province of British Columbia

for Better Terms' was issued by Order in Council to two persons in 1913 with the express authorisation to name a third commissioner; however, the power to do so was never exercised.

The work of a royal commission may come to an end for the following reasons:

1. Completion of its task, including the submission of a final report. While the report is seldom specifically requested in the Warrant, it is understood to be the aim of each commission that its findings be submitted to the government in the form of a report.
2. Inability to continue due to lack of funds (being 'starved to death' by the government).
3. Discharging the commission before it has had time to complete its task. This can only be done by the appointing authority.
4. Resignation.
5. Death, illness or inability to perform (relevant in the case of a one-man commission).

In the vast majority of cases the commissions are able to perform their tasks and produce at least one report. Items 2 to 5 refer to rare exceptions. The Hyndman Commission inquiring into the marketing of grain in Canada (1922) was unable to produce a report due to lack of funds, although the four commissioners did manage to spend \$46,373.12 before the government decided not to authorise additional funds. The four-member Ross Commission appointed to inquire into the feasibility of constructing a canal across the Isthmus of Chignecto was discharged by an Order in Council dated July 14, 1931 annulling the Order in Council

dated June 11, 1930, which authorised the issue of the commission.

However, seven days after the discharge of the commission a new three-member commission was appointed to investigate the same matter. ³

3. Stephen Leacock, author and McGill political science professor, was appointed a member of the new commission. However, preferring literary and academic pursuits to the problems of connecting the waters of the Bay of Fundy and the St. Lawrence, he resigned two months later.

P A R T II.

CANADIAN FEDERAL ROYAL COMMISSIONS IN THE 1960'S.

1.

Introduction.

Perhaps the first major effort to list all Canadian federal royal commissions was made by J.E. Hodgetts in 1940. In his M.A. thesis he compiled a list of 276 commissions, unclassified, but describing the nature of each inquiry. ¹

K.B. Callard's study prepared for the Privy Council in 1950 ² updated and enlarged Hodgett's list and also attempted to classify them according to various criteria. He listed 1,205 commissions appointed between 1867 and 1949 (471 commissions under Part I of the Inquiries Act, 343 under Part II, and 391 under other Acts of Parliament).

The latest published listing available is G.F. Henderson's "Federal Royal Commissions in Canada - A Checklist". ³ Henderson lists 396 royal commissions appointed between July 1, 1867 and July 4, 1967. The difference between this and Callard's considerably higher earlier figure is explained by Henderson's exclusion of all but the Part I commissions not dealing with the investigation of charges of political partisanship (Callard's 471 Part I Commissions include 178 such

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1. J.E. Hodgetts, Royal Commissions of Inquiry in Canada: A Study in an Investigative Technique, (MA Thesis, University of Toronto, 1940).
 2. K.B. Callard, Commissions of Inquiry in Canada, 1867-1949 (A study prepared for the Privy Council, 1950).
 3. University of Toronto Press, 1967.

investigations). The reason for this, according to Henderson, is that "the pertinent legal definition of a royal commission is that provided by Part I of the Inquiries Act.... But commissions appointed to investigate charges of political partisanship while they fulfil this definition, cannot be included here... (since they) tend to be numerous after every change of government in Ottawa but have never tabled their reports." 4 Nevertheless, some Part II inquiries or those appointed under any other act or under no specific act have been included in his list provided that they seemed to "have been concerned with matters of a public nature." 5

Henderson's basis of selection can be looked upon as a retro-active redesignation of royal commissions in accordance with some of Callard's earlier recommendations as to under what conditions and for what purposes royal commissions should be employed in the future. Callard recommended in his 1950 study that - among other suggestions - the following guidelines should be observed:

- "1. As a technique of executive inquiry the commission has great advantages. In order that these may be maintained it is essential that the device should not be employed too frequently or for trivial matters.
2. The Royal Commission with its great prestige should be reserved for major inquiries into matters of great public importance." 6

Although Henderson's list still includes a large number of relatively irrelevant inquiries, it is probably more realistic - and certainly more convenient - to ignore the terminology applied to most Part II and other commissions and regard Henderson's selection as the

4. Ibid, p. 11.

5. Ibid, p. 12.

6. Callard, "Commissions of Inquiry...", pp. 53-54.

only 'true' royal commissions. The historical prestige and current usage of this executive investigative technique suggests that to designate Part II and other types of inquiries as 'royal commissions' is to broaden the meaning of the term into a meaningless, undefinable catch-all phrase. Consequently, the Canadian federal royal commissions discussed in this Part have all met Henderson's criteria referred to above.

References have been made to the various types of Canadian federal royal commissions appointed since 1867 in Part I of this paper. In fact, the description of 'The Royal Commission' in that Part has been based largely on legal, behavioural and other types of studies analysing past Canadian royal commissions. To present even a cursory discussion of all of the more significant commissions issued since 1867 would be a monumental task, one that would certainly exceed the scope of a minor thesis. At any rate, the vast majority of the most important royal commissions appointed before the 1960's have been dealt with in the following works:

1. J.E. Hodgotts: "Royal Commissions of Inquiry in Canada: A Study in an Investigative Technique".⁷ This thesis covers all but the most trivial pre-1946 commissions.
2. H.B. Gallard: "Commissions of Inquiry in Canada, 1867-1949".⁸ This study makes brief references to many pre-1946 commissions.
3. J.C. Courtney: "Canadian Royal Commissions of Inquiry, 1946 to 1962".⁹ This thesis provides adequate coverage of the important commissions of the period it deals with.

7. Supra, p. 56.

8. Supra, p. 56.

9. J.C. Courtney, Canadian Royal Commissions of Inquiry, 1946 to 1962. (Ph.D. Thesis, Julia University, 1964).

In the following pages we propose to deal with Canadian federal royal commissions of the Sixties, one of our aims being the updating of the data contained in the works listed above.

2.

Classification.

The appointment of Canadian federal royal commissions in the Sixties did not conform to any 'ideal' pattern, such as the suggestions made by Callard ¹ as to the circumstances under which they should be used. The commissions have varied in size, degree of representativeness, procedural pattern followed, types of reports produced, backgrounds of commissioners selected, topic investigated or inquired into, and the motivating forces playing part in the Executive decision-making process in instances where the issue of a commission was considered.

Nevertheless, compared to any other decade in Canadian history, the Sixties brought about a marked improvement in the way royal commissions were used, the frequency with which the spotlights of Canadian national and political life were focused on them, the prestige which some commissions were able to generate, the public involvement, participation and response some commissions sought, invited, encouraged and succeeded in receiving, and so on. They have also succeeded in spending unprecedented amounts of money, in producing preliminary reports, final reports and minority reports, studies, research papers and other types of reports, and were instrumental in the birth of countless 'invited' and 'uninvited' submissions from all strata of society, but mainly from the various interested and interest groups and pressure groups, resulting in an information overload in areas where the commission's role was intended to be the emergence of one clear, authoritative voice proclaiming the remedies sought, followed

1. See Section 1 of this Part.

by pledges of faithful adherence from all sides.

The Commission on Bilingualism and Biculturalism and the one on Taxation did not, of course, produce this desired result, but one should not measure reality in terms of impossible dreams (although nightmares may at times be useful units of measurement in the sphere of political reality). The major commissions of the Sixties may not have achieved what politicians, public administrators and the humble citizenry had hoped for, but the fault did not lie with the commissioners. The commissioners of the decade have been generally competent, dedicated and hard-working. They have laboured and produced. But they could not perform miracles. Our nation has faced and is still facing a number of problems, some unique, some universal, that appear to be incapable of solution, at least in the short run. The ever-recurring problem of controlling and ensuring the efficiency of the vast bureaucratic machinery of the federal government; the attempt to impose an equitable system of taxation on an economic and social structure functioning on principles contrary to the concepts of equity and equality; and the desperate desire to solve the racial-linguistic cleavage threatening to destroy our country, are the most prominent examples of the insoluble problems that faced the most important royal commissions of the Sixties.

But if we can agree that only few and limited positive results can be expected from a n y attempt to solve these problems by a n y means, and that consequently the performance of a royal commission should not be measured in terms of providing universal remedies or triggering government action or public reaction amounting to a de facto solution, then we can still label even a seemingly unproductive royal commission

successful. The broad political, economic and other considerations are matters for the government to consider when the decision to appoint a commission is made. The commissioners should not be held responsible for investigating something that should perhaps be looked into at another time, or for complying with the terms of reference prescribed for them, unrealistic or ill-conceived though they may be. Furthermore, by including the numerous other purposes that royal commissions serve,² the major commissions of the Sixties, especially the two most controversial ones ('B.&B.' and Taxation), have been successful in fulfilling most of their primary and secondary roles.

The average number of commissions issued annually has remained fairly constant (approximately three) during the decade. The change of government in 1963 did not result in the usual proliferation of investigations that had occurred on previous similar occasions, although some commissions were appointed as the result of election pledges and the continued power struggles in the House of Commons following three general elections that had been 'inconclusive' in a sense (they failed to grant any party a clear mandate).

The healthy trend of getting away from judicial appointments and court-like procedures continued in the Sixties, although political expediency still prevailed in the investigation of some partisan issues. John Diefenbaker, while in opposition, had been a vocal opponent of appointing judges to commissions where they might compromise the integrity of the judiciary, and yet, as Prime Minister, he proceeded to appoint judges to chair four (three of them in the Sixties) of the sixteen royal

See Part I, Section 3.

commissions issued by his administration. Furthermore, "the four judges selected as chairmen of the royal commissions also received their judicial appointments from the Diefenbaker government." 3

The Pearson government did not seem especially concerned about the integrity of the judiciary either in appointing judges as commissioners investigating matters charged with political dynamite, but they at least had the more or less legitimate excuse that the Munsinger, Spencer and Rivard inquiries required legal expertise and at least quasi-judicial procedures. The four judges appointed as chairmen by the Diefenbaker administration, however, were asked to look into matters concerning national health, financial structures, railway routes, and the Canadian pilotage system. But the major commissions of the decade escaped the 'curse' of the tradition of judicial appointments and discarded the 'manacles' of the trial form of conducting hearings. These commissions were finally freed from deriving their findings 'based on the evidence adduced' in the narrow, restrictive tradition of the adversary system of justice. They invited participation from expert and layman, preferred dialogue to the 'extraction' of testimony, and relegated verbal 'evidence' to the supplementary role of clarifying more 'coherent', pre-studied written submissions. They also relied more on their own substantial research staffs in gathering first hand information and consolidating it with information received from other sources. These staffs in addition made internally generated recommendations to the commissions as alternatives to the supposedly more biased

3. J.C. Courtney, "In defence of royal commissions", Canadian Public Administration, Vol. XII (1969), p. 204.

recommendations coming from interested outsiders. The trend toward the 'new type' royal commissions started in the 1930's (Rowell-Sirois Commission) appears to have come to full bloom in the 1960's.

To discuss each commission which was appointed since the beginning of the Sixties and concluded its task before the end of the decade is not the aim of this paper. To take an inventory of these commissions and isolate and systematically arrange certain facts about them is a task more suitable for the Dominion Bureau of Statistics. To cover in excessive detail the terms of reference and the report of each commission, especially its recommendations, would result in discussing editorials that appeared in the newspaper TAPWE in the Hay River Area in the North West Territories, ⁴ the merits of taxing capital gains, ⁵ the desirability of requiring a public service employee to be bilingual in Victoria, B.C., ⁶ and deciding whether Gerda Munsinger was a '\$15.00-a-trick' prostitute or the agent of a foreign government, or both. ⁷

Our subject being the Royal Commission as an executive instrument, apart from the particular use to which it is put in a given instance, our attention should be focused on the aspects of each inquiry that conform to or deflect from some general patterns identified in connection with commissions under Part I of this paper. However, scientific detachment, desirable though it may be, is probably impossible to maintain in analysing royal commissions. In spite of the commission's

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4. The Morrow Commission on the administration of justice in the Hay River Area.
 5. The Carter Commission on Taxation.
 6. The Dunton-Laurandeau Commission on Bilingualism and Biculturalism.
 7. The Spence Commission involving Gerda Munsinger.

similarity with the judiciary in being to some extent independent and objective (?), it is, unlike the judiciary, asked to examine 'cases' that almost without exception originate from the political arena or from anticipating or responding to issues that may become relevant in the political arena.

Also, unlike the courts, the commission has to be 'creative' in the sense that the inquiry and the report are not required to be based on precedents. The subject investigated, the method of investigation and the resulting findings and recommendations are always in some ways unique. Consequently, some degree of familiarity with the issues is essential in order to understand conformity, non-conformity and creativity in the work of each commission. Furthermore, the pre- and post-commission stages are equally important topics of discussion if the very relevance of the royal commission is to be appreciated at all. The political, economic and social climate, the government's strength and position, the various internal and external pressures influencing the government party, and the personality traits of influential Cabinet members and the Prime Minister are all vital in evaluating the usefulness of the Royal Commission as an instrument to be employed in the usually complex circumstances that eventually lead the government to setting up a commission. The legislative aftermath or the absence of it is equally significant, especially when related to the pre-appointment stage, thus allowing one to re-examine and re-evaluate the considerations that had led to the appointment in the first place. It can, at the post-commission stage, help to determine whether the choice to appoint a commission was a sound one, whether the scope

was properly set, whether the right men were selected for the job, whether the decision proved to be politically beneficial or disastrous, and so on.

All of these types of conclusion, of course, can only be drawn and understood if one is familiar with at least some basic aspects of the issues and their places in the political-economic-social environment. This is not to say that an itemised account of the activities of commissions is required after all. By isolating certain patterns and characteristics it is possible to arrange the royal commissions under discussion in the following groups:

1. 'Pure' investigations.
2. Inquiries regarding social services.
3. Inquiries into matters concerning the Canadian economy.
4. Commissions dealing with labour relations.
5. The 'scandal and security commissions' of the mid-sixties.
6. Commissions on provincial and regional problems.
7. Major commissions:
 - a) On Government Organisation.
 - b) On Taxation.
 - c) On Bilingualism and Biculturalism.

In the following sections each of these groups will be considered in accordance with the areas of relevance touched upon earlier.

3.

'Pure' Investigations.

'Pure' investigations involving non-partisan issues, requiring semi-judicial methods and usually chaired by judges were the following:

1. "Royal Commission to inquire into complaints received concerning certain activities of Station CHEK/TV, Victoria, British Columbia." 1
2. "Commission to inquire into... the circumstances leading to the dismissal of Mr. George Walker from the position of District Supervisor of the Prairie Farm Assistance Administration and irregularities alleged to have occurred in the processing of claims for benefits under the provisions of the Prairie Farm Assistance Act..." 2
3. "Commission to inquire into ... the circumstances surrounding the crash of ... (an) aircraft ... at St. Therese, Quebec..." 3
4. "Commission to inquire into and to investigate the charges of irregularities in the federal election of 1963 made by Mr. Ormond Turner in the ... Vancouver Province." 4
5. "Commission to inquire into the dealings of ... Justice Leo Landreville with Northern Ontario Natural Gas Limited ... and to advise whether ... such dealings constituted misbehaviour in his official capacity." 5
6. "Commission to investigate ... the administration of justice in the Hay River Area of the North West Territories ... upon statements and editorials appearing in issues of the newspaper TAPWE..." 6

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1. Order in Council P.C. 1960-1211.
 2. Order in Council P.C. 1963-1896.
 3. Order in Council P.C. 1964-1544.
 4. Order in Council P.C. 1965-372.
 5. Order in Council P.C. 1966-128.
 6. Order in Council P.C. 1967-1327.

With the exception of the investigation of CHEK-TV, Victoria, which was carried out by five commissioners, all of the 'pure' investigations were done by one-man commissions. One could argue that since the object in each case was to determine facts by obtaining evidence, and to apply known or clearly-implied criteria to them, these commissions should be labelled 'ad hoc mobile courts' and not royal commissions. Of course, the problem is that there are no ad hoc courts and no high level mobile courts in Canada that could handle these assignments (although there are a few 'travelling judges' in our Northern Territories). Furthermore, although the procedure is judicial, usually there are no 'parties' in the legal sense to the matters inquired into. Without such parties no existing court could be involved as such, regardless of whether stationary or mobile. Another consideration barring the use of any regular courts in such cases is that usually no sanctions are known or intended to be applied by the commission. The intent is to determine the facts in the most acceptable manner known in our Western civilisation, i.e. in a court-like procedure, and at the same time retain the privilege of choosing and applying the sanctions, if any, in the hands of the executive - a very convenient combination indeed.

Having agreed that the functions of such commissions cannot be carried out by the regular courts, even though the expertise required, the procedures followed and the relative significance of the inquiries do not go beyond the scope of some sort of permanent court of tribunal, certainly not to the extent of warranting the appointment of a royal commission, the question arises why are commissions still appointed for such mundane inquiries? Should there not be a permanent body, perhaps

a branch of the high court of the land established for ad hoc inquiries of this type? Of course, suggestions abound, but the one thing most of them have in common is their being ignored. Perhaps rightly so. Nevertheless, possibly the main reason for appointing the royal commissions discussed in this section was that the government had no alternative instruments at its disposal. Courts as courts could not handle the job. Judges as private citizens lack the power to summon, to request witnesses to testify under oath, to compel cooperation by the power to hold a witness in contempt and apply the appropriate sanctions. Part I of the Inquiries Act grants these powers to appointees of the Privy Council. In other words, only by appointing a judge to a royal commission can the government re-equip him with the powers he otherwise possesses in regular judicial proceedings.

The Landreville inquiry involved the rare occurrence of a judge being investigated by a royal commissioner who was also a judge, the object being the determination of the former's fitness for the 'proper exercise of his judicial duties'. Having accepted certain shares of capital stock before his appointment which eventually yielded a gain of \$117,000.00, Justice Landreville of the Ontario Supreme Court was the subject of an inquiry conducted by Supreme Court Justice I.C. Rand. This inquiry raised the questions whether it is proper to ignore the probable presence of professional solidarity (regularly demonstrating itself in mutual 'white-washing' in the professions) in a judge asked to investigate a fellow judge; whether the already over-privileged judiciary should be allowed to 'police' itself even in such an extreme and

consequential case of misbehaviour on the part of a high court judge, and whether it is proper to investigate under authority granted by Order in Council a person who can only be removed by two-thirds majorities in both Houses of Parliament but can be sufficiently embarrassed in a public inquiry so that he may be forced to resign regardless of its outcome. One of the results of a royal commission inquiry in this case was the perhaps never before equalled public exposure of misbehaviour on the part of a member of the revered judiciary. It was a healthy shock to our judges and the general public alike. It was an important step in the direction of destroying myths of infallibility and the outdated, undemocratic position of virtual untouchability and impunity of our judges. Of course, the fact that Leo Landreville was a Liberal appointee also acquired significance in the daily Pearson-Diefenbaker rugby on the floor of the House of Commons, but the appointment of a Supreme Court Justice, ill-conceived though it may have been for some reasons mentioned earlier, clearly indicated the Liberal government's intention that the commission conduct a 'pure' inquiry, concerned with the facts and their ethical implications, regardless of any political mudslinging.

The investigation of the crash of an airliner at St. Therese, Quebec is difficult to regard as an appropriate role for a royal commission. Precedents exist for similar investigations conducted into fortuitous or seemingly fortuitous events in the past, such as the fire on Parliament Hill in 1916, but even if sabotage had been suspected, sabotaging a principal institution of our system of government such as Parliament, or a commercial airliner, while both may be of concern to

the public, differ quite sharply in the nature of such concern. At any rate, the royal commission appears to be an outdated instrument to investigate traffic fatalities, but if it is not, then one finds it difficult to understand why there has not been a royal commission investigating the carnage on our highways, costing us thousands of lives each year.

The inquiry into allegations of election irregularities also had political overtones - necessarily so - yet it was a 'purely' judicial one, conducted with impartiality. Once more numerous than any other type of investigation by commissions, election irregularities so settled are now the rare exceptions.

The inquiry concerning the dismissal of George Walker and alleged irregularities and the misappropriation of funds involving the Prairie Farm Assistance Administration was the type of investigation that is considered routine in large corporations, usually involving the police, private investigators and insurance company investigators. Perhaps the only justification for appointing a royal commission in this case is that it involved, in a sense, 'the government investigating itself' which is traditionally regarded as a delicate matter requiring independent, unbiased commissioners to do it in order to convince the supposedly ever-suspicious public that fairness and impartiality are the motto of the investigation.

Most of the 'pure' investigations conducted in the Sixties were necessitated by the lack of alternative instruments available to the government. Unfortunately, they also tended to dilute the prestige and the significance of the term 'royal commission' as it exists or should exist in the public mind.

4.

Inquiries Regarding Social Services.

Two inquiries regarding social services had been initiated by the Conservative administration in the Sixties:

1. Royal commission on health services. ¹
2. Inquiry into the Unemployment Insurance Act. ²

These were larger commissions, having seven and four members, respectively. Although the commission on health was chaired by E.M. Hall, Chief Justice of Saskatchewan (later appointed to the Supreme Court of Canada by John Diefenbaker), expertise in the field of health care was amply represented amongst the six other commissioners, and Justice Hall himself had considerable experience in health and welfare problems in Canada. ³

The scope of the inquiry made the Hall Commission one of the most important ones in the Sixties. Health services in Canada had been lagging behind most Western nations and at least one political party (the NDP and its predecessor the CCF) had been demanding the implementation of what some label 'socialist' schemes for decades. However, quite unpredictably, the commission may have been created as a result of the activities of a powerful interest group o p p o s e d to any government administered schemes:

"McGillivray writes that 'the Hall Commission on Health Insurance was appointed in 1961 on the request of the Canadian Medical Association which also had a big role in its terms of reference and personnel.' If this was

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1. Order in Council P.C. 1961-883.
 2. Order in Council P.C. 1961-1040.
 3. J.C. Courtney, "Judges as Royal Commissioners", Dalhousie Review, Vol. 44 (1964-65), p. 416.

so, reports of hearings in 1962 indicate considerable tension between commissioners and spokesmen of the CMA. At that time, the CMA became apprehensive that the Hall Commission might propose a compulsory scheme. It can now be said that the Canadian Medical Association, despite an initial influence on its terms and personnel, did not have much influence on the recommendations of the Hall Royal Commission." 4

It is probably an oversimplification to assume that other, equally important considerations did not play a part in setting up the Hall Commission, but if the CMA's role is correctly described above, then we are witnessing a most interesting manifestation of how a royal commission can fit into an overall interest-group strategy, regardless of the fact that it had backfired. Clearly, the implication is that the CMA assumed that if a royal commission were appointed at a time just before large scale public pressure was expected to build up in favour of a 'socialist' health scheme, the commission, whose make-up it could influence at this stage, would probably recommend an acceptable compromise solution, thus postponing the threat of a radical scheme for a good number of years, a scheme that would undoubtedly be recommended by a commission appointed a year or two later. The tactic was highly unconventional and, perhaps fortunately for most Canadians, it did not make much difference. The Pearson administration was committed to a universal health care scheme regardless of the CMA, the Hall Commission, and even of some members of the Pearson Cabinet itself.

But if the government were committed to a definite policy on health care, why did it appoint a commission, especially if the commitment

4. F.C. Engelman and M.A. Schwartz, Political Parties and the Canadian Social Structure (Prentice Hall, Scarborough, 1967), p. 100.

to its own design was so strong that many of the Hall Commission's recommendations were simply ignored without giving them serious consideration? Even more disturbing is the inconsistency in appointing a commission on health services and not bothering to appoint one on pensions, especially since "the pension plan might have avoided some difficulties had it been preceded by commission study ... and when it is observed that the recently passed medicare bill has, in many areas, ignored three years of royal commission study." 5

Of course, the problem of inconsistency demonstrated in issuing commissions where perhaps the use of this investigative technique is unwarranted and vice versa, can hardly be expected to disappear. Its use by the executive branch is similar to the use of the discretionary remedies (mandamus, certiorary, etc.) available to the courts. Discretionary powers, while unavoidable, tend to be exercised in a manner not always consistent with the principles of equity, impartiality and fairness. Discretionary devices, such as the Royal Commission, tend to be instruments of general convenience, rather than of serving well defined causes. There may be serious problems warranting a royal commission study, but the government is never required to appoint one. It will do so only if external forces, not necessarily dictated by or related to the problem itself, or internal opinions within the government will prompt it to act. However, it is difficult to foresee that a government - any government - would voluntarily deprive itself of the use of this discretionary device by prescribing circumstances where appointment must automatically follow.

5. G.B. Doern, "The role of royal Commissions", p. 420.

The 'Committee of Inquiry into the Unemployment Insurance Act' was regarded as a royal commission by the government. It was also appointed under Part I of the Inquiries Act and its members were referred to as commissioners in the Order in Council. The reason for calling it a 'committee' was probably to avoid confusing it with the Unemployment Insurance Commission. ⁶

It might be argued that the revision of a piece of legislation, as opposed to the consideration of a major legislative reform (the Hall Inquiry) should be done by legal experts of the Justice Department and experts of the U.I.C., or by a parliamentary committee. However, the changes contemplated in the Unemployment Insurance Act amounted to major reforms and a major public inquiry may be considered warranted where a large, underprivileged and unrepresented segment of the population is involved.

The consideration, evaluation and reform of social services seem significant enough to invite wide public participation and the impartial formulation of recommendations. Consequently, the Royal Commission is a proper instrument to employ in such circumstance, provided that it is used whenever a legitimate need arises, and not only when political winds blow in a given direction.

6. J.C. Courtney, "In defence", p. 203.

5.

Inquiries Into Matters Concerning the Canadian Economy.

If we are willing to interpret 'matters concerning the Canadian economy' in a very broad sense, then the following commissions may be included in this category:

1. Royal Commission on the Automotive Industry. 1
2. Royal Commission on Publications. 2
3. Royal Commission on Banking and Finance. 3
4. Royal Commission on Pilotage. 4
5. Commission to Inquire Into the Costs of Farm Machinery and Repaid Costs. 5

Problems concerning our economy are ever-present. Royal commissions investigating these problems are of the constantly recurring types. The recently constituted Economic Council of Canada can be viewed as a permanent royal commission. It was born out of the recognition that periodical, ad hoc commissions are insufficient sources of advice to the government in the all-important field of maintaining a 'balanced' economy, which has become one of the primary roles of modern governments. While the creation of the Economic Council may have eliminated the need for large scale, all-encompassing enquiries into all aspects of the economy, such as the Gordon Commission was asked to do in the Fifties, the need for concentrated, in-depth analyses of special problems or given areas of overall problems have remained and are likely to remain for some time yet. In fact, all of

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1. Order in Council P.C. 1960-1047.
 2. Order in Council P.C. 1960-1270.
 3. Order in Council P.C. 1961-1484.
 4. Order in Council P.C. 1962-1575.
 5. Order in Council P.C. 1966-978.

the commissions discussed in this section have dealt with such comparatively narrow areas affecting our nation's economy.

Another important aspect of such inquiries in recent times is that they inevitably involve Canada's external relations, mainly those with her closest friends and allies, the U.S. and the U.K. The high degree of foreign (mainly U.S.) ownership and control of large segments of significant branches of our economy makes it almost inevitable that any royal commission investigations of this type involve the investigation of the affairs of large and powerful groups of non-residents and any recommendations made and subsequent legislative, administrative, fiscal and monetary measures that may follow will affect **these same groups of non-residents** and their home governments. Thus, the issues involved in what are normally considered purely economic and domestic matters become much more than just such matters. This makes the task of the royal commissioner more complex, the issues more sensitive and the contemplation of any action by the government far more complicated and consequential than would ordinarily be the case. In fact, one of the principal reasons why the establishment of commissions is most desirable in cases affecting foreign economic interests is to give these interests and their home governments a forum where they can be heard, where they can be given notice, where they can assess in time what the eventual consequence of the inquiry is likely to be, to give them time and a chance to readjust or to exert pressure and indicate what, if any, reciprocal measures they and their home governments are likely to take in case certain undesirable measures were implemented. This way the Canadian government will also have time to formulate policies in full cognizance of the consequences of certain measures and prevent develop-

ments that might cause intolerable deterioration in economic matters as well as external relations, and so on.

The Bladen Commission was asked to look into the almost completely foreign dominated automobile industry. Its recommendations advocating that we "build a more viable automobile industry have been altered unrecognizably by the auto parts tariff incentive agreement recently signed by Canada and the United States." ⁶ Perhaps it is worth mentioning here that one should not automatically condemn the government's decision not to implement or to significantly modify a commission's proposals. The government has to consider a much broader spectrum of alternatives and other factors than the commissioners who have been wrapped up mainly in matters concerning their subject for some time. At any rate, one should not lose sight of the fact that royal commissions are advisory bodies, and insistence on the routine implementation of their remedies would turn them into dictators of policies, a role normally exercised by the government of the day.

The circumstances surrounding the creation of the O'Leary Commission on Publications and its legislative aftermath are amongst the most spectacular examples of intrigue in Canadian politics. According to Peter Newman, one of President Eisenhower's first questions to the newly elected Diefenbaker during their Ottawa meeting concerned Time magazine, with reference to the 20% tax imposed on advertising in foreign periodicals. This tax was removed soon after, even though its implementation was considered a last desperate effort to save struggling Canadian publications by the Liberals. But when in 1959 Time "suggested

6. Doern, "The role of royal commissions", p. 26.

that Canada under Diefenbaker was moving toward Nehru-style neutralism, the Prime Minister.... (threatened) to 'expose' Time in the Commons." 7 The following year Senator Gratton O'Leary, a known protectionist, was appointed chairman of a three-member commission to re-examine the position of Canadian versus foreign publications. The recommendations were predictably protectionist. However, no action of any kind was taken on the recommendations until 1965, although Diefenbaker had again tried to exploit the issue in the 1962 election campaign by threatening to implement them. But American resistance to the recommendations was so powerful that even when legislation was introduced in 1965 disallowing advertising expenses paid to foreign publications for tax purposes, Time and Reader's Digest had to be exempted. Then Finance Minister Walter Gordon writes: "The matter came up at a time when the automobile agreement was under heavy attack in Congress. Approval of the agreement might have been jeopardised if a serious dispute with Washington had arisen over Time." 8

The seven-member Porter Commission on Banking and Finance covered a field where not only problems of economics and external relations had to be considered, but federal versus provincial jurisdictional matters as well. The commission's recommendations were the subject of long and arduous struggles until finally toward the end of the decade most of them were enacted as amendments to the Bank Act. In spite of the scandal involving the takeover bid of the Mercantile Bank by the Rockefeller interests in New York, legislation ensured that control of

7. P.C. Newman, Renegade in Power; The Diefenbaker Years, (McClelland, Toronto, 1963), pp. 237-8.

8. W. Gordon, A Choice for Canada, (McClelland, Toronto, 1966), p. 97.

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our banks will remain in Canadian hands and that no one person will hold more than 10% of the voting shares of any bank, thus eliminating the possibility of concentrating power over them in the hands of a few. In a House of Commons debate in 1966 the conservative opposition "accepted the recommendation of the Porter Commission that the (6% interest) ceiling be removed, but only if coupled with the second major Porter recommendation - that provincial lending institutions be brought under the regulation of the Federal Bank Act,"⁹ ensuring wide and open competition in the field. But in this case it took more than opposition pressure, threats from Washington and local pressures that made the government eventually implement most of the recommendations. Once again, it was commitment on the part of individuals, such as Immigration Minister Jean Marchand threatening to resign over the issue, who were mainly responsible for pushing the proposed amendments through. The relevance of having the recommendations of a royal commission such as this one available is not so much their originality, as the 'respectability' they automatically acquire and as such can 'legitimise' and clothe with prestige the aims of crusaders such as Walter Gordon and others, aims which might otherwise have been dismissed as ones lacking seriousness or propriety.

The commissions on pilotage and farm machinery were relatively minor ones compared to the foregoing. The single-member Barber Commission on farm machinery did affect external relations in revealing serious abuses in setting Canadian price structures by major U.S. and British manufacturers, but the scope of the investigation was narrow, the findings

9. Canadian Annual Review - 1966, pp. 26-7.

straightforward, and the recommendations obvious. Possibly the determinations could have been made by means less spectacular than naming a humble fact finder a royal commissioner, but apparently it was found politically convenient to appease a large, important and generally malcontent segment of the population by demonstrating that their grievances regarding the prices of farm machinery are receiving the kind of attention their political influence entitles them to. It would probably be dogmatic to deny the validity of this argument on purely theoretical grounds.

6.

Commissions on Labour Relations.

Commissions appointed to deal with labour relations have been few in number and limited in importance during the decade. Once a primary tool - often preferred and requested by unions - the Royal Commission has been legislated out of significance in this area. Permanent bodies (boards, tribunals, etc.) have been set up under statutes to deal with all the routine and most of the exceptional problems concerning labour relations. There were at least two commissions in the Sixties that can be included in the group engaged in the outdated and inappropriate role of using royal commissions to act as arbitration boards:

1. "Commission to inquire into the increases in rates of pay for civil servants in 'Group D' announced by the government on July 16, 1965, including examination of all considerations which in the commissioner's view appear to be relevant in determining whether the increases so granted and the rates of pay so established are fair and reasonable..."¹

2. "Commission to inquire into the Post Office Department concerning grievances relating to work rules, codes of discipline and other conditions of employment applying to non-supervisory operating employees, exclusive of salaries; in doing so, to consult with officers of the Department and of organisations representing employees; and, keeping in mind both the welfare of employees and the efficient operations

1. Order in Council P.C. 1965-1350.

of the postal service, to report thereon and to recommend such changes in existing practices as may be in the public interest." 2

The one-man commission of J.C. Anderson inquiring into pay rates was not in any way different from an arbitration board except that its recommendations would not be legally binding. There were also two interim reports issued before the final report appeared, all within two months of the date of appointment. The fact that arbitration boards do not issue interim reports does not necessarily indicate a meaningful procedural difference either.

The other single-member commission of Andre Montpetit looking into the affairs of the Post Office Department, although barred from considering wage rates, was also engaged in a task essentially similar to arbitration, having been required "to consult with officers of the Department and of organisations representing employees."

The most important common feature of each commission was that the employer concerned was the Government of Canada. In 1965 bargaining and other rights of public service employees had not yet been resolved and the government was practically compelled to turn to the use of royal commissions for settling issues that could not be resolved within any prescribed procedural framework then in existence. The prestige of the Royal Commission, particularly amongst the usually better educated and highly law-abiding civil servants is extremely high, probably much higher than any arbitration board could hope to have, even if the same persons were to be appointed to them as the ones appointed to the royal commissions mentioned above.

2. Order in Council P.C. 1965-1590.

Another advantage was that the Crown did not at that time deem it proper that its 'sovereignty' be curtailed by accepting to be bound by the decision of any other body, such as an arbitration board, in spite of the fact that it would have been considered unthinkable not to accept the recommendations of the royal commissions under the circumstances, especially with respect to wages.

At any rate, it can be expected that royal commissions dealing with labour disputes would only be appointed in the rarest and most unusual circumstances in the future. Though legislative amendments and bilateral agreements entered into with civil service employee associations have since eliminated the need for the use of royal commissions even in matters concerning government employees, exceptional conditions may still warrant the periodical use of this device.

7.

The 'Scandal and Security Commissions' of the Mid-Sixties.

There was a time in the mid-sixties when Canada's Parliament was turned into a place in a sense resembling some shady saloon in the Klondike during the Gold Rush days. Parliamentary traditions, promising careers of public figures, and the faith of many in our system of government were broken during that time. The Royal Commission did not escape that period unscathed either. This potentially fine instrument of executive inquiry had become a lethal weapon in the desperate Diefenbaker-Pearson duel for power. The following commissions were brought about as the direct results of that partisan political struggle:

1. "Commission to investigate fully into allegations about any improper inducements having been offered to or improper pressures having been brought to bear on counsel acting upon an application for the extradition of one Lucien Rivard and all relevant circumstance connected therewith." 1

2. "Commission to inquire into the case involving George Victor Spencer." 2

3. "Commission to inquire into the case involving Gerda Munsinger." 3

4. "Commission to make full and confidential inquiry into the operation of Canadian security methods and procedures and, having regard to the necessity of maintaining (a) the security of Canada as a

1. Order in Council P.C. 1964-1819.
 2. Order in Council P.C. 1966-395.
 3. Order in Council P.C. 1966-482.

nation; and (b) the rights and responsibilities of individual persons, to advise what security methods and procedures are most effective and how they can best be implemented..." 4

Technically these commissions could be brought into the category of 'pure' inquiries, since as far as the commissioners and the procedures followed were concerned that is what they were. Exceptional rules applied only to the commission inquiring into security methods, which should perhaps be put into a different category. The only other commission properly allocable to the different category would be the 1946 inquiry into espionage.

The struggling minority government of Lester Pearson, already on the defensive on many issues ranging from provincial demands for more money out of the federal treasury to the hostile controversy surrounding the proposals for a new Canadian flag, was on the brink of collapse following the revelations of an opposition MP in November, 1964. The conservatives charged that "parliamentary assistants of the Pearson Government were involved in an effort to prevent the extradition to the United States of Lucien Rivard, now a convicted narcotics smuggler." 5 The inevitable result was the appointment of a royal commission of inquiry. Quebec Chief Justice Frederic Dorion was named the sole commissioner. It is easy to speculate that this high court judge was selected not only because of his competence to conduct the inquiry, but also because of the traditional exploitation of the integrity of members of the judiciary and the fear of French Canadian reaction to the possible condemnation of members of the all-French cast in this lethal farce by a non-French commissioner.

4. Order in Council P.C. 1966-2148.

5. Engelman and Schwartz, "Political Parties", p. 188.

The Dorion Report was released in June, 1965. "It was an unexpectedly harsh indictment of the Rivard affair's central figures. The judge found no difficulty in believing that a bribe had been offered to release Rivard" ⁶ and the general effect was to drag the Liberal Government through the mud. "The harshest verdict was reserved for Guy Favreau, not because it accused him from any wrong-doing, but because it questioned his judgement, and no man whose judgement is suspect can remain the country's Minister of Justice." ⁷

The Dorion revelations caused not only the resignation of the Minister of Justice. In the election that followed in the same year "Mr. Diefenbaker's pursuit of the Rivard theme ... no doubt contributed to Mr. Pearson's unexpected failure to obtain a parliamentary majority" ⁸ and probably caused the perhaps premature termination of Prime Minister Pearson's term of office, which is directly attributable to his party's failure to gain a majority of the seats in the 1965 elections.

The Dorion Inquiry raises the questions of the propriety of using the Royal Commission in cases so obviously charged with political partisanship and intrigue; of the propriety of a commissioner going beyond the reporting of the facts and expressing opinions on the judgement of a cabinet minister; and of the need for restraint on the part of a commissioner in dealing with an issue that can have consequences as far-reaching as the downfall of the government of the day, unless, of course, he is convinced of the gravity of the guilt he exposes and that it properly

6. P.C. Newman, The Distemper of Our Times (McClelland, Toronto, 1968), p. 275.

7. Ibid., p. 275.

8. Engelman and Schwartz, "Political Parties", p. 178.

belongs in the lap of the government as a whole. The Pearson government may have erred in appointing a royal commission, but it had no real choice in the matter. The unceasing cries of the opposition could not be muffled any other way. The choice of the commissioner may have been unfortunate, but there is always an element of risk involved in giving a person a free hand to do something. It could be argued that any opinions regarding the soundness of the Justice Minister's judgement in exercising discretionary powers granted to him by Parliament should be left to Parliament to express on the basis of the evidence sought from the commission and on any other considerations which that sovereign body should choose to take into account. In this respect the Dorion Inquiry had gone to the very core of the problem concerning the proper role of the Royal Commission in the political process. The Dorion case points out some serious problems but it does not suggest any solutions. The Royal Commission is a flexible, fluid instrument, to which no rigid rules could or should be applied.

The Spencer case was the next episode calling on the Royal Commission in the continuing soap opera staged daily in the House of Commons in the middle of the decade. This case involved

"George Victor Spencer, a Vancouver mail clerk accused of spying for the Soviet Union... The RCMP, under heavy criticism for the slackness of the investigative methods as revealed during the Dorion Inquiry, were anxious to divert public attention to their prowess in guarding the nation's security. When their sleuthing caused two spy masters working out of the Soviet Embassy in Ottawa to be expelled from the country, the Mounties happily helped External Affairs draft a press release that ... described an unnamed civil servant who had been paid 'thousands of dollars' to assist in the establishment of espionage activities." 9

9. Newman, "Distemper", pp. 390-391.

And so a minor civil servant became the center of a hot, nation-wide controversy, focused, of course, on the floor of the Commons. "Advocates of civil rights... protested that he was being convicted without a trial, and ... the country's ardent anti-communists ... couldn't understand why a self-confessed spy was being allowed to remain at liberty." ¹⁰ Once again the government was cornered, the Prime Minister was pressured into publicly reversing his own decision not to call an inquiry, thus threatening another Cabinet break-up. For reasons by now obvious, another judge, Justice D.C. Walls was appointed sole commissioner to rehash a minor case already adequately dealt with by the RCMP. The commission confirmed the previous findings that Spencer, who was dying of cancer anyway, sold only some trivial data available to the general public, none of which comes under the definition of 'secret information' under the Official Secrets Act. At the same time, his dismissal from the Public Service was warranted by the obvious breach of the loyalty oath that his dealings constituted. Under the guise of concern for his civil liberties the Opposition ruthlessly exploited his case for gains in the political arena. Whether it was wise or foolish, inevitable or not, that the government finally yielded to the demands calling for an inquiry, the fact remains that neither the nature of the issue, nor the magnitude of the case, apart from the artificial, disproportionate role it had assumed in the political struggle of the day, called for the employment of the Royal Commission as the instrument most suitable to dispose of this matter. One of the results of the

10. Ibid., p. 391.

inquiry was that yet another Justice Minister, Lucien Cardin, was publicly humiliated by the Prime Minister by surrendering to Opposition pressure and his threatened resignation had brought the government to the brink of collapse by the clear indication of mass-resignations that would have followed. This Cabinet crisis was compounded further by the Prime Minister when he decided to yield to concurrent Opposition demands for setting up a judicial inquiry into intelligence procedures (although the commission was not issued until several months later).

It was hardly conceivable that the scandalous situation surrounding and involving the subjects of the royal commission inquiries mentioned above could deteriorate any further, when yet another scandal was exposed.

It is probably the prurient aspects of the Munsinger case that make it the most memorable scandal of the Sixties. Nevertheless, it was a case which had very serious implications concerning national security and the quality of men to whom we had entrusted the fate of our nation. Both of these considerations are ordinarily proper subjects of serious, top-level public investigations in a democratic society. Even the use of the Royal Commission, being the very special all-purpose investigative tool of the highest executive authority in the land, cannot be seriously objected to. But objection can and must be made to using the Royal Commission as a venom-filled, deadly instrument of political vengeance. The case involved at least two Cabinet ministers in the previously defeated Diefenbaker administration and a German prostitute with underworld connections and a past linking her to the Soviet

espionage network. The case had been investigated by the RCMP some six years earlier and the Prime Minister, exercising his prerogative or discretionary power, had disposed of the matter at that time. The inquiry called by the Pearson administration therefore, as in the Rivard case, amounted to something resembling a 'sanity hearing' concerning the previous Prime Minister. As pointed out earlier, the arguments questioning the quality of the judgement exercised in deciding the matter at hand may be quite valid, but our political system assigns the role of meting out rewards and punishments for such unsound decisions to the electorate and not to a royal commission. Diefenbaker possibly erred in not removing Pierre Sevigny from the defence portfolio, but it was his unchallengeable right in law and in tradition to err this way. Even to raise the issue the way it had been raised (it involved the airing of the contents of confidential RCMP files) may not have been entirely proper, but this concerns only 'political ethics', which is a rather flexible term in any case. Or one could sincerely agree with the revelation on the basis that by the extreme and unprecedented use of political parliamentary tactics amounting to daily attempts of political assassination, John Diefenbaker had really 'asked for it'. But to drag a Justice of the Supreme Court of Canada and the revered Royal Commission 'into the mud of the political arena' was an improper way to alleviate an acute political crisis.

Of course, our aim is not to criticise and righteously condemn governments for misusing the Royal Commission which is admittedly a handy, tempting tool to be used at times of crisis. Without subscribing to the adage that 'all is fair in love and war' one must view

the actions of a government engaged in a desperate struggle for its very survival with some tolerance and understanding and without expecting rigid adherence to the rules of a game which at times seems to have no other rules than those of the jungle. Nevertheless, it must be pointed out repeatedly that such uses of the Royal Commission can injure it and reduce its effectiveness in cases where they can be of genuine service to the government and the people.

8.

Commissions on Provincial and Regional Problems.

In a transcontinental federal state there are few major issues that do not have some special implications for various provinces and regions. The commissions discussed in this section are by no means the only ones dealing with matters of largely provincial and regional concern. They are, however, the only ones whose concerns were restricted to the interests of certain geographic regions of the nation:

1. "Commission to inquire into ... the problem relating to the future of the aircraft overhaul base maintained by Trans-Canada Air Lines at Winnipeg International Airport and into the possibility of maintaining and increasing employment at the said base." ¹
2. "Commission to inquire into the problems of marketing salted and cured fish produced in the Atlantic Provinces." ²
3. "Commission to inquire into and report upon the marketing problems of the freshwater fish industry in the Provinces of Ontario, Manitoba, Saskatchewan and Alberta and North West Territories." ³

The commission on the TCA base in Winnipeg could to some extent be regarded as one dealing with labour relations and all three commissions could have been included in the group inquiring into matters concerning the Canadian economy. It is because of the special signifi-

1. Order in Council P.C. 1964-857.
 2. Order in Council P.C. 1964-1672.
 3. Order in Council P.C. 1965-1269.

cance of the relationship between federal authorities and regional interests that royal commissions dealing with regional problems should be identified as a distinct group regardless of the particular issue, whether social, economic or some other, that is to be investigated.

All three commissions covered in this section were one-member bodies. The Thompson Commission was the only one the subject of which had involved a real, nationwide controversy. TCA's decision (a Crown corporation now known as Air Canada) to move its major over-haul base from Winnipeg to Montreal for reasons of economy and convenience prompted a predictable public outcry in Winnipeg, where the livelihood of thousands was to be affected. There were really three parties involved in the issue (all of them indirectly): the nominally neutral federal government, owner of TCA, the Province of Manitoba, threatened with a serious economic loss, and the Province of Quebec, expected to gain from the proposed transfer of the base. Under the circumstances and in the absence of a permanent machinery for the settlement of such disputes it is difficult to see what else the federal government could have done but to appoint a royal commission and in effect transferring the responsibility for a painful decision taken by the management of a government owned enterprise.

The other two commissions inquiring into problems of fish marketing could be regarded as routine investigations into regional economic problems.

It should be pointed out at this stage that commissions on federal-provincial relations are considered to be in a group distinct from

the one discussed in this section. There have been a number of major commissions dealing with such problems, beginning with the Rowell-Sirois Commission in the 1930's. Examples of inquiries of this type in the Sixties are the already discussed Commission on Health Services, and the Commissions on Taxation and on Bilingualism and Biculturalism, which will be dealt with hereafter individually. The reason for not grouping these commissions together under the heading of 'federal-provincial relations' is that their other aspects (mainly topic and size) make them different in ways far more important than their incidental concern with federal-provincial relations.

9.

The Royal Commission on Government Organisation.

A long series of major 'self-investigations' undertaken by the Government of Canada was begun in 1867. The three-member Commission on Government Organisation ¹ set up by the Diefenbaker government in 1960 was the latest and perhaps the most thorough, all-inclusive examination of the federal government machinery ever undertaken in Canada.

"Even while in Opposition the Conservatives had begun calling for a commission to investigate all aspects of efficiency and economy in the public service, similar to the two Hoover Commissions in the United States." ² Consequently, they felt committed to make the appointment, even though the new Civil Service Act was passed in 1961 largely ignoring the fact that the Commission's recommendations should ideally precede any major legislative changes in the subject under study.

The Commission consisted of men oriented towards efficiency and convinced of the superiority and general applicability of modern business methods. J.G. Glassco (the chairman) and F.E. Therrien were corporation executives. The third member, Watson Sellar had previously been the top watch-dog over the public service as Canada's Auditor General. ³

In spite of the traditional use of the royal commission technique in the evaluation and upgrading of the bureaucracy's performance, T.H. McLeod has voiced strong objections to its use in this field in

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1. Order in Council P.C. 1960-1269.
 2. D.C. Rowat, Canada's Royal Commission on Government Organization, (reprinted from the Summer 1963 issue of Public Administration), p. 197.
 3. Sellar was also an expert on royal commissions. See his article in the Canadian Bar Review, Vol. XXV, 1947.

general. He pointed out that the commission must cater to

"... at least three ... audiences, the administrative organization which is the subject of the inquiry, the government which is ultimately responsible for the behaviour of that organization, and ... the public ... For a commission to attempt to satisfy all at the same time is to expose itself to the danger of falling between the stools." 4

He is also skeptical of the abilities of 'outsiders' in what he terms a 'management survey' to penetrate and sufficiently comprehend the workings of the vast, intricate government organisation. He also points out that a generally applicable weakness of the royal commission technique has special relevance in this area, namely that "the lack of operational responsibility ... can only tempt it to plan on a scale well beyond the limits of realization." 5

But McLeod's principal objection is to the openness and consequent publicity which characterizes the activities of royal commissions. His argument is relevant and interesting enough to be quoted at some length:

"The anonymity of the civil servant is designed not only to protect him, but also to ensure his ... loyalty ... and answerability ... He is held responsible by and justifies himself before one body and one body alone, and in turn that body has the sole responsibility for justifying itself before the court of public opinion. This continuous chain of responsible behaviour protects not only the civil servant but the public itself, for it removes both the temptation and the need for the politically non-responsible civil servant to enter directly into the political process either to protect his interests or justify his existence. The imposition of a third party ... in this arrangement does serve to place a strain upon traditional relationships ... The Civil Service cannot be brought directly under public scrutiny, and at the same time be denied full opportunity for self-justification in the light of such scrutiny." 6

4. T.H. McLeod, "Glassco Commission Report", Canadian Public Administration Vol. 6. (1963), pp. 387-8.

5. Ibid, p. 392.

6. Ibid, pp. 393-4.

One could hardly dismiss such reasoning; however, the degree of its validity may vary according to the weight given to the 'public's right to know' and other principles of democratic government. At any rate, the argument can have no retroactive effect. The Glassco Commission did pry into every aspect of government, it criticized inefficiency, condemned waste and in general gave a good airing of what it considered to have been the 'dirty linen' of the public service. It also made a number of recommendations of questionable value. In order to do all this it managed to spend \$2,791,915.00 in three years. It was in some ways a unique commission. Unlike other major commissions of the past thirty years it did not hire a large full-time research staff, but had broken down its activities into some two dozen 'tasks' that were to be carried out by several hundred 'efficiency experts', civil servants, professors, professionals and corporation executives in small groups, preparing reports on their findings to the commissioners. One of the unprecedented and widely criticised aspects of the Glassco Commission's procedure was that the internal studies and reports were not published. This is consistent with numerous recommendations to the effect that the commission's effectiveness is enhanced if it speaks with 'one voice', but the opponents of the muffling of the voices of internal dissent have equally convincing arguments for publication (see Part I.).

The fact that no public hearings were held may be justifiable on some grounds, but to grant the opportunity to the public to exert 'uninvited' influence on the commissioners as opposed to the 'invited' influence of the hired experts is one of the basic functions of royal

commissions. The opportunity to learn of various views expressed during hearings is also considered part of the educational role of the commission. The Glassco inquiry in this sense, too, was no more than an almost totally 'private' study of systems and efficiency.

What made the Glassco Commission drastically different from a large-scale study by business-oriented management consultants was its awesome report. Consisting of almost two thousand pages, it was released in five volumes between July 1962 and June 1963, ensuring that each one received a heavy dose of publicity and more careful study than their simultaneous release would have attracted and made possible. It was a clever method, indeed. Luckily, they did not decide to release the report in twenty-four 'instalments', which is the number of separate reports it consists of, some of them contradictory. There is certainly contradiction in devoting a section to pointing out the very basic qualitative differences between private and public administration and giving due recognition to the often insurmountable problems of quantification of goals and costs in public administration which are far less severe in private administration, and then basing the rest of the report on rather narrowly defined 'business principles'.

As mentioned earlier, this paper was not meant to deal with the recommendations of the commissions described in any detail, apart from describing what is essential in order to be able to derive some hopefully useful conclusions from the particular applications of the royal commission technique.

The Royal Commission itself was examined by the Glassco Commission, and although no shatteringly new and original observations and recommendations have resulted, it seems appropriate to mention some of them at this point.

The Commission sees the Royal Commission as a valuable instrument for studying and curing economic ills. It states that probably more economic research has been done by royal commissions than by other government organs in Canada. It values the obvious advantages of the royal commission technique, especially its ability to air a wide range of views and publicize proposals without committing the government. The research studies and statistical and other information published by commissions are contrasted with the then limited amount of significant data released by government agencies, pointing out the contributions of royal commissions to the development and improvement of scientific research and education at least in the field of economics. The commission's principal recommendation in this area seems to be to emphasize the usefulness of the Royal Commission in inquiring into problems concerning the sphere of federal legislative competence in cases where impartiality and expertise are desired in seeking solutions.

Of the several hundred recommendations made by the Glassco Commission most of the relatively trivial ones can be regarded as useful suggestions aiming at improving economy and efficiency (in the narrow sense at least). To date a large number of the recommendations have been implemented by the Conservative and Liberal governments and by the civil service upon its own initiative.

The recommendations seem to suggest that the objectives of the commission were determined by the following considerations, presumptions and conclusions, none of them necessarily implied in the terms of reference:

1. Government is a necessary evil.
2. The growth of government services and activities should be restrained.
3. The private sector is more important than and is superior to the public sector.
4. Business methods of administration are superior to those employed in the public service.
5. The principles, methods and techniques of private administration can and should be adopted in public administration.
6. The cost of providing government services is of overall importance to the public and so is the efficiency with which the service is performed ('efficiency' meaning the traditional concept of relating costs to benefits, largely ignoring the difficulty of measuring non-monetary costs and benefits).
7. The existing departmental system is flexible enough to fill the needs of efficiency, a view which is challenged by many authorities in public administration.
8. Financial management methods need improving.
9. A hierarchical administrative structure and adherence to a somewhat modified principle of 'unity of command' is desirable.
10. Bargaining and other rights of civil servants are of little importance and can be safely ignored.

11. Insufficient appreciation of the magnitude of differences between formal and informal organization patterns in departments.

Professor D.C. Rowat summarized the basic conclusion of the Glassco Commission in the briefest possible way by narrowing down most recommendations to their lowest common denominator:

"Like the earlier Royal Commission (the Gordon Commission) the Glassco Commission reached the conclusion that the main problem is the divorce of authority from responsibility, and that the remedy lies in the simple device of transferring financial and personnel controls to one centre, the Treasury Board." 7

Doctor Rowat then goes on to analyse the approach and the recommendations of the Glassco Commission, pointing out theoretical and practical faults in them. He observes that the reiteration of the "old nineteenth century view that government is 'a necessary evil' ... led it ...into policy questions that are best left for a government to decide". 8 He also points out that "there is no real recognition of the intensely political nature of public administration or of the grim realities of party politics." 9 On the staffing problem "the point not sufficiently recognized by the Glassco Commission is that its proposed centralization of control over personnel management will be control by a political body, the Treasury Board..." 10 He expresses amazement at the statement that "the question whether the government should negotiate with staff associations ... has relatively little direct bearing on efficiency, economy and service to the public." 11

7. D.C. Rowat, "Canada's Royal Commission", p. 198.

8. Ibid, p. 199.

9. Ibid, p. 199.

10. Ibid, p. 200.

11. Volume I., p. 283.

While Professor Rowat insists vehemently and quite rightly that "economy and efficiency are by no means the only criteria by which the excellence and effectiveness of public administration should be measured", ¹² he also recognizes that "there is sufficient similarity between public and private administration for business techniques to be applied successfully at the lower levels of public administration". ¹³

Another astonishing feature of the Glassco Report is that it "chose to regard the language issue as beyond its terms of reference, despite the fact that Commissioner Therrien submitted a minority report demonstrating its urgency." ¹⁴

The foregoing discussion of the many 'faults' found in the approach, procedures and recommendations of the commission serve to point out that the representation of wider skills and interests would be desirable in selecting commissioners ~~for~~ such a major commission, and that public hearings would possibly have resulted in the expression of a wider, more balanced range of views, which, hopefully, would have resulted in less one-sided and narrow-minded views and recommendations appearing in the report.

The propriety of investigating the civil service by royal commissions as opposed to less independent and less publicised means may remain an academic question, since governments are likely to go on preferring that someone else clean up their house from time to time. However, it is difficult to resist making the suggestion that,

12. D.C. Rowat, "Canada's Royal Commission", p. 203.

13. Ibid, p. 204.

14. Ibid, p. 205.

unlike the Glassco Commission, the next one on the civil service should act more like a royal commission and less like a dedicated group of technocrats wrapped up in their own prejudices, shutting out any challenges, and exploiting their commission for the purpose of imposing their own solutions.

10.

The Royal Commission on Taxation.

Kenneth Carter and five others (including one woman, a rare occurrence) were appointed by the Diefenbaker government in September, 1962

"to inquire into ... the incidence and effects of taxation imposed by Parliament ... upon the operation of the national economy, the conduct of business, the organization of industry and the position of individuals; and to make recommendations for improvements in the tax laws and their administration ... the distribution of burdens among taxpayers ... taking into account also the jurisdiction and practices of the provinces and municipalities; ... the means whereby tax laws can best be formulated to encourage Canadian ownership of Canadian industry without discouraging the flow of investment funds into Canada;... and such other related matters as the Commissioners consider pertinent ... That the Commissioners be ... assisted to the fullest extent by Government departments and agencies..." 1

This was a tall order indeed. Had the commissioners not been given a carte blanche to do as they saw fit and to spend as much money as they wished, the Carter Commission would not have been able to do more than come up with some recommendations aimed at plugging loopholes in our tax laws and advocating some new measures that usually result in the creation of new loopholes. No previous commission, committee or other individual or group study of the tax system has ever been able to go beyond that in the past. Our archaic tax system is so astonishingly complex, inconsistent, inequitable and confusing that it is largely incomprehensible even for the experts in the field, who are forced to specialize in various narrow areas, ignoring the rest, in order to preserve their sanity. The desire for major tax reform has been agreed

1. Order in Council P.C. 1962-1334.

by all governments for decades, but apparently John Diefenbaker was the first Prime Minister in recent times who could be made to realize that it would require no less than a Canadian 'Project Manhattan' to rationalise the Canadian tax structure. Of course, Prime Minister Pearson's role is equally important from the point of view of the final outcome, since shortly after the appointment of the Commission John Diefenbaker was turned out of office. One of the indications of the fact that tax reform is an appropriate subject for royal commission investigation was that the new Prime Minister continued to authorize almost unlimited funds to the Commission. This indicated also that there were hardly any partisan appointments made by the Conservatives. Kenneth Carter, a practising chartered accountant who specialised in taxation, had previously been a Liberal appointee as chairman of a federal investigative committee looking into certain matters concerning federal sales tax in 1955.

It is probably safe to assume that even the commissioners and their large staff of experts did not foresee initially just how big their task really was. Even though they were spared of most of the initial administrative difficulties by taking over the staff of the Glassco Commission, it had taken almost two years before they realised that our system of taxation could not be reformed any more than a rotten apple can be nursed back to health. It was then decided that a brand new, totally rational system would have to be designed, a complete 'package' that would make sense to everyone, would not offend one's sense of fairness and would not insult even a child's intelligence, as the existing system does to this very day.

The Carter Commission was a commission of experts, but, unlike the Glassco Commission, they did not lose sight of the various roles a royal commission must play. Public hearings were held in twelve cities and some seven hundred witnesses were listened to with attention and patience. C.E.S. Walls, one of the commissioners, writes of the realisation that "formal court procedure may destroy the very purpose of a royal commission ... in discouraging public-spirited citizens from coming forward either to air their grievances or to suggest solutions relevant to the commission's terms of reference." ² He describes the method of the Carter Commission as one creating "a more relaxed atmosphere at commission hearings through the questioning being carried out almost in its entirety by members of the commission, without benefit of legal counsel by either party." ³ But at the same time they did not allow too much time to be wasted on public hearings, as many other commissions have done. Walls goes on to describe the procedure:

"...Faced with 336 briefs, many of them of considerable length, we allowed no time for the reading of briefs but started in on the questioning immediately. This meant that each commissioner, of necessity, had studied each brief, in advance and in detail. On other commissions ... the brief was always first read into the record by the witness before cross-examination." ⁴

Another way of securing wide public and expert participation was the commissioning of a number of special studies on subjects covering the whole field, ranging from topics such as 'the budget as

2. C.E.S. Walls, "Royal commissions - their influence on public policy", Canadian Public Administration, Vol. XII (1969), p. 368.

3. Ibid, p. 368.

4. Ibid, p. 369.

an economic document' and 'the taxation of mineral extraction' to the 'stripping of corporate surplus' and 'death duties'. These studies, unlike the Glassco studies, were subsequently published and proved to be invaluable supplementary reading for those desirous of acquiring a thorough understanding of a given area of taxation, in spite of the fact that the 2,085 page report of the Commission was a rather thorough document.

The 336 briefs received included many major studies also, some of them prepared at considerable cost. The main difference between these voluntarily submitted briefs and the studies commissioned and paid for is that the briefs were presented by various interest groups, naturally enough aiming at preserving their own status quo within the tax system if they were the beneficiaries of various privileges known as 'tax advantages' or of proposing that changes be made that would in some way extend such privileges to them. The commissioned studies on the other hand were supposedly unbiased, although it is unrealistic to expect a total absence of bias where one must rely on a group of middle class experts educated mainly in accounting and law and closely identified with economic as opposed to popular interests.

Nevertheless, the Carter Report had succeeded in devising a blueprint for a system of taxation radically new and different, more 'perfect' in a technical sense than anyone had previously believed such a system can be. Overnight it became the universal ideal of experts throughout the world. The recommendations were aimed at creating a tax structure as equitable and fair as one can possibly

get in a free enterprise economy. And yet, the question must be asked, was the procedure followed by the commission as related to the final outcome significantly different from that of the Glassco Commission? The answer is probably no. The hearings, the publicity, the submissions, the impression of wide participation was mainly just that: an impression. The Carter Commission listened, but, like the Glassco Commission, it decided to go its own way regardless. It can be concluded that the recommendations came about in spite of, and not because of most of the briefs and witnesses' testimonies, although this could also be looked upon as a virtue. If one were to compile a list indicating the sources of the briefs and the interests represented by the witnesses the result would resemble a combined report of the New York and Toronto stock exchanges on a particularly active day...

The role of interest groups is probably the single most important aspect concerning any changes made in tax laws. This aspect assumes gigantic proportions when a general overhaul of the whole structure is proposed, and perhaps the best way to understand the pre-commission stage, the procedures followed by the commission, and the post-commission dilemma the government has been facing for three years so far, is to explore this aspect.

"Studies prepared for the Carter Commission estimated that almost \$5 billion in income received by Canadian individuals and corporations in 1964 either escaped taxation or was taxed at unduly low rates." ⁵ This alone explains the tremendous interest and

5. J. Bossons, "The objectives of taxation and the Carter Commission proposals", Canadian Public Administration, Vol. XII, (1969), p. 155.

pressure group activity that the government must constantly take into consideration before implementing a major reform that would do away with the monstrous inequity indicated by this figure. Tax reforms have always been slow and gradual, no one has ever attempted a full frontal attack against all privileged groups before. A royal commission was appointed in contemplation of all the well known advantages ('trial balloon', public education, gaining time, sharing responsibility, seeking a 'blue chip consensus', etc.) but one wonders whether the Conservatives would have changed their minds about appointing Kenneth Carter, had they any inclination as to the outcome of it all. The same question could be asked about the Liberals' continuing support of the "Carter boys'" spending spree. Ironically, three years after the release of the report the prospect of its partial implementation is finally at hand, while the main objection to this step comes from the party responsible for the creation of the commission. Such are the risks involved in using this tool of executive inquiry in the process of policy formulation.

Had there been any reliable clues regarding the shape of the report, speedier implementation might have followed. But since it represented an unexpectedly drastic departure from what was reasonable to expect, some of the roles royal commissions play had to be continued, even repeated in the post-commission stage. The report, usually a final document enabling the government to make a decision, turned out to be a starting point instead. Every Canadian was materially affected by the recommendations. The majority of the people were favourably affected, but it was the minority on the other end of the seesaw that

presented the problem. This minority includes those who sit at the controls of most economic and political power not only in Canada, but in the United States and the United Kingdom as well (mainly the multinational corporations). Although the recommendations include the suggestion that even unemployment insurance benefits should be brought into taxable income, the hundreds of thousands of unemployed had no audible voice in the public debate and private persuasion and influence-peddling that had begun. But the mining and petroleum industry, the banks and life insurance companies and other economic power groups had mounted a campaign so relentless that the government at first had to behave as if it virtually 'disowned' the report. Later, as the controversy continued, while at the same time the universally admired reform proposals could not be ignored, a White Paper was issued containing few significant departures from the Carter formula, but enabling the government to gain more time, give further warnings, let the opponents spend their fighting spirit in the prolonged debate and at the same time seek an even wider consensus among the ordinary voting citizens.

The Carter Report would probably be a more appropriate subject of a thesis dealing with interest group behaviour than of one on royal commissions. Sophisticated instruments clothed with respectability were employed by industrial and other interests. The Canadian Tax Foundation is an outstanding example of this. According to its 'motto' it is

"an independent tax research organization. Its governors are nominated each year by the Canadian Bar Association and the Canadian Institute of

Chartered Accountants... The purpose of the Foundation is to provide both the tax-paying public and the governments of Canada with the benefit of expert, impartial research into current problems of taxation and government finance." ⁶

In fact, the Foundation is controlled by influential lawyers and accountants and its membership is dominated by hundreds of the largest corporations contributing most of the funds for its operations. It provides a convenient, well-publicized forum for economic and professional interest groups. In 1967 alone, following the publication of the Carter Report two major conferences were sponsored (in Toronto and Montreal) by the Foundation on this topic. Reading the list of the participants is like reading a listing of blue chip corporations.

The Carter recommendations are so complex that it is impossible to discuss them in a sufficiently abbreviated fashion that would fit into the limited space available here. On the other hand, to evaluate the role of the royal commission in this particular application, it is not necessary to know much more than what has already been implied. The most important aspects of the Carter Report are that it discusses a traditionally sensitive issue, a complex matter having major socio-economic and political implications, it directly affects every citizen, and proposes to upset an important aspect of the nation's economic status quo, and so on. In other words, it proposes a minor revolution. Consequently, it is difficult to find a subject that is more suitable for the use of the royal

6. This motto appears on the jackets of most CTF publications.

commission technique. It is also difficult to think of any other policy instrument which would have enabled the government to change the political climate without its direct participation and consequent assumption of serious risks, to the extent that the until recently 'unthinkable' is now becoming more or less acceptable.

11.

The Royal Commission on Bilingualism and Biculturalism.

Peter Newman writes that "the only major measure passed specifically for French Canada during the Diefenbaker Years was the introduction of bilingual government cheques ... Dorion and Sevigny were so out of touch with Quebec ... that they assured Diefenbaker that bilingual cheques would satisfy the aspirations of French Canadians." ¹ The Liberals were more alert to the danger represented by the emerging French Canadian nationalism and its extreme form, separatism. As the 'quiet revolution' began to emit the sounds of explosion in Quebec, it became clear ~~that~~ the French-English cleavages must somehow be narrowed if this nation was to survive. To do this in the short run by any means whatever seemed impossible. Even a party commanding a large majority could not take the political risk of forcing the 'integration' of French Canadians by harsh legislation. The minority governments of the Sixties were engaged in daily battles for their survival and could not seriously consider such measures on a large scale unilaterally. At any rate, our political traditions would not tolerate the imposition of legislation in areas where the public is not prepared for it. An issue as vital as the need to save Confederation by giving substance to the fiction that Canada is a bilingual country, one that provides equal opportunities to its English and French speaking citizens in every field, cannot be resolved by passing a few laws, especially if they

1. Newman, "Renegade in Power", p. 283.

are likely to be met with hostility from all sides. The question was how to preserve the nation, i.e. keep Quebec in Confederation, if it is not within the power of the federal government to satisfy French Canadian aspirations and at the same time the English speaking majority is hostile to any 'concessions' being made to the French minority controlling the destiny of an important province and through it the future of the nation as it stands today. The answer seemed almost obvious. Even if little can be done in the short run, the appearance that something is being done must be projected and sustained, while at the same time long-term solutions should be formulated. By announcing in December, 1962, his intention to appoint a royal commission on bilingualism and biculturalism as one of his first acts as the new Prime Minister - if and when elected - Lester Pearson had chosen what seemed the best available weapon for following this strategy.

The noisy 'travelling freak show' that the commission was designed to be was supposed to create the impression that 'things are happening in Ottawa' while allowing the government to do things not much more significant than the introduction of bilingual cheques had been. At the same time, the 'Dunton-Laurendeau troop' was supposed to spread goodwill and understanding throughout the country, educating and preparing the people for the inevitable, and simultaneously allowing the government to adapt bolder measures as a result.

The main objective of the ten-member 'Royal Commission on Bilingualism and Biculturalism' ² was not the mere preparation of a

2. Order in Council P.C. 1963-1106, July 19, 1963.

report recommending a magic formula to cure the nation's near-terminal illness in the Sixties. It was supposed to be a catalyst, a public forum open to all, moderated by supposedly reasonable men, an alternative to non-communication that - if continued - would have inevitably resulted in increased violence, alienation and, possibly, rupture. It was to be the embodiment of the nation's concern for survival, the instrument that would do away with the still frighteningly real hold of bigotry and prejudice blocking the way toward doing what must be done to make Canada truly one nation and not the 'two nations fighting in the bosom of a single state' that it still is today.

But even if one chose not to view the gravity of the situation as one involving national survival, the subject of the B.&B. Commission was still vitally significant, one that few other issues could possibly cloud, and as such a most appropriate subject for the deployment of a large royal commission. Comparing the Kerner Commission in the U.S. with the B.&B. Commission, Kersell and Conley write that "it appears ... that there is discrimination practised against French-speaking Canadians and coloured Americans, and that this discrimination is a significant cause of grievances that must be remedied if Canada and the United States are to be reasonably stable polities." ³

Of equal significance for the need to rely on the commission's role to 'sell' the idea of bilingualism and biculturalism to the people in all parts of the nation was the fact that the federal government could only do so much, no matter how determined it was to act. One of

3. J.E. Kersell and M.W. Conley, eds., Comparative Political Problems, (Prentice Hall, Scarborough, 1968), p. 46.

the criticisms leveled at the Pearson government was that there was no real need to appoint a royal commission when it already had a declared policy on bilingualism. This criticism ignored - among other things - the fact that the issue was basically a constitutional issue affecting provincial jurisdiction and without the cooperation of the provinces Ottawa could do little to spread bilingualism and biculturalism. The issues aired at the hearings throughout the country concerned language rights in the field of education, in government services, in the courts, in humble jobs as well as those near the 'commanding heights' of the economy, and so on. This amounted to indirectly 'educating' provincial government leaders as well, although the creation of some degree of support for federal policies in given regions of the country was to serve the role not so much of educating local political leadership as making it possible for them to take a given stand on the basis of some grass-roots support.

As we can see, the B.&B. Commission had a number of intricate aims. Its creation, preceded by tactfully consulting all provincial premiers about its proposed task, was a sound political decision. Even the commissioners were well chosen, all major ethnic groups were represented, and the naming of Davidson Dunton and Andre Laurendeau as co-chairmen was a significant symbolic gesture, a most obvious manifestation of what the commission's task was all about and what its work expected to bring about. Unfortunately, the interpretation of the aims had run into some difficulties from the start:

".. there existed a basic confusion about the objectives of the Commission as held by the Government and the Commissioners on the one hand, and the general public and the majority of

interest groups on the other. For the Commissioners and Government, the Royal Commission ... was created to educate people about an already declared policy ... (but) many groups which appeared before the Commission clearly showed by the content of their briefs, that they deemed the purpose ... to be to discover whether or not bilingualism and biculturalism were desirable." 4

This was somewhat ironic, because by the middle and late Sixties events had overtaken the Commission. The federal government's policy toward the creation of a truly bilingual public service was put into high gear, while the 'English' provinces began to show signs of finally 'seeing the light'. The preliminary report issued in 1965 was a serious warning, and although the report issued in 1967 proposing some drastic measures, such as the creation of bilingual districts throughout Canada was far from the stage of implementation, most of the provinces decided to get on the bandwagon, mainly in the field of making provisions for French language education in the schools of the provinces.

Unfortunately, events had overtaken the Commission in another way as well. By the Centennial Year "the debate in Quebec had long since moved from questions of bilingualism to fundamental matters of collective political, economic, and social power." 5 This did not, of course, render the commission's work irrelevant for "an extension of bilingualism was a necessary basis for any constitutional accord," 6 but it did relegate the issue to second place, the spotlights having been turned on the ruthless prolonged showdown concerning the demands for power by Quebec as a province, no longer excessively concerned about what happened outside its own boundaries, and this lack of concern extended even to French Canadians living in other provinces.

4. Doern, "The role of royal commissions", pp. 422-3.

5. Canadian Annual Review, 1967, p. 91.

6. Ibid, p. 91.

In the meantime the B.&B. Commission went on doing its seemingly interminable task. Its reports indicated the long-known weakness of having the various interests represented among the commissioners and not on the witness stand. The reports seemed to amount to the outright condemnation of English Canada and line up the commissioners behind the banner of Quebec nationalism. The reason for this may be found in John Saywell's observation that

"the French Canadians on the Commission share the fervour for the revolution, which they helped to mould, and have a shared view of the problem and its solution. The others undoubtedly reflect the heterogeneous views of Canadians as a whole, and joined the Commission with no common philosophy of society or the state." 7

The fact that it took six years for the Commission to finally decide to wind up its activities made it the subject of sarcastic criticism. But recognising its educational role and that it provided the government with desperately needed time for taking action, it appears to have been a sound perception on the part of the commissioners that they saw their function not solely oriented toward the production of a report, which is the aim of most commissions. The fast-changing developments in the unending constitutional crises of the Sixties must have also sparked serious controversies amongst the commissioners and required a great deal of re-writing of their reports. The departure of Jean Marchand to a House of Commons seat and a Cabinet portfolio, and the death of co-chairman Laurendeau also account for some delays (Jean-Louis Gagnon, one of the commissioners, became Dunton's new co-chairman).

7. J.T. Saywell, "Royal Commission on Bilingualism and Biculturalism", International Journal, Vol. 20, (1965), p. 381.

The long delay did, however, prove embarrassing to the commissioners by producing outdated recommendations for curing ills that have already been healed. The third report released just before the decade expired was based mainly on data describing the situation as it existed as far back as 1961, and which was compiled by the B.&B. researchers in 1965. Using such data is counterproductive in describing a situation concerning the position of French Canadians relative to English Canadians as being possibly much worse than it really is today. By suggesting that measures be taken by the federal government that have been taken some time ago, and many of which have even been enshrined in legislation such as the Public Service Employment Act of 1967 and the Official Languages Act of 1969, in effect it condemns the federal government for slackness instead of applauding its speed.

The third report makes 57 recommendations on 576 pages, but the way it is worded is not always consistent with the objectives of the commission. A report should be a constructive document. The Dunton-Gagnon report can be viewed as a wholesale condemnation of the Canadian experiment, a document that could form part of a manifesto by Quebec separatists proving how badly the English have treated the French and that there is no point in continuing to try to live together when French Canadians are still in such a hopelessly underprivileged position.

In addition to being somewhat outdated, the recommendations even lack originality. Even the suggestion concerning the creation of 'French-language units' in the Public Service is but merely giving a name to a child who has already reached puberty.

Time magazine discusses the report under a most appropriate title; "B & B: Libert, Fraternit, Ingalit" 8 and observes that "by advocating what amounts to special policy for Quebec, the federal commission seemed to be making common cause with the province's nationalists." 9 This is demonstrated in the report which suggests

"in language that departs markedly from the Trudeauian view... that Ottawa should speak for French Canada, and not Quebec,... that 'since the Francophone population is concentrated in Quebec, the government of this province can be regarded as the principal architect of the supporting institutional framework of the Francophone community'". 10

This is hardly the kind of attitude the federal government would expect a federal royal commission to take, nor is it likely to contribute to the maintenance of a viable federal system of government, the very subject of the core-issue of the Sixties in Canada, a grave issue, which the B.&B. Commission was expected to help to solve.

To evaluate the overall role of the B.&B. Commission vis-a-vis the crisis-ridden Sixties would be premature. However, it seems reasonable to conclude that regardless of the performance of the Commission, which one can only view with ambivalence, it was a sound decision to turn to the use of this instrument in the process of seeking solutions and facilitating their implementation. Whether Canada will survive in its present geographic and/or constitutional form is still early to tell. But whatever the future may hold, it would probably be overly generous to conclude that the B.&B. Commission was a principal force contributing to the preservation of our federal state.

8. Canada Edition, December 26, 1969, p. 7.

9. Ibid, p. 8.

10. Ibid, p. 7.

P A R T III.

CONCLUSIONS.

The record of the Royal Commission in Canada shows an uneven but steadily improving performance. In recent years it has become a 'mature' instrument, for the first time being capable of characterisation of wide applicability. It is still being used for trivial purposes, but most of its current applications have accentuated its primary role as dealing with major issues in a serious, research-oriented way. As J.E. Hodgetts writes:

"In effect, royal commissions have been converted from specialised ad hoc judicial tribunals into sizable, temporary departments staffed by social scientists representing every discipline. While they may still continue the old practice of holding public hearings ... the facts now are primarily garnered by trained researchers..."¹

In fact, much of the concern and controversy surrounding royal commissions has been shifted from issues such as judicial appointments and the role of the commission as a convenient political tool for delaying action and so on, to the internal problems of the large new commissions. The role of the research staff has become perhaps the single most important aspect of this new type of Royal Commission. Criticism is now levelled at the domination of some commissions by their research teams, although few would argue for a reversal of the current trend in the Royal Commission's procedural evolution. Nonetheless, in order to be able to fully evaluate and properly exploit the kind of improved service this new-type commission can render to

1. J.E. Hodgetts, "Public power and ivory power", in Lloyd, Trevor Owen and Jack McLeod, eds. Agenda 1970 (U. of T. Press, Toronto, 1968) p. 273.

the community, the relationship between commissioners and research staff must be analysed and sufficiently corrected, if the de facto hierarchical structure of the commission as a whole is found to be upside down (i.e., if the researchers are 'in control'). One must keep in mind the multiplicity of uses and roles the Royal Commission has come to serve and play, and resist the temptation of turning most of them into glorified research teams.

Academics in general tend to be dedicated to reform, improvement and change. There is nothing implicitly wrong with that except when it becomes a compulsion to approach everything with the idea that it can and should be changed, that change be immediate, and that rationalization is desirable under all circumstances. It is rare to find anything written on royal commissions (including the foregoing parts of this thesis) that does not suggest a more systematic approach regarding something concerning them. Suggestions are frequently made to define more precisely, and therefore to restrict, the circumstances under which commissions should be appointed; to catalogue, and therefore to restrict, those who are most eligible for commission duty; to prescribe uniform rules of procedure, and therefore to restrict creative experimentation; to prevent the misuse of commissions in cases involving partisan political issues, and therefore to restrict a democratically elected government's freedom to use an instrument, a very important advantage of which is its discretionary nature.

It would be difficult to argue that these and other suggestions are not sound. They are. It is d e s i r a b l e that they be kept in mind, but the 'codification' of the royal commission technique

would probably amount to its emasculation. There are many sacrifices we must make to maintain the delicate balance of sustaining a system of government which we refer to as 'democratic'. We are maintaining an expensive debating society called Parliament, to mention just one of many examples where efficiency and economy must remain secondary considerations, and we can probably make a blanket statement to the effect that perhaps all taxes could be drastically reduced if we allowed the whole public service to be run by efficiency experts functioning solely on the basis of business principles. The question is, do we want this? So far, apparently the answer has been no. It has been pointed out time and again that the Royal Commission is a unique instrument at the disposal of the executive branch of government, one that is the subject of envy in nations having more rigid constitutions than ours. Its freedom and independence from the government, its unlimited adaptability to problems and circumstances, its ability to engage any citizen directly (by appointment or employment) or indirectly (by testifying) in its work, its ability to create a consensus of opinion, to iron out seemingly irreconcilable differences, to 'smooth' and protect the political process by helping to resolve divisive issues outside the political arena, all these and the other advantages discussed in Part I could be seriously impaired by a narrow definition of what the Royal Commission should be.

It has been proposed that the approximately \$20 millions spent by federal royal commissions in the Sixties could have been better utilized by setting up permanent research organizations inquiring into

major recurring problems. Universities or newly created independent bodies could do the job, no doubt. They could also handle most of the non-recurring minor and major problems. They would not have the serious handicap of royal commissions of being disbanded just when their task is completed. They could continue to be useful in the implementation of their recommendations and their 'team spirit' could be utilized in their next project without delay. A rosy picture indeed. But this writer is rather sceptical about any cost savings in creating permanent organisations of this type. It would probably result in the phenomenal growth of red tape, continuous search for 'problems' for growth and self-justification, and the absorption of a tremendous amount of 'idle time' in the budgets of various projects by full-time research personnel who would have to be made to appear busy all the time, even though their particular specialities are not needed at a given time. What happens to 'team spirit' in any large, permanent bureaucratic organisation is well known... Royal commissions on the other hand are highly goal-oriented and are usually characterized by enthusiasm, hard work, and often even a missionary spirit. The main objection to such permanent organisations, of course, is that most of their advantages from points of view other than cost-consciousness and efficiency, would be completely eliminated. This is not to say that the suggestions should be rejected, but merely to caution against any excessively systematic attitudes in shaping the future of an instrument of executive inquiry, the chief asset of which is its flexibility. When the need arises to departmentalize or otherwise institutionalize royal

commissions, it is usually done anyway. The role of the critics is constructive to the extent that perhaps these developments should take place with more deliberate speed. In recent years the Science Council, the Economic Council, the Transportation Commission, and a number of other 'permanent royal commissions' have been created. But even the existence of these permanent bodies should not be looked upon entirely as substitutes for ad hoc commissions. The government should still feel free to rely on the old method whenever exceptional circumstances warrant it. These 'permanent royal commissions' should not really be regarded as such, no matter how attractive the phrase is. They were institutionalized simply because major areas of their subject-matters ceased to be exceptional, no longer fit to be dealt with on an impermanent basis. But this does not imply that any given subject-matter can or should ever be excluded from royal commission inquiries in its entirety.

Viewing the matter in this way, one may conclude that major changes have taken place only in the investigative procedures of commissions and in the evolution of subject-matters that have reached the stage where they are considered ripe for investigation ('status of women'; 'drug uses'; etc.) or have passed the stage where they should be looked into only in an ad hoc manner. All these changes may have created the impression that the basic role of this instrument in the political process has also undergone significant changes. However, this is not the case. The role has not changed much in the last hundred years. Its evolution has amounted to little more than keeping pace with the greater sophistication and more complex demands of government itself. In the relative sense this change has been minimal.

A great deal has been said about the lack of continuity between recommendation and implementation, about the time and communication lags developing when the commission is disbanded and the waste involved in not taking advantage of the skills acquired by the team, which could be most useful in the process of implementation. One could submit, however, that it is precisely this lack of continuity and these gaps that are of immense value to the government. It allows the executive branch to decide whether to accept, reject, alter, or study further the recommendations and how, when and by whom action - if any - will be taken. In other words, there are some real alternatives open to the government. An undissolved royal commission could turn into an embarrassing pressure group. If the body responsible for research and recommendations were also expected to carry them out, the government would be almost compelled to accept most recommendations and have them executed forthwith in order not to leave the entire permanent organisation idle. This would take the royal commission far beyond its present role. Another possible result would be that empire building might become the primary goal even in the planning stage. As far as wasted skills are concerned, evidence suggests that many researchers and other staff-members are subsequently hired by the agencies entrusted with the execution of commission recommendations anyway.

The other popular approach of incorrigible reformers would do away with the Royal Commission not by changing it beyond recognition, but by letting other types of investigative instruments replace it.

For some reason the advocates of this method would prefer to see busy Members of Parliament labelled and bound by party-affiliations neglect their parliamentary duties and engage in ad hoc investigations. Members of the Senate are considered even more suitable for the job. Apart from reducing the number of eligible persons from several million to a few hundred, using Commons and Senate Committees lacks most of the advantages of royal commissions. Their members cannot be full-time 'commissioners', their term is limited to parliamentary sessions, they are less mobile, they cannot claim to be independent, entirely removed from the political arena, their recommendations cannot be easily divorced from the legislative process and they certainly cannot be ignored (coming from legislators), and so on.

Another alternative is the use of task forces. In the Canadian context they usually consist of a group of experts commissioned to carry out a certain (often very minor) task. They are ad hoc research teams not requiring the powers granted by the Inquiries Act in their work. The Watkins Task Force on Foreign Ownership consisted entirely of professors of economics whose task was to prepare an expert study. Conversely, the Hellyer Task Force on Housing held public hearings and conducted its affairs much the same way as a large royal commission would. One would suspect that if the term 'task force' had not been imported from the United States, then most of the major task forces would still be referred to as royal commissions (not all royal commissions exercise the powers granted under the Inquiries Act anyway). They are also so numerous that their impact is diluted (if we include the many departmental task forces now in existence).

One of the attractive features of appointing task forces may well be the government's preference for terminology omitting any reference to royalty, a sensitive topic as far as at least one-third of Canada's population is concerned. But even if the term 'royal commission' were completely abandoned it is certain that the essence of this form of executive inquiry would remain, either as the task force (given powers under the Inquiries Act if required) or under some other designation yet to be invented. The United States, which never had any royal commissions, but whose congressional committees are probably more numerous and active than our parliamentary committees, royal commissions and task forces combined, has recently found it necessary to 'invent them'. At the present time there are over 3,000 federal task forces dealing with everything from trite to major issues.² Recent U.S. administrations have appointed a number of major commissions as well (on income maintenance; on technology, automation and economic progress; on violence; etc.). According to a recent Time essay "today's commission is an outgrowth of the spirit of 'participatory democracy' now abroad in the land."³ Considering our present Prime Minister's views regarding participatory democracy the Royal Commission should experience a new renaissance in Canada...

If the time should ever come when our government will be run by computers in direct contact with all citizens, then a royal commission-like instrument will be definitely outdated. But at

2. Canada Edition, January 19, 1970, p. 23.

3. Ibid, p. 23.

this point in our constitutional development we must still be prepared to put up with imperfection as the rule and not as the exception. The experiments of 'perfectionists' such as Hitler and Stalin have failed. The Royal Commission may at times be an expensive 'travelling freak show' or an instrument of vengeance in politics, and its use by the government may not always be consistent or even rational, but it is precisely its immense adaptability and the government's power to decide upon its use at its discretion, that are its greatest assets. To ask for conformity with some abstract ideal in the definition and use of the Royal Commission would be as absurd as demanding that our government itself adhere to some such ideal, ignoring reality.

Constant constructive criticism of the royal commission technique is desirable. It is also acceptable to make value judgments regarding the propriety of individual applications and to suggest how and when and under what circumstances royal commissions should be employed. One can hardly object to expressing views as to procedures followed and powers exercised. Such criticisms will always serve as useful guidelines for the government of the day and for the commissioners themselves. But this is the point where the line should be drawn. The many useful suggestions of the critics and reformers should be adopted where they are appropriate. But codification and regulation should not be attempted. In this sense, the Royal Commission should remain 'free'.

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