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The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario and
Access to Government Information

by
Laurie Campbell, B.A., M.L.S.

A thesis submitted to
The Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario
January 20, 1999

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**The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario
and Access to Government Information**

submitted by **Laurie Campbell, B.A Hons.**
in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

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January 20, 1999

ABSTRACT

The objective of this thesis is to look at the factors which hindered the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario from obtaining government information concerning allegations of illegal access by the RCMP to OHIP's files. The most significant factors were national security and police informer privilege. Other contributing factors such as constitutional jurisdictional limitations will also be considered. This thesis will look at some possible legislative and judicial reforms which would help commissions of inquiry obtain access to government information. The thesis will also demonstrate that the "public interests vs. individual rights" paradigm is too simplistic to describe the situations that confronts commissions such as this Commission. Besides the issue of providing procedural protection for individuals, the Commission also faced the issue of trying to balance the protection of the privacy of individual health subscribers against the public interest in access to information and public safety.

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INTRODUCTION: THE KREVER COMMISSION AND THE PROBLEM OF ACCESS

The Royal Commission of Inquiry into the Confidentiality of Health records in Ontario, the Krever Commission, was created in 1977 by the Ontario government. The Commission was created in response to public allegations that the RCMP, the Ontario Provincial Police, and other police forces had illegally obtained confidential medical information from the files of the Ontario Health Insurance Plan, OHIP. The government gave the Commission a comprehensive mandate and broad investigatory powers.¹ It issued a statement requesting that all government ministries, boards, agencies and commissions should assist the Commission to the fullest extent to enable it to carry out its duties and functions.² However, the work of the Commission was plagued with significant delays, and it was unable to complete its investigations into allegations of misconduct on the part of the RCMP.³

The objective of this thesis is to look at the factors which hindered the Krever Commission from having access to government information⁴ - in particular information pertaining to OHIP. This thesis will examine how these obstacles prevented the Krever Commission from investigating allegations concerning the RCMP's illegal access to OHIP's files.⁵

The most significant factor which denied the Krever Commission access to government information was the RCMP's use of police informer privilege to prevent the disclosure of the names of its informers. The requirements of the Ontario Public Inquiries Act⁶ placed restraints on the Commission's ability to perform its mandate. The Commission's work was also hampered by a lack of cooperation on the part of OHIP and the RCMP, and by the organizational structure and the administrative procedures within these two organizations. These factors will be examined in detail to try to determine how the Krever Commission was denied access to information it considered relevant to its investigation.

As will be seen later in Chapter One, Royal Commissions have been criticized for having too much power. However, this thesis will attempt to demonstrate that the Krever Commission did not possess the powers required to fulfill its mandate. The Commission lacked the power to overcome the barrier of police informer privilege. It also lacked the power to compel The Globe and Mail's reporter, Lawrence Martin, to testify before the Commission.⁷ Without these powers, the Krever Commission was unable to obtain the names of the physicians and hospital employees who provided the RCMP with confidential health information.

Royal Commissions and public inquiries need access to government information to uncover the "truth" behind allegations of misconduct or negligence. Making this information public helps to ensure that the government is accountable to the public. In a broader sense,

public access to government information helps to maintain a democratic government. The public needs to know about the government policy-making activities before they can hold government accountable about its public policies. Recent inquiries such as the "Somalia Inquiry", "Westray" and the "Tainted Blood Inquiry" indicate that the public, and especially individuals who are directly affected, are anxious and frustrated when they think that government is trying to conceal the "truth" by the use of legal technicalities. In order to maintain the credibility and legitimacy of Royal Commissions and public inquiries, a solution is needed.

The subject matter of the Krever Commission is important because this was the first comprehensive investigation on the confidentiality of health records in Ontario. The Commission's research revealed that health information was being disclosed without authorization to a wide variety of sources including health-care institutions, physicians, OHIP, employers and insurance companies.⁸ The Ontario Law Reform Commission's Report on Public Inquiries called the Krever Commission one of the best examples of a commission that was able to combine, "both an assessment of a well-publicized event and future-oriented research."⁹ The Commission made numerous recommendations on how changes should be made to health-care institutions, businesses and government to protect the collection and dissemination of health information. But a review of the literature on public inquiries and public health reveals that there has been little written on this Commission.

In the legal sphere the Krever Commission is important because the Supreme Court of Canada in Solicitor-General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario et al. expanded the scope of "police informer privilege" to include civil proceedings, including public inquiries.¹⁰ During the hearings Justice Krever ruled that the "law recognizes that no privilege exists so as to prevent the disclosure to the Commission of the identity of those physicians and hospital employees who divulged medical information to members of the RCMP without the patient's authorization."¹¹ The Supreme Court of Canada disagreed with Justice Krever's position. The government had given Justice Krever the mandate to investigate allegations concerning the RCMP's illegal access to health records. But the RCMP also had a responsibility to protect the public from criminal activity.

In terms of access to information, the Krever case is a good example of where the need to access government information comes into conflict with a competing public interest. In this instance, the need to protect public safety was considered to be more important than the public mandate of the Krever Commission. Because of the Supreme Court of Canada's decision on "police informer privilege", Justice Krever was refused access to the names of the people who provided the RCMP with information from local OHIP offices. As a result, Justice Krever was unable to complete his mandate. This study is an example of the complex tensions between the broad principles underlying access to information and those underlying government confidentiality in the

public interest raised by issues such as police informer privilege, national security and privacy.

Overview of Thesis and Methodological Considerations

To examine the Krever Commission and the problem of access, this thesis will use several analytical approaches. It will start with a general theoretical discussion. It will consider the context in which the Commission was created; look at how the Commission was denied access to the information it needed; and consider some possible reforms. Accordingly, Chapter One will examine the functions and powers of Royal Commissions and public inquiries. The writings of Holland, Henderson and Salter will provide a useful starting place for the introductory theoretical discussion of this thesis. These writers discuss the tensions which exist within commissions - between the policy-makers who view commissions as a public instrument to be used for "fact-finding" and the lawyers who are interested in protecting the rights of their witness clients. Recently, the discussion on Royal Commissions and public inquiries has centred on this debate. Although procedural protections can hamper the work of Royal Commissions and public inquiries, they are not the only possible obstacles.

Chapter Two will provide a brief overview of the events which preceded the creation of the Commission. It will also look at the issue which gave rise to the Commission. This issue - the

confidentiality of an individual's health record - underlines the importance of the substantive issues of the Krever Commission's inquiry. OHIP, the Ontario Health Insurance Plan, and the RCMP are both responsible for protecting the privacy of individuals. But in the events which led to the creation of the Commission both of these institutions breached this duty, by unlawful disclosure and use of confidential health information. Looking at this issue provides an understanding of the paradox which faced this Commission. Generally, Commissions are perceived by individuals as a threat to their privacy, since Commissions rely on access to information in order to carry out their mission of fact-finding and investigating allegations of misconduct or negligence. However, this Commission required access to information in order to strengthen individual privacy.

It is important to keep in mind, though, that protection of privacy was only one of the various competing state and public interests which faced the Commission. Others included public safety, national security, and effective law enforcement

Chapter Three will look at the obstacles which prevented the Commission in carrying out its mandate. These include jurisdictional limitations; national security and police informer privilege; resistance on the part of OHIP officials, members of the RCMP and The Globe and Mail in cooperating with with the Krever Commission; lack of government accountability, and administrative problems which included problems with organizational structure and record keeping. This will be done by using a case study approach and incorporating

historical methodology. Traditional legal methods focusing on doctrine and expository legal reasoning are narrowly circumscribed, designed for the practical purposes of negotiation as litigation for the purpose of authoritative dispute-resolution. While the technical legal sources are important they shed insufficient light on the origins of law or how they are administered and experienced. Historical methods open up a wider range of sources.

On the other hand, the goals and objectives of this case study are modest. This is not an attempt at what Harvey refers to as "critical social research" wherein social historians deconstruct and reconstruct an historical event.¹² That would require more time and research than the scope of this thesis allows. However, this thesis will employ techniques used by historians; narrative, analysis of the content and structure of documents; and slow peeling back of the layers, all with the aim of understanding moments and events in time and space, and seeking answers to the critical questions "how" and "why".

This approach will require an examination of the archival files of the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario. The files provide a rich source of information and include correspondence between the Commission and government departments, memorandums, briefs, research reports, and transcripts of the hearings. Access to this kind of material is crucial in an attempt to piece together a "behind-the-scene" view of the life of this Commission. Newspapers and the Ontario

parliamentary debates, Hansard will also be used to evaluate the public and the political assessments of how successful the Commission was at revealing the "truth" and fulfilling its mandate. These sources are also important in helping provide background details of the events preceding the Commission's hearings and helping place them in their social and political context.

Chapter Four, the final chapter, will look at possible solutions for making government information more accessible to Royal Commissions and public inquiries. In his Report Justice Krever made recommendations on how OHIP could improve its record keeping in relation to inquiries made by the police for access to health information. However, his Report did not address the issue of how Royal Commissions' and public inquiries' access to government information can be improved. Several solutions will be considered. Legislative reforms that will be considered include clarifying the Canada Evidence Act¹³ and amending it to require the government to submit to judicial review a claim for refusal to disclose information based on police informer privilege. Amendments will be suggested to the Access to Information Act¹⁴ to grant Royal Commissions and public inquiries full party status as information requesters; and to include a "public interest override" which would compel government institutions to release government information that would reveal a threat to public health and safety. Amendments to federal and provincial access legislation to include penalties for the destruction or the refusal to disclose requested

information will also be considered. Whistle-blowing legislation will also be examined as a means of protecting government employees who wish to disclose government acts of negligence or wrongdoing.

Finally the issue of compelling witnesses to testify will be examined. Witnesses often do not want to testify for fear of self-incrimination. In R. v. S. (R.J.)¹⁵ and Branch¹⁶ the Supreme Court of Canada devised a test for compelling of witnesses to testify and the subsequent use of compellable testimony. This test balances the state's interest in obtaining evidence for a valid public interest and the individual's right to remain silent and have a fair trial. The Supreme Court of Canada applied this test in Phillips v. Nova Scotia (Commission Of Inquiry in to the Westray Mine Tragedy).¹⁷ It will be examined here to see if this test can be applied to a public inquiry seeking information from government employees who do not want to testify.

The thesis will also demonstrate that the commonly expressed "public interest vs. individual rights" paradigm is not adequate to describe the situation that confronts inquiries like the Krever Commission. The problem with this paradigm is that it is too simplistic. Besides the issue of providing procedural protection for individuals, the Krever Commission also faced the issue of the need to balance the protection of the privacy of individual health subscribers against public interest in access to information and public safety. The Commission also faced the challenge of conducting its investigations in a narrow framework

constructed by constitutional jurisdictional limitations. The thesis will attempt to demonstrate that the Krever Commission lacked the power to fulfill its mandate. However, the problems which the Krever Commission encountered extended beyond a lack of power. As Chapter Three will show the Krever Commission had to face many obstacles in trying to solve the puzzle of how confidential information was being disclosed by employees of OHIP to members of the RCMP.

Endnotes for Introductory Chapter

1

The Commission was given the mandate to conduct a comprehensive review of legislation and regulations pertaining to the administration of health records, and to make recommendations in regards to preserving the confidentiality of health records. The Commission was also given the mandate to investigate any possible acts of misconduct, negligence, coercion, or non-compliance on the part of any person, firm, corporation or organization that were involved with the administration and the dissemination of health records, or that wanted to have access to medical information. The scope of the Commission's investigation was extensive and included investigating the administrative procedures and activities of hospitals, health care institutions, insurance companies, federal and provincial government departments, and the activities of the RCMP and the police. See Order-in-Council 1129/78 as reprinted in Ontario, Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Report of the Commission of Inquiry into the Confidentiality of Health Information vol.1 (Toronto: Queen's Printer, 1980) (Commissioner: Justice Horace Krever) at vii [hereinafter Krever Report].

2

Order-in-Council 3566/77, s.2 as reprinted in Krever Report, supra note 1, vol.1 at vi.

Even when it is not specified, the Commission has the right to expect cooperation especially from the sponsoring departments. See Russell J. Anthony and Alastair R. Lucas, Handbook on the Conduct of Public Inquiries in Canada (Toronto: Butterworths, 1985) at 34.

3

Krever Report, supra note 1, vol.1 at 11.

4

In the context of this thesis "access to government information" will be synonymous with the term "evidence" and will be defined as information which is in the possession of the government. The Krever Commission was

actively engaged in gathering information prior to, and during the hearing proceedings. This includes receiving testimony from witnesses. Both phases of the Commission will be studied.

5

The Krever Report was significant for its recommendations in the disclosure of health information by hospitals and health care facilities to third parties and to law enforcement agencies. The purpose of the recommendations was to preserve the confidentiality of individuals' health records. Although the question of individuals' right to privacy in respect to their health records raises many important legal and medical issues, including the protection of an individual's dignity and autonomy, these issues are not the primary focus of this paper. However, they will be discussed initially in regard to the genesis of this Royal Commission.

6

(Ont.) Public Inquiries Act, R.S.O. 1990, c. P.41 [hereinafter (Ont.) Public Inquiries Act].

7

Lawrence Martin, was the reporter who was responsible for the initial allegations against the RCMP. At the time of the Commission's hearings, he had been transferred by The Globe and Mail to Washington, D.C. .

8

Harvey Strosberg, "Experiences with the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario" Symposium Issue of the Confidentiality: Part 1 (1981) 2(1) Health Law in Canada 5 at 5. The issue of confidentiality of health information has been discussed at length in a variety of medical and legal journals and books. In 1981, the journal Health Law in Canada published a special two-part symposium on confidentiality See also Lorne E. Rozovsky and Fay Rozovsky, Canadian Health Information a Legal and Risk Management Guide, 2d ed. (Toronto: Butterworths, 1992) and Barney Sniderman and John C. Irvine, Canadian Medical Law: An Introduction for Physicians, Nurses and other Health Care Professionals (Toronto: Carswell, 1995) for a good overview of the issues related to the confidentiality of health information.

- 9
Ontario Law Reform Commission, Report on Public Inquiries (Toronto: Ontario Law Reform Commission, 1992) (Chair: Rosalie Abella) at 23.
- 10
Solicitor-General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario et al. (1981), [1982] 128 D.L.R. (3d) 193 (S.C.C.) at 220.

The decision of the Supreme Court of Canada has been severely criticized. See Dennis B. Evanson, "The Development and Power of the Informer Privilege: The Health Records Inquiry Case" (1983) 9 Queen's L.J. 207-225, and J. F. Harris, "The Solicitor General of Canada et. al. v. the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Opening the Files for the RCMP" (1983) 12 Man. L.J. 399-405.
- 11
Re Inquiry into the Confidentiality of Health Records in Ontario, [1979] 24 O.R. (2d) 545 (Ont. H.C. Div. Ct.) at 548.
- 12
Lee Harvey, Critical Social Research (London: Unwin House, 1990) at 208.
- 13
Canada Evidence Act, R.S.C. 1985, c. E-10 [hereinafter Canada Evidence Act].
- 14
Access to Information Act, S.C. 1980-81-82-83, c.111 [hereinafter Access to Information Act].
- 15
R. v. S. (R.J.), [1995] 1 S.C.R. 451.
- 16
British Columbia Securities Commission v. Branch, [1985] 2 S.C.R. 3.
- 17
Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97 [hereinafter Phillips].

CHAPTER ONE: FUNCTIONS AND POWERS OF ROYAL COMMISSIONS

This chapter examines the role, functions and powers of Royal Commissions, emphasizing some of the legal issues raised by them. It also briefly looks at some of the scholarly debate about commissions. This sets out the broad context for the particular circumstances and issues about the Krever Commission.

In Phillips, Justice Cory described Royal Commissions or public inquiries as independent, ad hoc bodies created by government.¹ He said that they are quasi-judicial in function but unlike the judiciary they are endowed with wide-ranging investigative powers.² For Justice Cory one of the primary functions of Royal Commissions or public inquiries is fact-finding.³ In times of public shock, horror or disillusionment they are convened in order to uncover "the truth".⁴ He said that these bodies allow for public questioning of worrisome community problems and enable the public to be a part of the recommendations aimed at resolving them. He noted that Royal Commissions can also be used to educate the public about social and economic problems, and to inform them about government policy. Conversely, he said Royal Commissions can inform government about social attitudes and responses to economic and social problems.⁵ Justice Cory said that the independence of Royal Commissions, the open nature of their hearings, and the status and the high respect they receive from the public make them ideally suited for restoring confidence in the government.⁶ These comments about the importance of Royal commissions have been recently been restated by Cory J.

in Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission).⁷

Both supporters and many of the critics of Royal Commissions agree on the importance of Royal Commissions. However, critics complain about the cost, lengthy delay, unduly rigid procedure, and the lack of focus of Royal Commissions' mandates.⁸ There are also concerns about politicizing the judiciary. Gordon Henderson questions the independence of Royal Commissions and the ability of judges to be impartial.⁹ Henderson says that "such qualities are difficult to find since the commission is, institutionally, exposed to the control of its creator and almost always sensitive to public pressure on widely held opinions."¹⁰ Kenneth Holland believes that government appointment of judges to serve as judicial commissioners, especially in connection with controversial inquiries, compromises the independence of the judiciary.¹¹ He says that if the rule of law and equality are to be preserved, the judicial system must be completely separate in authority and function from all branches of government.¹² Holland believes that with the availability of highly qualified and distinguished people from the ranks of business, academia and the professions, the necessity of judicial appointments should be questioned.¹³

Although these criticisms are important and need to be addressed, for the purpose of this thesis the most important criticism that has been levied against Royal Commissions is that they have too much unrestricted power.

Royal Commissions and public inquiries are given a wide scope of powers under statutory authority.¹⁴ In Ontario the Public Inquiries Act gives Royal Commissions broad powers to conduct their investigations. Royal Commissions are given the power to establish their own procedures and discretion with respect to the admissibility of evidence. Evidence is admissible if it is reasonably relevant to the subject matter of the Commission.¹⁵ Section 7 of the Act authorizes the Commissioner to issue a subpoena or a summons requiring the attendance of any witness and the production of evidence to the inquiry.¹⁶ Under s.7(1)(b) a Commission is empowered to summon witnesses and to produce documents in their possession that the Commission considers necessary for the inquiry.¹⁷ The Commission under section 10 is empowered to admit evidence not given under oath or affirmation.¹⁸

Critics such as Wayne MacKay¹⁹ and David Scott²⁰ argue that these powers are coercive and threaten the rights of witnesses to be protected against self-incrimination and from criminal or civil liability. These criticisms are not new. Their historical origins can be traced back to the nineteenth century²¹ when Royal Commissions were frequently appointed by government to investigate a variety of matters including the construction of public works, the boundaries of boroughs, public health, crime, local courts, and the grievances of the colonies.²² In 1835, the Merchant Tailor's Company refused to testify before the Royal Commission

on Municipal Corporations. It argued that "by common law, which is the right of the subject, no man can be compelled to disclose any matter that may expose themselves to peril, except in the due course of justice." ²³ The Company said, "it is not consistent with the law or the liberty of the subject that commissioners ... should be endowed with a power of compulsion either for the disclosure of facts or the attendance of witnesses." ²⁴

Nearly thirty years later, in 1863, Canadian advocate Thomas Ramsay ²⁵ expressed a similar view in his pamphlet, Government Commissions of Inquiry. Ramsay believed that "the Crown may have the power to appoint a commission of inquiry, but this power must be exercised so that it does not trespass on the rights of individuals, or to enter any investigations otherwise provided by law." ²⁶ This includes "anything of a private nature, or into the conduct of any person named, or to any accusation of any crime or offences alleged against a particular person." ²⁷

A century has passed, and Ramsay's concerns are still the centre of debate. In the past twenty years there have been at least four major studies on public inquiries. ²⁸ The three most important reports that have been written are the Law Reform Commission of Canada, Administrative Law Commissions of Inquiry,

Working paper 17 (1977), the Alberta Law Reform Institute, Proposals for the Reform of the Public Inquiries Act, Report No. 62 (1992), and the Ontario Law Reform Commission, Report on Public Inquiries (1992). The reports stress the benefits and the importance of the retention of public inquiries. Both the Ontario Law Reform Commission and the Alberta Law Reform Institute were restrained in their criticisms about Royal Commissions and public inquiries. The Ontario Law Reform Commission stated that "however compelling the arguments are for restrictions the power of commissions to compel testimony and the production of evidence, they overstate the dangers of the inquiry process and underestimate the unique attributes of commissions as instruments of government." ²⁹ In the opinion of the Commission, the Ontario Public Inquiries Act, ³⁰ the Evidence Acts of Ontario and Canada, and the Canadian Charter of Rights and Freedoms ³¹ provide adequate protection for witnesses. ³² If critics feel that witnesses are not adequately protected then the solution lies in devising better ways to protect witnesses during the inquiry process, and not in the dispensing of an important instrument of government. ³³

The Alberta Law Reform Institute also acknowledged that public inquiries with coercive powers can damage the reputations of individuals, and they can subject an individual to the likelihood of criminal prosecution. ³⁴ But it also said that:

It is imperative that inquiries be able to somehow acquire a knowledge of facts to give informed advice. There are times when information can only be obtained by compulsion, when people have information in a documentary form or in memory and do not to give it to the commission.³⁵

Thus, says the Institute, public inquiries legislation must give commissions of inquiry the power they need to compel persons to give information and produce the documents necessary for effective inquiries.³⁶ What is required, they say, is a balance between public and private interests.³⁷

Of the studies which have been done the Report of the Law Reform Commission of Canada is the most critical of the powers of public inquiries. The Commission argued that Royal Commissions which are primarily focused on public policy matters do not need coercive powers to compel the attendance of witnesses.³⁸ The Commission said that "granting inquiries the same power to enforce the attendance of witnesses and to compel the production of documents as vested in any court of record in civil cases creates difficulties in not clearly defining the power of inquiries and their limits."³⁹ The Commission recommended that the powers of commissions of inquiry be more carefully defined according to the role of the commission, advisory or investigatory, and that

criteria for the admission or rejection of evidence be clearly established.⁴⁰

However, the Ontario Law Reform Commission and critics such as Salter have disagreed with the Commission's suggestion of classifying Commissions as either advisory or investigatory. Both point out that there is a tension between and a contradiction that exists within commissions between their policy function and their investigatory role. The Commission believes that "it is a rare occurrence where a commission is solely concerned with fact-finding related to making recommendations about policy."⁴¹ Salter says that "even the most limited "fact-finding" inquiries often examine how government procedures are put into operation and who is actually responsible for the consequences of public policies or actions."⁴² She believes that inquiries almost always deal with the issue of wrongdoing, either in terms of something that has happened or in terms of potential harm if a course of action is followed.⁴³ When this happens inquiries become trial-like in their functions.⁴⁴ According to Salter, "corporate, and even government participants, know this and plan their participation accordingly to protect themselves from the legal consequences of their actions."⁴⁵

In essence what occurs is a clash between two principles - the state's right to investigate its own matters and to address

the concerns of the public, and the right of individuals to be protected against self-incrimination or other personal harm. Members of the legal community such as Scott,⁴⁶ MacKay⁴⁷ and Schwartz⁴⁸ believe that the rights of individuals need to be protected. The federal government in a recent discussion paper titled Reforming Commissions of Inquiry suggested that a bill of rights for witnesses could help provide witnesses with protection.⁴⁹ In Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission), Cory J. said:

The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. ... This means that no matter how important the work of the inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.⁵⁰

Perhaps the strongest statement which has been made on this issue is by Justice Sopinka. In an address to the Canadian Institute for the Administration of Justice Conference Justice Sopinka said that "the concern for the individual should be the bedrock principle which guides public inquiries."⁵¹ He added that:

when an individual is subjected to the investigation and possible punishment by the state, we must ensure that rights are protected. Only this vigilance can ensure

that innocent individuals are not unjustly accused and convicted, and⁵² the guilty receive the appropriate sanction.

Justice Sopinka said that "the constitutional division of powers is also important in determining the legitimacy of inquiries."⁵³ The division of the constitutional powers will be addressed in the next chapter when examining the obstacles which faced the Krever Commission.

Both of these two opposing principles have been applied by the courts. In the more recent cases of Nelles⁵⁴ and Starr,⁵⁵ the courts have stated that there are limits to the powers of Royal Commissions to investigate the specific criminal acts of individuals. In Nelles, the Ontario Court of appeal quoting Mr. Justice Riddell, said that "the object of a Royal Commission is to determine facts, not to try individuals or institutions" ⁵⁶ The Court stated that the "Commissioner should analyze and report upon all of the evidence and make recommendations without naming names as who was responsible." ⁵⁷

In Starr, the Supreme Court of Canada went even further, declaring that the Starr Inquiry was ultra vires because the pith and substance of the subject matter of the inquiry was related to criminal law and criminal procedure, both of which fall within the exclusive jurisdiction of Parliament pursuant to s.91(27) of the Constitution Act, 1867. ⁵⁸ Writing the

majority decision for the Court, Justice Lamer acknowledged that provinces should be given ample room within their constitutional competence to establish public inquiries aimed at investigating, studying and making recommendations for the better government of their citizens.⁵⁹ However, a province cannot enact a public inquiry, with all of its coercive powers, as a substitute for an investigation into the alleged criminal actions of an individual. As Justice Lamer stated, "this is an interference with the federal interest in the enactment of and provision for a system of criminal justice as embodied in the Criminal Code."⁶⁰ The result is that such an inquiry bypasses the protection accorded to an individual by the Criminal Code.⁶¹

Justice Lamer's statements are supported by Cory J. in Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System - Krever Commission). In his decision Cory J. states that "a commission of inquiry is neither a criminal trial nor a civil action for the determination of liability."⁶² A commissioner can only inquire and report. A commissioner's findings do not have either penal or civil consequences.⁶³

The Supreme Court of Canada's decision in Starr adds to the limitations placed by the Court in Keable on the ability of public inquiries to conduct investigations related to criminal matters. In Keable, the Supreme Court said that a

provincial inquiry has limited power to investigate specific criminal acts committed by the RCMP.⁶⁴ The Court said that s.92(14) of the Constitutional Act, 1867 gave the Keable Commission the power to investigate the methods used by the RCMP to conduct its searches mentioned in its mandate.⁶⁵ But it did not have the power to investigate the frequency of their use, or the general administration of the RCMP, which operates under the jurisdiction of the federal government.⁶⁶

In the recent decisions of Nelles⁶⁷ and Starr⁶⁸ the Courts stated that provincial inquiries can investigate acts of individual wrongdoing. But they cannot make findings of individual criminal responsibility on the grounds that this falls under the criminal federal law power.

Where Royal Commissions are created by federal government, they can investigate individual wrongdoings fully, because under the Constitution Act, 1867⁶⁹ the federal government has the full power to conduct criminal investigations under its criminal law jurisdiction. However, both jurisdictions are now subject to additional safeguards prescribed under the Canada Charter of Rights and Freedoms.⁷⁰

Justice Grange fears that the Supreme Court of Canada's decision in Starr will seriously restrict the scope of the federal and provincial inquiries to investigate matters

involving misconduct.⁷¹ He is concerned that in Starr, "the Supreme court has given notice that it is more likely today than in the past to conclude that an inquiry is in pith and substance an inquiry into crime if the inquiry is looking into the conduct that may result in criminal charges."⁷²

This is not to portray Justice Grange as someone who believes that individuals do not have a right to protection. He does believe that they should be accorded protection but he believes that individuals are already receiving adequate protection under the Canada Evidence Act,⁷³ the Canadian Charter of Rights and Freedoms,⁷⁴ and the federal and provincial Inquiries Acts.⁷⁵ As Madame Justice L'Heureux-Dubé noted in her dissenting decision in Starr, the Ontario Public Inquiries Act⁷⁶ and the commissioner's own rulings gives individuals: "standing at the inquiry; cross examination of witnesses; right to counsel; opportunity to call witnesses to introduce evidence; privileges available to witnesses in court, such as solicitor-client privilege, and the opportunity to move for in camera hearings."⁷⁷ Madame Justice L'Heureux-Dubé also said "the commissioner is also precluded from expressing an opinion regarding civil or criminal liability, or from levying any sanctions against the named appellant or any individual called upon to testify at a public inquiry."⁷⁸

As can be seen, the powers of Royal Commissions and public inquiries are not as coercive as critics say. The powers of Royal Commissions are limited. With the law as it now stands, Justice Grange would not blame commissioners facing the prospect of investigating a matter which involved misconduct from first sending a reference to the Supreme Court of Canada to ascertain the validity of the terms of reference and a definition of the scope of their mandate before commencing the hearings.⁷⁹

Royal Commissions and public inquiries - especially those which have been created by provincial governments - face a dilemma. How can they investigate matters of wrongdoing or misconduct if they cannot effectively investigate the suspected wrongdoings of individuals? Kent Roach suggests that one solution to resolve this problem is to focus on organizational accountability. Roach defines "organizational accountability as a process whereby organizations are called to account for events and risk being held for either their actions or inactions."⁸⁰ Officials will still be called upon to explain their actions, but the focus is not on holding individuals accountable for their actions. Instead, the focus is on the structure of the decision-making process and the factors which encourage the wrongdoing.⁸¹ This was the approach used by the Krever Commission. However, as this thesis will

demonstrate, investigating the systemic administrative problems of an organization such as OHIP is not an easy task. As will be seen later in Chapter Three, the Krever Commission faced a bureaucracy within OHIP that was reluctant to cooperate and plagued by administrative problems in record keeping and the dissemination of information in relation to the disclosure of health information to the police.

Endnotes for Chapter One

- 1 Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy, [1995] 2 S.C.R. 97 [hereinafter Phillips]. Cory J. wrote for three of the nine majority judges.
- 2 Phillips at 137.
- 3 Ibid.
- 4 Ibid.
- 5 Ibid. at 138.
- 6 Ibid.
- 7 Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System - Krever Commission), [1997] S.C.J. No. 83 (QL), at para. 30 [hereinafter Canada (Attorney General v. Canada (Commission of Inquiry on the Blood System - Krever Commission)]. In this instance Cory J. wrote the decision for a unanimous court.
- 8 Ibid.
- 9 Gordon F. Henderson, "Abuse of Power by Royal Commissions" (1979) Spec. Lect. L.S.U.C. 493 at 503.
- 10 Ibid.
- 11 Kenneth M. Holland, "Judicial Activism and Judicial Independence: Implications of the Charter of Rights and Freedoms for the Reference Procedure and Judicial Service on Commissions of Inquiry" (1990) 5 CJLS 95 at 101.

12

Ibid. at 95.

13

Ibid. at 103.

14

The powers of federal Royal Commissions and public inquiries are governed by the Inquiries Act, R.S.C. 1985, c. I-11. Each of the provinces has its own separate public inquiries act. Powers of the federal and provincial inquiries vary according to statute.

15

Canadian Encyclopedic Digest, (Ontario) vol.27, 3d ed., (Toronto: Carswell, 1987) "Public Inquiries", Title 119.1, at 35, § 40.

16

Ibid. at 36, § 43.

17

(Ont.) Public Inquiries Act, R.S.O. 1990, c. P.41, s.7(1) [hereinafter (Ont.) Public Inquiries Act]. A Commission may require any person by summons to give evidence on oath, or to produce in evidence at an inquiry such documents and things as the commission may specify.

18

Ibid. s.10. A Commission may admit an an inquiry evidence not given under oath or affirmation.

19

A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" in Paul A. Pross, Innis Christie and John Yogis, eds., Commissions of Inquiry (Toronto: Carswell, 1990) 28 [hereinafter Commissions of Inquiry].

20

David W. Scott, "The Rights and Obligations of those Subject to the Inquiry and of Witnesses" in Commissions of Inquiry 133.

21

The origins of Royal Commissions can be traced back to the Middle Ages. However, the current form of Royal Commissions as they are known today commenced in 1517 with the Commission

on Enclosures. In British North America, the first Royal Commission pertained to investigating the losses suffered by the Loyalists during the American Revolution. For a good overview of the history of Royal Commissions see Thomas Lockwood, "A History of Royal Commissions" (1967) 5 Osgoode Hall L.J. 172.

22

Joshua Toumlin Smith, Government by Commissions Illegal and Pernicious; the nature and effects of all commissions of inquiry and other Crown-appointed commissions, the constitutional principle of taxation; and the rights, duties, and importance of self-government (London: S. Sweet, 1849) at 28.

23

Supra note 21 at 176.

24

Ibid.

25

Thomas Kennedy Ramsay was an advocate who later became a judge, and who resided in Lower Canada. He was one of the founders of the Lower Canada Jurist (Montreal), and in 1859 was appointed to the commission responsible for codifying the civil laws of Canada East. See Dictionary of Canadian Biography, vol. XI, 1881-1890 (Toronto: University of Toronto: Press, 1982) at 721-722.

26

Thomas Kennedy Ramsay, Government Commissions of Inquiry (Montreal: John Lovell, 1863) at 4.

27

Ibid. at 6.

28

Alberta Law Reform Institute, Public Inquiries Issues Paper No. 3 (Edmonton: Alberta Law Reform Institute, 1991) [hereinafter A.L.R.I. Issues Paper No. 3], Alberta Law Reform Institute, Proposals for the Reform of the Public Inquiries Act, Report No. 62 (Edmonton: Alberta Law Reform Institute, 1992) [hereinafter A.L.R.I. Report No. 62]. Law Reform Commission of Canada, Administrative Law Commissions of Inquiry (A New Act), Working Paper 17, (1977) (Ottawa: Supply & Services, 1978) [hereinafter L.R.C.C. Working Paper

No.17], Law Reform Commission of Canada, Advisory and Investigatory Commissions, Report No. 13 (Ottawa: Supply & Services, 1979) [hereinafter L.R.C.C. Report No.13] and Ontario Law Reform Commission, Report on Public Inquiries (Toronto: Ontario Law Reform Commission, 1992) [hereinafter O.L.R.C. Report].

29

O.L.R.C. Report, supra note 28 at 185.

30

(Ont.) Public Inquiries Act, supra note 17 at s.9(2).
A witness shall be informed of his or her right to object to answer any question under section 5 of the Canada Evidence Act.

31

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

32

Supra note 29.

33

Ibid.

34

A.L.R.I. Issues Paper No. 3, supra note 28 at 15.

35

A.L.R.I. Report No. 62, supra note 28 at 67.

36

Ibid.

37

Ibid. at 7.

38

The comments of the Law Reform Commission of Canada refer to the powers given to federal royal commissions and public inquiries under the federal Inquiries Act, R.S.C. 1985, c. I-11. See L.R.C.C. Working Paper No. 17, supra note 28 at 13.

39

Ibid. at 28.

40

L.R.C.C., Report No. 13, supra note 28 at 3.

41

O.L.R.C. Report, supra note 28 at 138.

42

Liora Salter, "The Two Contradictions in Public Inquiries" in Commissions of Inquiry 173 at 174.

43

Ibid. at 175.

44

Ibid.

45

Ibid.

46

David W. Scott, "The Rights and Obligations of those Subject to the Inquiry and of Witnesses [in commissions of inquiry]" in Commissions of Inquiry 133.

47

A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" in Commissions of Inquiry 28.

48

In a recent newspaper article Bryan Schwarz is quoted as saying, "I see too much enthusiasm for public inquiries and I don't see sufficient caution about recognizing the risks these inquiries can create for individual civil liberties. See Doug Saunders, "Public Inquiries too lengthy, far-ranging, critics charge" The Globe and Mail (29 March 1997) A6.

49

Jim Bronskill, "Report urges inquiry reform: Federal proposals include witnesses' bill of rights" The [Ottawa] Citizen (29 June 1997) A1.

50 Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System - Krever Commission), supra note 7 at para. 31.

51 O.L.R.C., Report, supra note 28 at 138.

52 Ibid.

53 Ibid.

54 Re Nelles et al. and Grange et al. (1984), 46 O.R. (2d) 210 (O.A.C.) [hereinafter Nelles].

55 Starr v. Houlden (1990), 68 D.L.R. (4th) 641 (S.C.C.) [hereinafter Starr].

56 Nelles, supra note 54 at 215.

57 Ibid. at 211.

58 Starr, supra note 55 at 641.

59 Ibid. at 674.

60 Ibid.

61 Ibid.

62 Canada (Attorney General) v. (Commission of Inquiry on the Blood System - Krever Commission), supra note 7 at para. 34.

63 Ibid.

64

Quebec (Attorney General) v. Canada (Attorney General)
et al. (1978), [1979] 1 S.C.R. 218.

65

Ibid.

66

Ibid.

67

Nelles, supra note 54 at 216-217.

68

Starr, supra note 55 at 674.

69

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c.3,
s.91(27).

70

Canadian Charter of Rights and Freedoms, supra note 31 at
ss.11 and 13. Madame Justice L'Heureux-Dubé cited both
sections in her dissent in Starr. See Starr, supra 55 at
697.

71

S.G.M. Grange, "A Requiem for the Royal Commission" (1984)
43 U.N.B.L.J. 381 at 381.

72

Ibid. at 384.

73

Canada Evidence Act, R.S.C. 1985, c. E-10.

74

Supra note 31.

75

Supra note 71 at 388.

76

Supra note 17.

77

Starr, supra note 55 at 698.

78

Ibid.

79

S.G.M. Grange, "Public Inquiries and Private Rights: An Inquiry into Inquiries" (1990) Pitblado Lectures (Winnipeg: The Law Society of Manitoba, 1990) at 38.

80

Kent Roach, "Canadian Public Inquiries and Accountability" in Phillip Stenning, ed. Accountability for Criminal Justice (Toronto: University of Toronto Press, 1995) 268 at 271.

81

Ibid.

CHAPTER TWO:

SETTING THE STAGE FOR THE KREVER COMMISSION

Introduction

The purpose of this chapter is to provide a background that will set the stage for the case study in Chapter Three. To do this, the chapter will briefly look at events which led to the creation of the Krever Commission. It will also look at the issue which gave rise to the Commission, the issue of privacy and the importance of maintaining confidentiality of an individual's health record. This will be done in the context of the discussion of the general mandate of the Commission. The issue of privacy will also be discussed in the context of OHIP's duty to protect the privacy of individuals - a duty which OHIP breached. The need for vigilance in ensuring that the privacy of individual's health records is protected becomes even more important when public institutions such as OHIP, which are responsible for protecting the privacy of the public, violate this trust.

Part two of this chapter will look at the issues involving public access to information. This is the opposite side of the coin of the need to maintain privacy, and it underlined a paradoxical dilemma which faced the Krever Commission. The Commission's mandate was to investigate allegations that confidential information had been disclosed without proper authorization. However, the Commission also needed access to

information in order to determine who was responsible for releasing the names of the patients to members of the RCMP.

But as will be seen in Chapter Three, despite the importance of access to government information for the conduct of the Krever Commission and for the interest of the general public, access was restricted and in some cases denied all together.

Events Leading to the Krever Commission

(a) Events involving OHIP

Before allegations were made by Lawrence Martin in The Globe and Mail outside observers were unaware that there was a connection between OHIP and the RCMP. The Ontario Health Insurance Plan (OHIP) is responsible for the administration of the Health Insurance Act, 1972.¹ OHIP collects medical premiums and maintains enrollment records of individuals who are registered with the insurance plan. In 1978, 6.9 million Ontario residents were insured under the OHIP plan.² There were also 1.5 million single certificate holders.³ OHIP is also responsible for the payment of medical claims to subscribers. In the same year, OHIP processed 72,000 payments to the hospitals and related facilities and 2.7 million cheques to subscribers, physicians and practitioners.⁴ OHIP is directed to maintain the privacy of their enrollment and claim records. Under former s.44(1) of the Health Insurance Act the

General Manager of OHIP and the employees engaged in the administration of this Act and its regulations are responsible for preserving the confidentiality with all matters related to their duties pertaining to insured services and insured persons.⁵ The huge number of subscribers underlines the enormous trust that is placed in OHIP to maintain the privacy of its subscribers.

Although the insurance plan was still in its infancy it was already facing allegations of mismanagement in its handling of medical records, and of involvement with insurance fraud. In 1976, Mr. Ziemba, New Democratic Party member for High Park-Swansea, disclosed information to the OPP which alleged that a owner of a medical laboratory had defrauded OHIP of \$73,000.00 by over-billing it for tests that were never performed.⁶

The Krever Commission also revealed that employees of OHIP had been negligent in their duty by failing to ensure the proper handling of patient's records. For example, prior to the Commission's hearings, the Ontario Medical Association received a package of discarded OHIP claim cards naming patients, their doctors and their illnesses.⁷ Several months earlier in the spring of 1977, approximately 275 IBM claim cards had been found in the parking lot.⁸ Mr. Adams, OHIP's Oshawa's District Manager, was asked to determine the source of the cards found in the parking lot. In his report to Mr. Buchanan, the Director of OHIP's Insurance Claims Mr. Adams wrote, "confidentiality within OHIP is

ludicrous." ⁹ He described how medical claim cards were stuffed into overflowing bags; if a few cards were missed they were ignored or were shoved into wastebaskets. Documents which were considered to be confidential by some parts of OHIP were thrown into bulk bins where they could be blown into the street. ¹⁰ At the Commission's hearings, Mr. Adams complained that Mr. Buchanan had failed to take adequate steps to improve the disposal of claim cards. ¹¹

(b) Events involving the RCMP

The Royal Canadian is a federally constituted police force. The RCMP is responsible for the preservation of peace, and the prevention of crimes and offences against the laws of Canada. ¹² During the 1970s, the RCMP conducted security clearances for the federal government. It also investigated activities involving the alleged acts of terrorism and counter-espionage. ¹³ At the same time as allegations were being levied at OHIP, the RCMP was also facing allegations of misconduct and illegal activities. The RCMP was accused of arson, destruction of documents, theft, illegal entry, and unwarranted surveillance of the activities of members of the PQ and the NDP, as well as of a number of non-parliamentary groups and organizations. ¹⁴ The McDonald Commission ¹⁵ and the Krever Commission ¹⁶ also revealed that the RCMP had used illegal access methods to obtain medical information in its investigations.

These illegal activities had been committed under the RCMP's mandate of protecting national security in the aftermath of the October Crisis.

These allegations eroded public confidence in the RCMP. As a result of these allegations the RCMP became the subject of several public inquiries.¹⁷ The two most important were the Keable Commission and the McDonald Commission. The Keable Commission referred to in the previous chapter was a provincial inquiry appointed by the Quebec government with the mandate to investigate alleged illegal activities of the RCMP.¹⁸ These included illegal entry into the premises of the l'Agence de presse libre de Québec, arson, and theft of dynamite in Rougemont.¹⁹ As stated in chapter one, the Supreme Court of Canada's decision limited the powers of a provincial government to conduct a provincial commission of inquiry.²⁰ The Supreme Court's decision in this case was important and will be examined later in the context of how jurisdictional limitations restricted the work of the Krever Commission.²¹

The McDonald Commission was a commission of inquiry which was created by the Liberal Government. The Commission was created at the federal level because the RCMP falls under the federal jurisdiction. In the House of Commons the Solicitor General Francis Fox said that the McDonald Commission was set up when the government received confirmation from the RCMP that the incidents

which had occurred in Quebec were not isolated incidents.²²

However, there is speculation that there were other reasons why the government created this commission.²³

In the context of this thesis the McDonald Commission is important for two reasons. The first reason involves the question of jurisdiction. Like the Keable Commission, the McDonald Commission defined the jurisdictional limitations of a provincial inquiry to investigate into the activities of the RCMP. Second, it was the McDonald Commission that first revealed that the RCMP had obtained access to confidential medical information for the purpose of disrupting a political group for the purposes of national security.²⁴ Unfortunately, the Krever Commission did not know that this information existed until January, 1979 a year after the hearings of the Commission had commenced.²⁵

Before November 14th, 1977 when Lawrence Martin wrote his story in The Globe and Mail the lives of OHIP and the RCMP were unconnected. But it was on this date that their two lives would merge. It would be the task of Justice Krever to try to determine if there was truth in Lawrence Martin's allegations.

THE NEED FOR THE PROTECTION OF PRIVACY

The Order-in-Council issued by the Government of Ontario for the creation of the Krever Commission stated that:

Whereas, there has been considerable recent public discussion respecting the confidentiality of health and associated personal information, the Honourable Minister of Health recommends that pursuant to the provisions of the Public Inquiries Act, 1971, S.O. 1971, Chapter 49 the confidentiality of health and associated personal information, collected under the legislation administered by the Minister of Health... be declared a matter of public concern.²⁶

The Krever Commission was given the mandate to review all legislation and regulations relevant to the confidentiality of health and associated personal information.²⁷ It was given the power to investigate and to consider any misconduct or acts of negligence by any person, firm, corporation or organization in relation to the relevant legislation or regulations. The Commission also had the power to investigate any activities, practices or other conduct of any person, firm, corporation or organization which coerced, persuaded or induced improper activity, practice or conduct on the part of those who were involved with the collection or the dissemination of health information.²⁸

The difficulties which OHIP was having with the processing and the management of health records clearly indicated that OHIP was

having problems with maintaining the confidentiality of individual's health records. But the reason for having this Royal Commission went beyond the need to investigate the administrative problems of a government organization.

This Royal Commission was also about the need to maintain the privacy of individual's health records. In her thesis on access to and disclosure of health information,²⁹ Heather Hobart says that privacy is a human need to withdraw from social contact.³⁰ Hobart also asserts that the concept of privacy embraces the communication of information. She quotes Alan Westin who says that:

Privacy is a claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is to be communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary or temporal, withdrawal³¹ of a person from the general society

Hobart does not go farther in discussing Westin's concept of privacy. For Westin privacy is more than a basic human need to seek seclusion; privacy is also an expression of an individual's unique personality or personhood.³² An individual is a moral agent who has a sense of his or her own life, and can make and express decisions about the significant issues in his or her own life including decisions about health.³³ Privacy is an important dimension of human personality and is necessary for maintaining an individual's dignity. This is the basis of the respect that we

owe individuals, including those who through some accidents or misfortune have lost the capacity to exercise this ability. ³⁴ As Charles Taylor put it, "the central importance of all of this for our moral thinking is reflected in the fact that these capacities form an important part of what we should respect and nourish in human beings." ³⁵ Alan Westin believes that when we respect the privacy of individuals we respect their claim to determine for themselves when, how, and to what extent information about them is communicated to others. ³⁶

Justice Krever agreed with Alan Westin. In Justice Krever's view there is an obligation on the part of those in possession of the information to respect the claim of those whom the information concerns. ³⁷ Justice Krever said that in order to preserve the primacy of privacy the starting presumption should be that society values privacy of health information, thus creating the need for the observance of, and respect for confidentiality. ³⁸

But preserving privacy also requires trust. As Charles Taylor argues, a community is not an aggregation of disengaged individuals who operate independently. ³⁹ Individuals in a community live in an interdependent relationship. This relationship involves trust. OHIP is part of our community. It was created as a means of providing universal health insurance to the residents of Ontario. ⁴⁰ As Justice Krever clearly stated in his Report, "OHIP was not established to

create a pool of information easily accessible to the police." ⁴¹

He added that:

It is in the public interest to maintain the privacy of patients and the confidentiality of health information in OHIP's possession both because a person covered by the Plan has no alternative to having information about him or her forwarded to OHIP and because it is important that health-care providers candidly disclose to OHIP diagnostic and fee schedule codes necessary for the purpose of payment and auditing. ⁴²

However, Justice Krever said that enrollment information (that is, the individual's name) and residence is not health information and should not be treated as confidential. He believes that in our society this type of information cannot be considered to be intimate information. ⁴³ He also said that the evidence indicated that this information would assist the RCMP or the police for such legitimate purposes as locating someone, and that it would surely be in the public interest to make this work easier for the police. ⁴⁴

Not everyone would agree with this latter proposition. Arguably, all enrollment information should be considered as the entrance requirement into the OHIP Plan. When individuals give this information to enroll in OHIP there is an expectation that all the information given to OHIP will be kept confidential and be used only in conjunction with the Plan. This concession on the part of Justice Krever reflects his acknowledgment that privacy cannot be

viewed as an absolute value.⁴⁵ It is also a view that is reflected in the literature. However, there is considerable debate in the literature about what aspects of a person's private life should be protected from outside intrusion.⁴⁶ For example, Jack London says that "in the absence of competing interests in disclosure of information, free and open disclosure ought to be the rule."⁴⁷ But he acknowledges that there are frequently times when there are legitimate competing interests, and decisions have to be made about the disclosure of confidential health information.⁴⁸ One such area is in the protection of the public's health and safety. There are various provincial statutory laws which require physicians to report findings of contagious disease, or other threats to the public such as suspected cases of child abuse.⁴⁹

However, as the Supreme Court of Canada stated in Solicitor-General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario et al.,⁵⁰ there is no legal duty imposed on physicians not to disclose confidential health information.⁵¹ At the time of the Commission's hearings, under the regulations of the Health Disciplines Act, 1974⁵² a physician who disclosed confidential information could only be found guilty of professional misconduct.⁵³ The law has since been revised. Under the regulations of the Regulated Health Professions Act, 1991⁵⁴

it is not professional misconduct if a physician discloses information for the purpose of the care of a patient, or for research if the physician is convinced that the identity of the patient will not be disclosed.⁵⁵

Physicians are also legally obliged to disclose confidential information in courts of law. The Supreme Court of Canada in Halls v. Mitchell⁵⁶ held that "communications made in confidence to physicians are not in common law privileged from disclosure in courts of justice."⁵⁷ Courts, however, do have some discretion and as in the example of Smith v. Royal Columbia Hospital⁵⁸ may apply Wigmore's criteria to extend privilege to a physician-patient communication on a case-by-case basis.⁵⁹ In making such decisions the courts will look at the impact on the administration of justice.⁶⁰

Within the realm of medicine physicians are faced with the challenge of making decisions regarding the disclosure of health information. But this dilemma can also be seen as part of the broader public issue - the right of freedom to access of information.

THE NEED FOR PUBLIC ACCESS TO INFORMATION

After incidents such as the scandals surrounding the RCMP which culminated in 1978 with the McDonald Commission of Inquiry on the Activities of the Royal Canadian Mounted Police, there was increasing public uncertainty about government. There developed less deference to authority and the public began to demand greater government accountability. Events south of the boarder such as Watergate also had an impact. In 1966, members of the opposition parties, both federal and provincial, together with members of the press, looking at the model of the American Freedom of Information Act ⁶¹ argued that Canada needed its own information laws. ⁶² They argued that the "traditional mechanism of accountability - elections, opposition parties and the free press were no longer adequate." ⁶³

Political and public pressure resulted in a series of federal studies and committee hearings which led to the passing of the Access to Information Act ⁶⁴ in July of 1980. ⁶⁵ In 1977 the Ontario government established a Commission on Freedom of Information and Individual Privacy. ⁶⁶ In September of 1980 the Commission released its final report, entitled Public Government for Private People. ⁶⁷ Access to information legislation was passed in 1987. ⁶⁸

Donald Smiley believes that freer access to information is more than making government accountable for its actions, or providing information to allow for a more open public discussion about government policies. Freedom of access to information can also be viewed as a human right. In this instance, though, Smiley would prefer the term "human claim" because:

the assertion of a "right" has an absolute and unconditional connotation which masks our real activity in ordering and reordering a complex system of claims which are often in competition and sometimes wholly irreconcilable.⁶⁹

For Smiley, the public right to access information can best be defended by asserting that the right to information allows the public, individually or collectively to exercise other rights. These rights include the ability of people to defend themselves when public authorities subject them to deprivations, or to learn how they can take advantage of public benefits which are available to them.⁷⁰ Smiley believes that the most crucial information imbalance is not between government and its citizens, "but rather between individual citizens under unfortunate circumstances and public agencies who have been delegated the power by government to give or withhold various forms of public assistance."⁷¹

During the public debates surrounding the passing of the access to information legislation consumer advocates, labour leaders, academics, and members of the press also expressed

concerns about the increasing use of computer technology by government and business to record personal information including marital, employment, financial and health information. Labour and consumer groups were afraid that government or business could use this information to deny individuals employment, housing or financial assistance.⁷² The government acknowledged their fears with the enactment of the Privacy Act which was contained within the Access to Information Act.⁷³ Recently, the Supreme Court of Canada has also acknowledged the importance of personal privacy in Dagg.⁷⁴ However, the Act only applies to information that is held by federal institutions. Similar legislation was passed in Ontario in 1987.⁷⁵ Research for the Krever Commission revealed that OHIP was inconsistent in its response to requests for information from the Ontario Ombudsman on behalf of complainants.⁷⁶ Offices in Toronto were reticent about giving out information, but offices outside of Toronto were quite willing to release information over the telephone. These inconsistencies existed despite the fact that there were guidelines on releasing information to the Ombudsman.⁷⁷

Thus the right to privacy and the right of access to information were two critical elements of the challenge facing the Krever Commission. In order to determine how the confidentiality of individuals had been violated, Justice

Krever discovered that a Royal Commission's right of access to information is not absolute. The next chapter will look at obstacles which prevented the Krever Commission from carrying out its mandate.

Endnotes for Chapter Two

- 1 Health Insurance Act, 1972, S.O. 1972, c.91 [hereinafter Health Insurance Act].
 - 2 Ontario, Ministry of Health, Annual Report: 1977-78 (Toronto: Queen's Printer, 1978) at 15.
 - 3 Ibid. at 15.
 - 4 Ibid. at 16.
 - 5 Health Insurance Act, supra note 1 at s.44(1). This section is renumbered in the Health Insurance Act, R.S.O. 1990, c. H.6 and is now s.38(1).
 - 6 At the preliminary hearing Mr. Ziembra refused to disclose the source of his information claiming parliamentary privilege. However, Mr. Ziembra was found in contempt of court for failure to disclose information that was deemed relevant to the trial and sent to jail. See Ontario, Legislative Assembly, Debates, No.1 (27 June 1977) at 15. The decision of the Trial Court was upheld by the Ontario Court of Appeal. See Reference Re Legislative Privilege (1978), 83 D.L.R. (3d) 161 (O.A.C.). The Ontario Supreme Court overturned the Ontario Court of Appeal decision. The Court ruled that Mr. Ziembra did not have to reveal the source of his information because the information was not relevant to the issues of the case. See Michael Keating, "Not necessary to give source, Ziembra is told" The Globe and Mail (28 September 1978) at 5. (case unreported).
- The treatment received by Mr. Ziembra was in sharp contrast to how members of the RCMP were treated when they refuse to disclose the names of their informers to the Krever Commission. Members of the force were exonerated by the Supreme Court of Canada. See Solicitor-General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario et al. (1981), [1982] 128 D.L.R. (3d) 193 (S.C.C.).

- 7
Joan Hollobon, "Tightening of security on private OHIP files ordered by Timbrell" The Globe and Mail (4 August 1977) at 1.
- 8
Ontario, Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Report of the Royal Commission into the Confidentiality of Health Information, vol.2 (Toronto: Queen's Printer, 1980) (Commissioner: J. Horace Krever) c.16 at 72 [hereinafter Krever Report].

This Royal Commission is also know as the Royal Commission of Inquiry into the Confidentiality of Health Information.
- 9
Ibid.
- 10
Ibid.
- 11
Thomas Claridge, "Boss ignored complaints about laxity in OHIP data disposal, ex-aide says" The Globe and Mail (31 October 1976) at 1.
- 12
Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, s.18. In provinces where the RCMP is employed it is responsible for enforcing the laws of the province.
- 13
After the McDonald Commission a new civilian security force, CSIS was created. Responsibility for security is divided between CSIS and the RCMP. CSIS is responsible for conducting domestic security clearances and for security evaluations. The RCMP is responsible for foreign security clearances and international operations.
- 14
There were numerous newspaper articles which chronicled the alleged activities of the RCMP surveillance of political parties. From the headlines of the newspapers indexed in the Canadian News Index, it appears that none of the major political parties escaped the surveillance of the RCMP. Included were the following headlines: "RCMP probed NDP for communist infiltration" The Globe and Mail (25 August 1977) at 1, "I halted police watch on PQ - Trudeau" Winnipeg

Free Press (29 October 1977) at 1, and "At least 2 Tories bugged, sweep finds; device in MacKay's chair" The Globe and Mail (1 November 1977) at 1. The newspaper reports prompted questions from members of the House of Commons. See Canada, House of Commons, Debates, (14 November 1977) at 812.

15

Canada, Commission of Inquiry Concerning Certain Activities of the RCMP [hereinafter the McDonald Commission]. This revelation was revealed when members of the Revolutionary Workers League accused the RCMP of having been engaged in a letter writing campaign to discredit the League for Socialist Action's executive secretary John Riddell. The letters referred to him seeking psychiatric aid and questioned the stability of his mental health. See Canada, Commission of Inquiry Concerning Certain Activities, of the RCMP, Submission to the Commission of Inquiry Concerning Certain Activities of the RCMP presented by the Revolutionary Workers League (18 January 1978) at 17.

16

Despite the revelation made by the Revolutionary Workers League, the Krever Commission did not know about this incident until three months after the RCMP had sworn under oath to the Commission that it had turned over all available information on RCMP access of medical information. The admission that the RCMP had violated the confidentiality of Ontario health information was made by Superintendent I.W. Taylor before the Krever Commission. See Policy Submission to the Royal Commission of Inquiry into the Confidentiality of Health submitted by Ross Dowson, A.O. RG18-187, R.C.#P383, File: Brief No. 179 (14 June 1979). The RCMP documented other incidents where medical information was accessed in conducting investigations. See RCMP Handling, Storage and Destruction of Medical Information, A.O. RG18-187, R.C.#P383, File: Brief No. 210 (11 June 1979) Part One, 1-177.

17

The three major inquiries were the Quebec, Commissions d'enquête sur des opérations policières en territoire québécois [hereinafter the Keable Commission], the McDonald Commission, and the Commission of Inquiry into the American Air Show (the Laycraft Commission). There were also inquiries in New Brunswick and Nova Scotia which involved RCMP investigations into political kick backs.

- 18
See Chapter One at 23-24. The investigations also included members of the Sûreté du Québec and the Montreal Urban Community Police Department.
- 19
Quebec, Commissions d'enquête sur des opérations policières en territoire québécois, Rapport de la Commissions d'enquête sur des opérations policières en territoire québécois (Quebec: Ministère de la Justice, 1981) (Commissaire: Jean F. Keable) at 12-13.
- 20
See Chapter One at 23-24.
- 21
See Chapter Three at 65.
- 22
Canada, House of Commons, Debates (12 December 1977) at 1764.
- 23
Michael Mandel, "Discrediting the McDonald Commission" (1982) 61 Canadian Forum 14-17.
- 24
Supra note 17.
- 25
Supra note 18.
- 26
Order-in-Council 3566/77, s.1 as reprinted in Krever Report, supra note 8, vol.1 at v.
- 27
Ibid. s.1(1).
- 28
These additional powers were given to the Krever Commission after the original Order-in-Council was amended. The Order-in-Council was amended after Justice Krever requested clarification of his mandate. See Order-in-Council 1129/78, s.1(3) as reprinted in Krever Report, supra note 8, vol.1 at vii-viii.

29

Heather Mary Hobart, "A Legislative Proposal Addressing the Access to and Disclosure of Health Information" (LL.M. Thesis, Dalhousie University, 1995) [unpublished].

30

Ibid. at 10.

31

Ibid. at 11.

32

A.F. Westin, Privacy and Freedom (New York: Atheneum, 1967) at 349-350.

33

Charles Taylor, Human Agency and Language: Philosophical Papers, vol.1 (Cambridge: Cambridge University Press: 1996) at 103.

34

Ibid.

35

Ibid.

36

Supra note 32 at 7.

37

Krever Report, supra note 8, vol.1, c.1 at 6.

38

Ibid. at 7.

39

Supra note 33 at 8.

40

Krever Report, supra note 8, vol.2, c.16 at 63.

41

Ibid.

42

Ibid.

43

Ibid. at 63-64.

44

Ibid. at 64.

45

Krever Report, supra note 8, vol.1, c.1 at 8.

46

Authors which represent a cross section of perspectives on privacy and the right to privacy include:

Jean L. Cohen, "Rediscovering Privacy: Identity, Difference, and the Abortion Controversy" (1992) 3(1) Columbia Journal of Gender and the Law 43.

Ruth Gavison, "Privacy and the Limits of the Law" (1980) 89(3) The Yale Law Journal 421.

Julie C. Innes, Privacy, Intimacy and Isolation (New York: Oxford University Press, 1992).

Jeffrey H. Reiman, "Privacy, Intimacy and Personhood" in Ferdinand David Schoeman, ed. Philosophical Dimensions of Privacy: An Anthology (London: Cambridge University Press, 1984) 300; and

Judith Jarvis Thomson, "The Right to Privacy" (1974/75) 4 Philosophy and Public Affairs 295.

47

Jack London, "Privacy in the Medical Context" in Dale Gibson, ed. Aspects of Privacy: Essays in the Honour of John M. Sharp (Toronto: Butterworths, 1980) 281 at 282-283.

48

Ibid.

49

Barney Sniderman and John C. Irvine, Canadian Medical Law: An Introduction for Physicians, Nurses and other Health Care Professionals, 2d ed. (Toronto: Carswell, 1995) at 222-223.

50

Solicitor-General of Canada et al. v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario et al. (1981), 128 D.L.R. (3d) 193 (S.C.C.) [hereinafter Health Records case].

- 51
Ibid. at 194.
- 52
Health Disciplines Act, 1974, S.O. 1974, c.47.
- 53
Health Records case, supra note 50 at 194.
- 54
Regulated Health Professions Act, 1991, S.O. 1991, c.18.
- 55
O. Reg. 856/93, s.1(1)(10) under the Regulated Health Professions Act, 1991, S.O. 1991, c.18 as cited in R.D. Manes and P. Silver, "Doctor-Patient Communication" in The Law of Confidential Communications in Canada (Toronto: Butterworths, 1996) at 18 [hereinafter The Law of Confidential Communications].
- 56
Halls v. Mitchell, [1928] S.C.R. at 128.
- 57
The Law of Confidential Communications, supra note 55 at 16.
- 58
Smith v. Royal Columbia Hospital (1981), 123 D.L.R. (3d) 723 (B.C.S.C.).
- 59
The Law of Confidential Communications, supra note 55 at 15.
- 60
Ibid.
- 61
Freedom of Information Act 5 U.S.C. § 552 (1967).
- 62
John D. McCamus, ed., "Preface" in Freedom of Information: Canadian Perspectives (Toronto: Butterworths, 1981) at v [hereinafter Freedom of Information].
- 63
Donald Smiley, "Freedom of Information: Rationales and Proposals for Reform" in Freedom of Information, supra note 62 at 1.

64

Access to Information Act, S.C. 1980-81-82-83, c.111; now R.S.C. 1985, c. A-1 [hereinafter Access to Information Act].

65

For a summary of the legislative events leading to the passing of the Access to Information Act see "Preface" at v-vi and John D. McCamus, "Bill C-43: the Federal Canadian Proposals of 1980" in Freedom of Information, supra note 62 at 266-268.

66

John D. McCamus, "The Report of the Ontario Commission on Freedom of Information and Individual Privacy: A Synopsis" in Freedom of Information, supra note 62 at 306.

67

Ibid.

68

Freedom of Information and Protection of Privacy, S.O. 1987, c.25.

69

Supra note 63 at 6.

70

Ibid.

71

Ibid. at 7

72

Laurie Campbell, "To Protect and Defend: Access to Information and National Security" (BA Hons. Paper, Carleton University, 1993) [unpublished] c.1 at 2.

73

Privacy Act being Schedule II to the Access to Information Act, S.C. 1980-81-82-83, c.111; now R.S.C. 1985, c. P-21.

74

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403.

75

Supra note 68.

76

Memo of Carene Smith to Barbara Casson Robin (9 January 1979) A.O. RG18-187, R.C.#P415, File: C-7-16 Research on OHIP.

77

Ibid.

CHAPTER THREE:

OBSTACLES WHICH HINDERED THE KREVER COMMISSION FROM OBTAINING ACCESS TO GOVERNMENT INFORMATION

Introduction:

This chapter addresses the specific obstacles which hindered the Krever Commission from obtaining access to information. As noted earlier Royal Commissions have been criticized for having too much power.¹ It will now be demonstrated that in the case of the Krever Commission at least, there was too little power, given the array of factors that combined to deny it the information it needed to do its job effectively.² These factors included jurisdictional limitations; national security and police informer privilege; reluctance on the part of OHIP officials, members of the RCMP, and The Globe and Mail to cooperate with the Commission; lack of government accountability and administrative problems, which included problems with organizational structure and record keeping.³

These obstacles will be examined using selected materials from the Krever Commission's files and Justice Krever's Report. The Commission's files include transcripts of proceedings, briefs letters, memos, research files and exhibits.⁴ However, it was not possible to obtain access to all the material in the Commission's files. The Commission's investigative files are classified as restricted. This classification includes the investigative files of OHIP and the RCMP, and the transcripts of the in camera hearing

concerning John Riddell, executive secretary for the League of Socialist Action.⁵ Without access to this material, it is difficult to determine the extent to which the Commission was able to uncover the use of medical information by the RCMP in its investigations. The Archives of Ontario "Access Policy for Restricted Records of Public Inquiries" requires that permission to use restricted materials must be obtained either from the Deputy Attorney General or the Deputy Minister of the ministry which was responsible for administering the commission or task force.⁶ I submitted a request to the Deputy Attorney General of Ontario for access to this restricted material. Ironically, in light of the topic of this thesis, after long delays⁷ I was refused access to it, "on the basis of the sensitivity of the requested information."⁸

Although this decision made the research more difficult for this thesis, my experience made me realize how difficult it must have been for the Krever Commission to endure confusion, delays, and other obstacles in trying to obtain information from OHIP, the RCMP, and other organizations. The first such obstacle to be examined involves jurisdictional limitations.

OBSTACLES

(1) Jurisdictional Limitations

The Krever Commission faced different kinds of jurisdictional limitations. These included limitations relating to the scope of the Krever Commission's mandate; constitutional limitations resulting from the division of legislative powers in the Constitution Act, 1867; ⁹ geographic limitations which prohibited the Commission from compelling witnesses residing outside of Ontario to testify before the Commission; and evidentiary limits such as police informer privilege.

(i) Jurisdictional Limitations and the Scope of the Krever Commission's Order-in-Council

The RCMP's lawyer, Mr. Pennington, challenged the scope of the Order-in-Council which was issued by the Government of Ontario for the creation of the Krever Commission. ¹⁰ Mr. Pennington said, "the Lieutenant-Governor of the Province had not specifically directed Justice Krever to look into the matter of the police." ¹¹ He argued that the police were exempted from the inquiry under section 11 of the Public Inquiries Act. ¹² Justice Krever disagreed. He replied by saying that the Order-in-Council had been extended to allow him to examine the conduct of anybody who had violated any legislation of Ontario, including the police. ¹³ Justice Krever insisted that the executive of the Province of Ontario had directed him, in the interest of the public, to look

into the legality of the conduct of medical personnel and the police.¹⁴

Mr. Pennington insisted that it was in the public's interest to protect the names of the RCMP's informants.¹⁵ The full reasoning behind Mr. Pennington's argument will be examined later in the section on police informer privilege.¹⁶ Briefly stated, Mr. Pennington's argument was that in order to ensure the effective law enforcement to protect the public, it was necessary for the police to be able to protect their sources of information. The exchange between Justice Krever and Mr. Pennington was a clash between competing state interests as discussed in Chapter Two¹⁷ - the state's need to investigate alleged breaches of confidentiality of an individual's health record versus the state's need to maintain effective law enforcement.

Eventually, Mr. Pennington conceded that Justice Krever could look into the conduct of the police, but insisted that full disclosure of the conduct of the police would not be possible because of police informer privilege.¹⁸ Justice Krever disagreed, insisting that this privilege does not apply to public inquiries.¹⁹ His objections will be examined later in the section on police informer privilege.

The Krever Commission had the power to investigate the conduct of the police, but it lacked the authority to investigate the procedures used by the RCMP to conduct its investigations. This

was due to constitutional jurisdictional limitations which will now be examined.

(ii) Constitutional Jurisdictional Limitations

Constitutional limitations limit the jurisdiction of a provincial commission of inquiry to investigate the activities of the RCMP.²⁰ They prevented Justice Krever from finding out the "true" motives behind RCMP activities. For example, Justice Krever could not compel Superintendent Spooner²¹ to tell the Commission why the Thunder Bay operation took place or who was responsible for this operation.²²

In Quebec (Attorney General) v. Canada (Attorney General)²³ referred to in the previous two chapters the Supreme Court of Canada ruled that the jurisdictional powers of a provincial commission cannot exceed beyond the constitutional limits of a provincial legislature's authority.²⁴ The province of Quebec had the constitutional authority to set up a commission of inquiry, the Keable Commission, to investigate and report on the administration of justice in a province.²⁵ The Supreme Court said the Keable Commission could also investigate crimes of a general nature and the circumstances surrounding the commission of a specific criminal act.²⁶ But the Court said the Keable Commission did not have the authority to examine the RCMP itself or its services, rules, policies and procedures, because the RCMP operated under the authority of the federal government.²⁷

- Because of the narrow jurisdictional limitations set down in Quebec (Attorney General) v. Canada (Attorney General), Justice Krever could not compel Superintendent Spooner to tell the Commission why the Thunder Bay operation took place or who was responsible for it. This would have forced Superintendent Spooner to answer questions about procedures and policies of the RCMP, both of which were outside of the Commission's purview.²⁸ For Justice Krever, this situation illustrated the serious difficulty of making recommendations with respect to access to a provincial source of information (OHIP records) by a federal force (the RCMP).²⁹ How could he make recommendations, if the RCMP could not be held accountable to provincial authorities for abusing access to provincial information?³⁰

The issue of constitutional jurisdictional limitations was never specifically addressed by the Krever Commission. However, this issue was a significant factor in preventing the Krever Commission from obtaining information from the RCMP. In appealing the Health Records case³¹ before the Supreme Court of Canada, the federal government used the constitutional argument that crime and national security are exclusive areas of federal jurisdiction which cannot be investigated by a provincial inquiry with coercive powers. The Supreme Court decided in favour of the federal government, although the Court did not make its decision on constitutional grounds Justice Martland did say that informer

privilege belongs to the Crown and provincial statutory provisions could not preclude the Crown from this right. ³²

We will return to the Supreme Court's decision later. ³³

(iii) Geographic Jurisdictional Limitations and The Globe and Mail

Jurisdictional limitations were also an obstacle for Justice Krever in questioning a newspaper reporter. Reporter Lawrence Martin published a story in The Globe and Mail containing allegations that the RCMP had misused medical information. The newspaper had subsequently transferred Mr. Martin to its Washington, D.C. office. Section 7 of the Ontario Public Inquiries Act gives a commission of inquiry the power to summon witnesses to appear before a commission. However, this applies only to individuals that reside in Ontario. Because of constitutional restrictions, a provincial government cannot pass legislation that would extend its power beyond its territory. ³⁴

The geographical jurisdiction restrictions on the Commission's powers were a specific form of constitutional jurisdictional limitation. As a result, Mr. Patterson, The Globe and Mail's lawyer, was able to argue that Mr. Martin was outside the geographic jurisdiction of the Commission. Hence Mr. Martin could not be compelled to testify before the Commission about the source of his story.

In January 1979, a year after the Commission's hearings had commenced, the Krever Commission still had no evidence to support the allegations that had been made in Lawrence Martin's story. Justice Krever believed that in fairness both to the people who had been affected by the story and to the public who had a right to know if the statements in the story were true, he had an obligation to make every effort possible to obtain all relevant information before the hearings finished.³⁵ He had also believed that a public institution such as The Globe and Mail had a civic obligation to assist a public body to uncover the truth.³⁶

However, The Globe and Mail's lawyer, Mr. Patterson would not be swayed. He argued that it would be an abuse of the employer/journalist relationship for the paper to order Mr. Lawrence to have a subpoena to be served on him.³⁷ There was also no point in having him testify because everyone would want to know his sources which, as a journalist he would naturally want to protect.³⁸ Mr. Patterson was also afraid that Lawrence Martin might be subjected to severe punishment from the Commission if he agreed to appear before the Commission.³⁹

Justice Krever tried to reassure Mr. Patterson that there was no trial taking place. However, Mr. Patterson would not change his mind and the Commission was denied access to one of the most important pieces of the puzzle, the source of Lawrence Martin's story.

The next two sections will look at two specific obstacles which were closely related to the issue of jurisdictional limitations; national security and police informer privilege.

(2) National Security

National security and the administration of the federal agencies such as the RCMP fall under the jurisdiction of the federal government.⁴⁰ National security involves the protection of Canada against threats to its national security. There are a number of legislative provisions that define national security. The Access to Information Act⁴¹ defines threats to national security as "subversive or hostile activities" and include espionage, and unlawful acts of violence which are politically motivated and directed towards the destruction of the overthrow of the Canadian government.⁴² The Royal Commission on Security (the Mackenzie Commission)⁴³ stated in its Report, "the State has a clear right to protect certain information - some defence information for example - which must remain secret if danger to the state is to be avoided."⁴⁴ The Commission also said it had little sympathy with suggestions that inquiries about persons should not be undertaken because of an individual's right of privacy."⁴⁵ The Mackenzie Commission's Report was used by the RCMP in its brief⁴⁶ to the Krever Commission to explain why it could not disclose information regarding investigations involving national security.

Despite the RCMP's formal position, the Commission in fact was able to obtain some information from the RCMP about activities involving national security.⁴⁷ Examples of where the RCMP used medical information in conducting its investigations included the Lonsdale case,⁴⁸ the Niagara investigation,⁴⁹ and security clearances involving federal civil servants.⁵⁰

But it is difficult to determine how much information the Commission was able to obtain about these investigations. Under section 4(a) of the Ontario Public Inquiries Act matters involving public security cannot be disclosed in a public hearing.⁵¹ In dealing with such matters a commission may hold in camera hearings.⁵² In camera sessions were held by the Commission to address sensitive matters such as the Riddell affair. As mentioned earlier,⁵³ it was not possible to gain access to the transcripts of in camera hearings such as the Riddell affair. Thus it was difficult to know just how much information was disclosed.

However, an article⁵⁴ published in The Globe and Mail shows that Justice Krever was denied full access to top-secret RCMP files about the Riddell affair. Justice Krever was allowed to read only portions of the file and was not permitted to make notes.⁵⁵ The file was not allowed to be used as an exhibit during the hearing.⁵⁶

The federal Solicitor General, Jean Jacques Blais, was responsible for authorizing the restrictions placed on Riddell's

file.⁵⁷ The RCMP's lawyer, Mr. Pennington, also claimed that because the Riddell files was classified under the Official Secrets Act⁵⁸ it could not be released.⁵⁹ Justice Krever believed that these unusual conditions would not have been imposed had it not been for the Supreme Court's decision that as a matter of constitutional law the Keable Commission could not compel the production of RCMP or federal government papers.⁶⁰

The Krever Commission's task was frustrated by constitutional uncertainty, conflicting priorities and an unwillingness by the RCMP and The Globe and Mail to compromise their positions. The relationship between the Krever Commission and the RCMP was particularly strained and it is not surprising that an additional spark would propel this conflict into the courts. The additional spark was the RCMP's attempt to deny the Krever Commission information on the basis of the common law police informer privilege rule.

(3) Police Informer Privilege

"The police informer privilege is a rule of law protecting against the disclosure of the identity of an informer".⁶¹ The only exception to this common law rule is where the identity of the informer is required to prove the innocence of the accused.⁶² The rationale for this privilege is based on two theories, the "protection/inhibition theory", and the "continual flow theory". The first theory is based on the notion that it is

the civic duty of people to report to the police any information relating to crime, but in order to allay their fears that their safety or economic interest may be placed in jeopardy, their identities need to be protected.⁶³ The second theory is related to crime prevention and deterrence. If the identities of "police informers" are disclosed, then other prospective informers would refuse to supply information, fearing that their identities would be revealed. As a result the police would lose a valuable supply of information.⁶⁴ The constriction of these channels of information would threaten the ability of law enforcement agencies to protect the public from criminal activity or threats to national security.⁶⁵

The RCMP's lawyer Mr. Pennington admitted that he was unable to find any authority as to where this privilege had been raised in a Commission of Inquiry.⁶⁶ Nonetheless, he argued that this privilege founded on public policy,⁶⁷ was applicable in this situation.⁶⁸

Justice Krever disagreed with Mr. Pennington's position. The Lieutenant-Governor-In-Council had asked him for an opinion as to whether or not who had given information in violation of Regulations should be permitted to do so.⁶⁹ But Justice Krever believed that it would not be possible to offer an opinion or to make recommendations without knowing why a physician decided to disclose information to the police.⁷⁰ Justice Krever said, "I do

not think I can accept from the person who received the information the assurance that a physician had acted in the best interest of his or her patient by revealing information to an officer." ⁷¹ The other reasons for the disagreement between Justice Krever and Mr. Pennington have already been discussed and require no further comment. ⁷²

After listening to Mr. Pennington's arguments, Justice Krever ruled that the informer privilege did not apply to commissions of inquiry. In response to Justice Krever's ruling, Mr. Pennington requested that a case be stated ⁷³ before the Divisional Court of Ontario concerning this principle under section 6 of the Ontario Public Inquiries Act. ⁷⁴ Justice Krever agreed.

The decision of the Divisional Court and the subsequent appeals to the Ontario Court of Appeal and the Supreme Court of Canada will be considered. Each of the decisions reveals a different aspect of the Krever Commission's losing battle to gain access to the names of the RCMP informers.

THE COURTS AND THEIR APPROACHES IN RESOLVING THE CONFLICTS OF POLICE INFORMER PRIVILEGE AND NATIONAL SECURITY

(1) Divisional Court of Ontario's Decision

In stating the case before the Divisional Court, Justice Krever asked two questions, (a) was he correct in ruling that the law recognizes no privilege that would prevent the disclosure to the Commission of the identity of those physicians and hospital

employees who disclosed information to the RCMP without the patient's authorization, and (b) was he correct in requiring witnesses to disclose the identity of the physicians and hospital employees in this particular situation? ⁷⁵

Osler J. wrote the decision for the Court. ⁷⁶ Osler J. said, "The first and most general principle of evidence was that all evidence should be admissible if it is relevant, unless made inadmissible by statute or a rule of evidence under the common law." ⁷⁷ In looking at the wording of the Order-in-Council for the appointment of the Commissioner he said:

the names of the persons who disclosed information to the RCMP without the patient's authorization are clearly relevant to the Commission's inquiry. They should be admissible unless excluded by some rule of evidence or, as put by the Commissioner, by some privilege recognized by law.

Upon considering the circumstances of the case, Osler J. held that a privilege did apply once it was established that information had been disclosed to a member of the RCMP then the name of the informer had to be protected under the umbrella of police informer privilege, ⁷⁹ unless some new exception ⁸⁰ was to be made. ⁸¹ Osler J. said an exception did not exist in relation to physicians and hospital employees who were governed by the Public Hospitals Act. ⁸² The Legislature had clearly indicated in this Act that it was an offense for hospital employees and physicians

to release medical information. Thus it would be contrary to public policy for the rules of evidence to protect the names of any physician or hospital employees who had disclosed this information.⁸³ However, he held that a privilege did exist for physicians and other members of self-governing professions not under the control of a hospital board.⁸⁴ Osler J. said, "in the Court's view it was for the College of Physicians and Surgeons of Ontario to decide if the actions of a physician constituted professional misconduct."⁸⁵ The Court believed that it was not possible or desirable for the Court or the Commission to say in advance if the disclosure of information by a physician without proper authorization constituted professional misconduct.

Writing the majority decision for the Ontario Court of Appeal, Dubin J.A. said that Justice Osler was wrong in distinguishing between physicians in private practice and physicians who were under the control of a hospital board.⁸⁷ He said the behaviour of both were governed by the Health Disciplines Act.⁸⁸ Under the regulations of this Act it was professional misconduct for a physician to release information concerning a patient's condition without the prior consent of the patient.⁸⁹ Although the Act did not contain penal consequences for professional misconduct, an elaborate legislative scheme had been put into place to maintain the confidentiality of health information. Justice Dubin believed that if this Act and its regulations were not upheld a patient's

right to privacy would be illusory.⁹⁰

Justice Osler's decision failed to consider the relevance of the names of the RCMP informants to the work of the Krever Commission. Justice Osler began his comments by saying that the most general principle of evidence is that all evidence should be admissible if it is relevant,⁹¹ but in his decision Justice Osler did not consider the relevance of this information for the Krever Commission, or the harm that would result to the public if this information was not disclosed.⁹² Without the disclosure of this information there was no independent way to verify whether any physician had provided information to the RCMP or whether the RCMP had obtained the information in some other manner.⁹³

It is not surprising that Justice Osler did not use this approach, for Justice Osler had said that if an exception was to be made to the informer privilege rule the Court had to balance the public policy in favour of protecting the identity of informers against the public policy of not releasing medical information without a patient's authorization.⁹⁴

The Court's decision did not help resolve this conflict. The Court's answer to question (a)⁹⁵ was that a privilege did not exist for physicians and hospital employees who were under the control of a hospital board, but a privilege did exist for physicians and other members of self-governing professions who were not under the control of a hospital board.⁹⁶ The answer to question (b)⁹⁷ was

that there was no over-all answer. Each case had to be decided upon the classification in which the witness fell in the light of the Court's analysis ⁹⁸

The Divisional Court's decision made it difficult for the Krever Commission to complete its work. The Krever Commission was able to identify a number of physicians and hospital employees who had disclosed information to the RCMP. But because of the Court's decision the Commission was unable to identify others who were involved without the assistance of the RCMP. ⁹⁹

The Solicitor General of Canada was displeased with the Court's decision because the identity of physicians and hospital employees who were not covered by the informer privilege would have to be disclosed by the RCMP. As stated previously, the RCMP believed that it was in the public's interest that the names of the informants be protected. ¹⁰⁰ The Solicitor General decided to appeal the decision of the Divisional Court to the Ontario Court of Appeal. ¹⁰¹

(2) The Ontario Court of Appeal's Decision

The Ontario Court of Appeal addressed the issue of informer privilege. The Court asked if a privilege existed that would prevent the disclosure of the identity of the RCMP informants to the Krever Commission. The Court's answer was that no such privilege existed.

The Appeal Court reversed the decision of the Divisional Court of Appeal. ¹⁰² The Appeal Court held that police informer privilege is only recognized when it is essential that confidentiality be maintained between the parties. The relation, though, must be one that the community believes ought to be fostered, and the injury to the relation from the disclosure of information must be greater than the benefit gained by the disclosure to the Court. ¹⁰³ The Court acknowledged that the information had been given to the RCMP in confidence. However, the Court said "that fact is not sufficient in itself to foreclose its availability to judicial inquiry." ¹⁰⁴ The promise of confidentiality must yield to public interest in protecting the confidentiality of medical information. The Ontario legislature had established a legal duty not to disclose medical information under the Health Disciplines Act. In Justice Dubin's opinion, "there can be no privilege when the informer in providing the information to the police is in breach of a legal duty not to disclose such information." ¹⁰⁵

The RCMP had said that without police informer privilege it would lose a valuable source of information. Justice Dubin responded that:

Where confidential information is obtained other than by due process of law, the administration of law cannot help but be impaired. Effective law enforcement in a democratic society is dependent on public confidence. ... The public can hardly be expected to

The public can hardly be expected to have respect for the law when those entrusted with its enforcement do not scrupulously adhere to it,¹⁰⁶

Justice Dubin believed Justice Krever was correct to say that there was no privilege to prevent the disclosure to the Commission of the identity of those physicians and hospital employees who had divulged medical information to members of the RCMP without the patient's consent.¹⁰⁷ At the same time, Justice Dubin's decision also supported Justice Krever's belief in the importance of the public's general right to privacy,¹⁰⁸ and the need for public institutions to respect this right.

Justice Brooke was the lone voice of dissent. In his dissent he argued that a privilege did exist.¹⁰⁹ The only exception to this privilege was when the identity of the informer was required to prove the innocence of the accused. In this case the exception did not apply and there were no grounds for creating a new exception.¹¹⁰

Justice Brooke wrote that the basis of the informer privilege is a public one - ¹¹¹ the public's interest in the effective administration of law and the protection of the country from threats of terrorism and violence. On the other hand, the duty a physician owes a patient to keep information confidential is a private matter.¹¹² In this situation, the interests of the public should prevail over private interests. In Chapter Two, however,

it was argued that the confidentiality of health records is an important aspect of privacy, the need for which is a critical element of human personality and individual dignity.¹¹³ to preserve confidentiality, government institutions such as OHIP¹¹⁴ and the RCMP must be trusted to respect and protect the privacy of citizens. Under this approach privacy becomes a public interest worthy of serious consideration by the courts.

Nevertheless, Justice Brooke's viewpoint triumphed at the Supreme Court of Canada and Justice Krever lost the battle in trying to obtain the names of the RCMP's informants.¹¹⁵

(3) The Supreme Court of Canada's Decision

The Solicitor General of Canada appealed the Ontario Court of Appeal's decision to the Supreme Court of Canada. The Supreme Court ruled that a privilege did exist which prevented the RCMP from disclosing the names of their informers to the Krever Commission. This ruling established a precedent, because the Supreme Court extended the informer privilege to include commissions of inquiry. Prior to the Court's decision the police informer rule was limited to criminal prosecutions and civil proceedings arising out of malicious prosecution.¹¹⁶

In this appeal the Solicitor General enlarged the issue of privilege by asking two constitutional questions. The first question was: does the Ontario Public Inquiries Act, and in particular section 7, authorize the Krever Commission to compel

testimony from an officer of the RCMP as to the sources of information obtained while conducting investigations involving crime or national security? ¹¹⁷ The second question was:

Where a provincial Commission of Inquiry has been created by the Lieutenant-Governor-In-Council, the subject matter of which has been conceded to be properly within the provincial jurisdiction, ... does there exist a privilege which prohibits disclosure by police of the identities of persons who furnish information to the police in the course of their investigations into crime and national security? ¹¹⁸

These two questions were raised by the Solicitor General, as Chief Laskin pointed out, because the federal government was concerned about the right of a provincial commission of inquiry to compel the disclosure of information that had been obtained by the RCMP in conducting criminal and national security investigations. ¹¹⁹ The strategy of the federal government was to underpin its evidentiary argument about the importance of informer privilege for obtaining information, with a functional argument about the importance of applying this privilege to an area of important national interest such as national security, and a constitutional argument that crime and national security are exclusively areas of federal jurisdiction and cannot be investigated by a provincial body with coercive powers.

Writing the majority decision ¹²⁰ for the Supreme Court, Justice Martland did not address the first issue. Justice Martland did not say why he decided not to answer this question. Justice Laskin, writing the dissenting decision for the Court, also refrained from answering this question. He believed that this question did not relate directly to the two questions posed by the Krever Commission in the original stated case before the Ontario Divisional Court. ¹²¹

However, Justice Martland and Chief Justice Laskin both addressed the evidentiary and the functional arguments put forward by the Solicitor General. Justice Martland considered whether RCMP officers can be compelled to disclose the identities of persons who had been given an assurance of confidentiality. Citing Lord Esher in Marks v. Beyfus, ¹²² Justice Martland said that "the law for many years has recognized the existence of police informer privilege." ¹²³ The case involved a civil claim for damages for malicious conspiracy to prosecute the plaintiff. In his decision, Lord Esher said that this was a common law rule founded on public policy which had to be applied by the trial judge. It was not a matter of discretion for the judge to decide if a witness should answer or not. ¹²⁴

Justice Martland also referred to comments by Lord Diplock in D. v. National Society for the Prevention of Cruelty to Children¹²⁵ (N.S.P.C.C. case). In this case the N.S.P.C.C., a voluntary society, refused to disclose to the plaintiff the name of the person who had alleged that the plaintiff had mistreated her daughter. In his decision Lord Diplock said it was a well established rule of law that the identity of police informers may not be disclosed in civil action.¹²⁶ He said that the rationale of this rule as it applies to the police is plain. If the identity of the police informers were disclosed a valuable source of information would be hindered in detecting crime.¹²⁷ Lord Diplock extended this immunity to apply to persons who provided information about the neglect or abuse of children to the N.S.P.C.C. He said that the public interest was served by protecting the anonymity of both classes was analogous.¹²⁸

Justice Martland interpreted Lord Diplock's ruling to imply that the immunity from disclosure which is accorded to the furnishing of information to the police should be general in scope.¹²⁹ Therefore, there was no logical reason why police informer privilege could not be applied to other civil proceedings including public inquiries.

Addressing the Solicitor General's functional argument about the importance of police informer privilege, Justice Martland said:

the foundation for the existence of this rule of law, which evolved in respect of the field of criminal investigation, ... has even greater justification in relation to the protection of national security against violence and terrorism.¹³⁰

Chief Justice Laskin disagreed with Justice Martland. Chief Justice Laskin said the present case was about a claim of privilege that was based on the need to protect confidence between the police and their informers.¹³¹ However, Chief Justice Laskin argued that a claim of confidence is not sufficient in itself to justify a claim of privilege. Instead, confidence should be relevant to a determination as to whether in the public interest the disclosure should be refused.¹³²

Chief Justice Laskin believed that police informer privilege should be restricted to public prosecutions and to criminal-related proceedings.¹³³ Apart from these situations, the courts should have the discretion to determine on a case-by-case basis whether the information and the identity of the informers should be revealed. Factors to be taken into account would include the nature of the proceedings; the relevance of the information; the identity of the informers; and the public interests that would be served by the disclosure of the information.¹³⁴

Chief Justice Laskin balanced the competing public policy interests represented by the Solicitor General of Canada and the Krever Commission. The Chief Justice looked at the evidence

presented by the Solicitor General of Canada and the Counsel of the RCMP to support the non-disclosure of the identities of their informers, and found that the Solicitor General's evidence was highly generalized.¹³⁵ To the Chief Justice this may have been the reason the Solicitor General could not sustain the non-disclosure claim for the 368 instances cited.¹³⁶ The Solicitor General abandoned the assertion of a non-disclosure privilege in all but 138 cases which were alleged to involve national security.¹³⁷ The Chief Justice also noted that although the police were engaged in a widespread exercise to ferret out medical information there was no indication that any of it was actually or imminently concerned with prosecutions.¹³⁸

Chief Justice Laskin noted that this situation involved a Royal Commission which was entrusted with a public interest and with recommending legislative reforms. In this context, any attempt to withhold relevant information such as the identity of RCMP informers must be justified.¹³⁹ The Krever Commission, a public inquiry of juridical character, had been asked to investigate certain issues which directly involved the identity of those who had improperly disclosed medical information to the police.¹⁴⁰ The Chief Justice said it was a "known fact that confidentiality, supported as it was by legislation and regulations, was being improperly breached."¹⁴¹ In this

situation, the public interests represented by the Krever Commission should prevail over those represented by the Solicitor General of Canada. Chief Justice Laskin said, "if there was a concern about public security then the Krever Commission was entitled under section 4(a) of the Ontario Public Inquiries Act to hold hearings in camera." ¹⁴² This would by no means affect disclosure but would leave it to the Commissioner to decide how to deal with the disclosures in the report. ¹⁴³

Justice Martland's decision has also been criticized by writers Dennis Evanson ¹⁴⁴ and Jeffrey Harris. ¹⁴⁵ Evanson argues that Justice Martland's approach is too simplistic. Evanson says that what the courts are doing is more complex than balancing the interest of revealing the identity of the informer against preserving the free flow of information to the police. ¹⁴⁶ He argues that what the courts are usually doing, apart from the majority in the Health Records case, is applying two other criteria; the relevance of the informant's identity and the dominant nature of the interest in disclosure. ¹⁴⁷ If either of these criteria is not met, the informants' names become non-compellable evidence. ¹⁴⁸

Jeffrey Harris is critical of Justice Martland for failing to take into account the broad public policy considerations in making his decision. Harris believes that this case has implications for police investigations, the sanctity of legally recognized

confidential relationships, and the law of evidence in general.¹⁴⁹ Unfortunately, Harris does not go into more detail as to how these public interests are affected, a matter that that will be discussed later. Harris and Evanson both support Chief Justice Laskin's approach of considering competing public interests.¹⁵⁰ The criticisms of these two commentators and Chief Laskin's case-by-case approach in balancing competing public policy interests will be discussed later in the context of the findings of the thesis and in the recommendations for reforms.

At this point, though, it is suggested that Evanson's and Harris's criticisms of Justice Martland's decision both have considerable weight. Justice Martland's decision was primarily based on precedent. Justice Martland examined a number of cases and said their common denominator was the court's concern to protect law enforcement by protecting the free flow of information between the police and their informers. Justice Martland's approach shows his awareness of the public policy supporting the police informer privilege. But his approach does not show an awareness of competing public policy interests.¹⁵¹ Justice Martland failed to consider the dominant public interest at the centre of the Krever Commission's investigations. The central reason the Commission was created was a breach of legislatively sanctioned confidentiality.¹⁵² As discussed in Chapter Two, the public's interest in the protection of the confidentiality of patient's

records had been violated.¹⁵³ The confidential relationship between physicians and patients had been jeopardized because some doctors and others had disclosed information to the police without prior consent from the patients. But Justice Martland did not agree with Justice Dubin that medical doctors had a legal duty not to communicate information to the police under the Health Disciplines Act.¹⁵⁴ Justice Martland said, "The medical doctor who does so may be guilty of professional misconduct, and if so, he or she will become subject to the disciplinary procedures provided by in the Act." ¹⁵⁵ Justice Martland said the behaviour of the informers who disclosed confidential information may have been wrong, but it did not matter since the privilege belonged to the Crown and not to the informer.¹⁵⁶ The misconduct on the part of the informers did not destroy this privilege.¹⁵⁷

Justice Martland was not concerned about protecting the confidence between a physician and patient. He was interested in protecting the confidence between the informers and the police in the interest of effective law enforcement. It did not matter if the informers or the RCMP had breached the law. However, the actions of the informers and the RCMP discredit government in the eyes of the public. As Justice Dubin said, "The public can hardly be expected to have respect for the law when those entrusted with its enforcement do not scrupulously adhere to it."¹⁵⁸ In the next Chapter in looking at possible reforms for improving access to

government information, it will be argued that claims based on police informer privilege should be subjected to judicial review, and that courts must carefully scrutinize these claims by balancing competing public interests which are involved in a particular matter.

The Supreme Court's judgment was not decided on constitutional grounds.¹⁵⁹ Nevertheless, from a constitutional perspective this decision undermines the powers of provinces to pass legislation to protect the interests of the provinces' citizens. Justice Martland said that "statutory provisions do not preclude the right of the Crown to resist compulsion to disclose the names of the informants to whom an assurance of confidentiality had been given."¹⁶⁰ This common law immunity which relates to criminal law and procedure is a federal matter and can only be altered by the federal parliament.¹⁶¹

The effect of the Supreme Court's decision is to restrict the capacity of public inquiries, especially provincial inquiries, to obtain access to information. The question of possible responses to the Supreme Court's decision will be discussed in Chapter Four.

As seen then, the RCMP made special use of jurisdictional restrictions, national security and police informer privilege to deny the Krever Commission access to information. The Commission

encountered another array of obstacles in its dealings with the second major institution in its path, the Ontario Health Insurance Plan.

LACK OF COOPERATION - OHIP AND THE KREVER COMMISSION

This section will look at how the bureaucratic environment of OHIP and the Ministry of Health may have influenced OHIP officials and ministry officials in their reluctance to cooperate with the Krever Commission. Fear of personal incrimination, based on a misunderstanding of the Commission's objectives, will also be examined as an explanation for the unwillingness of OHIP officials to cooperate with the Krever Commission.

Observers of government administration such as James Wilson and John Burke believe that bureaucratic culture, and the organization, goals and objectives of a government department or agency influence the behaviour of government officials and employees. In his book Bureaucracy What Government Agencies do and Why they do it, James Wilson argues that Weber's view that government is a monolithic structure is only partly correct.¹⁶² Wilson thinks that a more accurate description is that government is comprised of many independent agencies. John Burke agrees. He believes that bureaucracies may be created by legislation, but as they grow in power they develop into separate entities.¹⁶³ Legislation does not define specific goals, or how an agency is to administer legislation; it is the responsibility of the agency to define the

goals and tasks required for administering the legislation.¹⁶⁴

However, Wilson argues that many agencies, such as OHIP, resist¹⁶⁵ efforts to set forth their policies for administering standards and regulations in the form of clear and general rules.¹⁶⁶ As will be seen below, this was certainly true for OHIP at the time of the Krever inquiry. When goals are vague Wilson believes that daily circumstances influence people's behaviour.¹⁶⁷ According to Wilson some situational factors can be so powerful as to make organizational goals meaningless.¹⁶⁸ Again, OHIP furnishes an example. OHIP employees were asked by the RCMP to provide medical information to members of the force to assist them in their criminal investigations. The OHIP employees reacted by providing the requested information to the RCMP.¹⁶⁹ They did so despite the fact that the Heath Insurance Act, 1972 stipulated that a law enforcement agency could only be provided with information, if they had a subpoena issued by a court of competent jurisdiction.¹⁷⁰

Wilson also believes the attitude and the behaviour of the person in authority can also influence how a job is performed, if the job is weakly defined.¹⁷¹ It will be seen later that OHIP's General Manager Mr. Fetherston and his senior officials did not place a high priority on maintaining the confidentiality of OHIP subscriber's files, or in instructing employees on the required procedures for disclosing confidential medical information.¹⁷²

Another important factor is bureaucratic culture. Wilson believes that every organization has one or more cultures that have been passed from one generation to the next.¹⁷³ Wilson defines culture as a persistent, patterned way of thinking about the central tasks and human relationships within an organization.¹⁷⁴

OHIP provided many apparent examples of this kind of bureaucratic culture. The Ministry of Health resembled a huge honey comb, and OHIP¹⁷⁵ was part of the general structure. The goal of OHIP was the efficient processing of insurance claims.¹⁷⁶ Justice Krever was very critical of the efforts of Mr. Fetherston, the General Manager of OHIP, and his senior officials Mr. Buchanan¹⁷⁷ and Mr. Harnett¹⁷⁸ to find out how often information had been released by OHIP without proper authorization.¹⁷⁹ Justice Krever in his Report said that "these men did not give confidentiality a high priority. Instead they were more concerned about the efficient processing of claims."¹⁸⁰

Justice Krever was also highly critical of Mr. MacLean, Director of OHIP's Metropolitan Toronto office, for failing to inform the Commission about the existence of the OPP's office on the premises of the Yonge Street's office. The office was discovered by the Commission's lawyer, Mr. Strosberg, and the Commission's head of Research, Ms. Smith, during one of their visits.¹⁸¹ Mr. MacLean was asked why he had not informed the

investigative officers about the office. Mr. MacLean was evasive but eventually said the investigators were not told about the office because "it did not seem significant. ... All it meant to me was that we provided accommodation so that they (the OPP) could work properly. ..." ¹⁸² Mr. Strosberg, the Commission's lawyer, was surprised that Mr. MacLean would not think this information relevant to the investigation of the Commission. ¹⁸³

But neither Mr. Fetherston nor Mr. MacLean shared the Krever Commission's view of the importance of protecting the privacy of individuals. Mr. MacLean, Mr. Fetherston and the other OHIP officials were career public servants who had worked for the government for many years. These men were not people who were attempting a cover-up. They were bureaucrats whose thinking had become influenced by an OHIP internal policy that over the years had become entrenched. Indeed, Mr. Fetherston had helped to create this policy. ¹⁸⁴ Mr. Fetherston testified that since his early days with the Ontario Hospital Services in 1958, the policy had always been that enrollment information would be provided to the police. ¹⁸⁵ Justice Krever asked him, "how could he reconcile this policy with the requirements of section 44 of the Health Insurance Act, 1972?" ¹⁸⁶ Mr. Fetherston's response was that "he did not even think about it." ¹⁸⁷

It may be said that Mr. Fetherston's response was an example of a public servant displaying deference towards the effective

administration of law. But it was also an example of bureaucratic atrophy, in which a senior bureaucrat whose preoccupation with internal administrative routine had blinded him to the newer legislative responsibilities of his department. The result was a violation of the privacy of OHIP subscribers.

It was not only OHIP officials who failed to cooperate with the Commission. This attitude was also displayed by the Ministry of Health, which is responsible for the legislation and regulations governing OHIP. Within the Ministry of Health, a working party was established to prepare a written submission for the Commission. However, the Ministry Working Party recommended that its report not be submitted to the Commission.¹⁸⁹ Instead, the Working Party recommended that its recommendations should be incorporated into a Ministry review of legislation and regulations,¹⁹⁰ and that this review should commence immediately.

The Working Party's recommendations could be interpreted as showing that it thought that the Ministry should take preemptive action to show that the Ministry was in control and could resolve any internal problems within OHIP. Taking such measures would hopefully also deflect charges of mismanagement that might be made against members of the Ministry in Justice Krever's Report.¹⁹¹

The Working Party's explanation for advising against cooperation with the Commission's inquiry was that the Ministry's concerns regarding the principles underlying confidentiality of

information differed from the concerns of the Krever Commission.¹⁹² The Working Party believed that the primary concern of the Krever Commission was the investigation of alleged acts of misconduct.¹⁹³ The Commission's lawyer, Mr. Strosberg, informed Mr. Backley, the Deputy Minister of Health, that "the Working Party had misunderstood the thrust of the Commission's work."¹⁹⁴ He told the Deputy Minister in a letter that the investigative hearings were secondary to the primary purpose of identifying areas of abuse so that recommendations for legislative changes could be made."¹⁹⁵ However, members of the Working Party represented most areas of the Ministry that were involved in the administration of health records, and were probably afraid that they would be held accountable for actions of misconduct if they were questioned by the Commission.

The fear of self-incrimination by witnesses was discussed in Chapter One.¹⁹⁶ The Chapter also discussed the problems which Royal Commissions encountered when trying to investigate allegations of individual wrongdoing. It ended with a brief discussion of Kent Roach's suggestion that Royal Commissions should not try and hold individuals accountable for actions of misconduct. Instead, the focus should be on the structure of the organization and the factors which encourage wrongdoing.¹⁹⁷

This was the approach adopted by Justice Krever. Justice Krever wanted to understand the administrative structure of OHIP

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in order to determine who was responsible for making the decisions that confidential health information could be disclosed to the RCMP. He also wanted to follow the chain-of-command within the RCMP to find out who made the decision that OHIP should be contacted for information; why were these investigations conducted; how the investigations were conducted, and the frequency in the number of contacts made between the RCMP and OHIP. But the Krever Commission was frustrated in its attempts to understand the inner workings of OHIP and the RCMP because of the confusing and inaccurate information provided to the Commission by OHIP and the RCMP. As will be seen in this section, lack of accountability and the absence or the improper keeping of records, frustrated the Commission in completing its work.

ADMINISTRATIVE DEFICIENCIES

(1) OHIP and the Problem of Dissemination of Information by Management

This section will look at how a lack of clarity in OHIP's information policy delayed the Krever Commission from having access to relevant information.

The Commission wanted to know whether OHIP had an official policy of allowing the release of medical information to law enforcement officers and if OHIP employees were aware of this policy. The Commission also wanted to know whether employees were

aware of specific legislative provisions regarding the confidentiality of medical records. The Commission's head of Research, Carene Smith, thought that the submissions made to the Commission indicated that most people had attempted to shelter behind the fact that they were unaware of specific legislative provisions regarding confidentiality.¹⁹⁸ However, it appears from the testimony before the Krever Commission that officials and employees did not have the same level of knowledge about the police policy, because of the inconsistent manner in which the policy was disseminated.

Mr. Fetherston, OHIP's General Manager, told the Commission that the policy had been discussed at meetings but neither the policy or the proceedings of the meetings had been recorded. However, the district managers had been told what procedures to follow.¹⁹⁹ Louis Kerwyn, Manager of Enrollment Inquiry and Standards, confirmed this by saying that "the policy had been discussed among the managers and the director of his department."²⁰⁰

The Commission wanted to know how this policy was disseminated. Mr. Buchanan, Director of the Insurance Claims Branch said that police policy was included in the Enrollment Branch manual.²⁰¹ A clerk employed in the enrollment section told the Commission that it was her supervisor who told her what the policy was regarding the release of information to the police.²⁰² In her testimony she did not refer to the enrollment manual.

A year later, Mr. Fernandez, a records management officer employed in OHIP's central registry, told the Commission that there was no documentation that permitted the release of mental patient records to authorized agencies.²⁰³ Justice Krever asked:

Is it fair to conclude that the knowledge of the existence of this information and of agencies which would have access to it was something that was not widespread and was something that those concerned didn't many people to know about?²⁰⁴

Mr. Fernandez's reply was that the information was confidential as well as sensitive.²⁰⁵ Justice Krever was grateful for this information. He said that even with an order-in-council to find out the existence of this information, he suspected that before this revelation many people would have denied that there existed such a system.²⁰⁶ However, Mr. Fernandez was willing to tell him. Employees such as Mr. Fernandez and Mr. Adams²⁰⁷ recognized the importance of preserving the confidentiality of medical records, however they were in the minority.

After two years of listening to conflicting evidence, Justice Krever finally came to the conclusion:

It was understandable why some employees believed that any kind of information could be disclosed since there had been no clear directive issued outlining what information may be disclosed and under what circumstances disclosure could occur.²⁰⁸

Ironically, the unclear and inconsistent information policy which had permitted the release of private information to the RCMP had

also become a major obstacle to the gathering of relevant information by the Krever Commission.

(2) OHIP and Poor Record Keeping

OHIP was also negligent in its keeping of records on contacts with the RCMP. When the Commission asked OHIP officials and employees about the frequency of contacts made by the RCMP, they were unable to provide accurate numbers. According to Justice Krever in his Report "contact was so routine that no record was record kept by the OHIP employees with respect to the date of the contact, the name of the officer, the police force involved, and the information given." 209

Justice Krever was very critical of Mr. Fetherston's methods for determining the number of occurrences of release of information to the RCMP. Mr. Fetherston had asked Mr. Buchanan to conduct a telephone survey. Mr. Buchanan then asked Mr. MacLean, Director of the Toronto Metropolitan office, to contact district offices to obtain the necessary figures. Since no records had been kept, the directors had to guess about the number of contacts that had occurred. Mr. Buchanan also failed to keep records of his own contacts with the directors. Mr. Buchanan reported to Mr. Fetherston that the estimated number of contacts between OHIP and the RCMP was between 24 to 30 visits per year. 210 This number proved to be inaccurate. Other evidence at the Commission's

hearings disclosed that the number of contacts was at least 80 per year.²¹¹

(3) The RCMP and Poor Record Keeping

The RCMP was also not immune to poor record keeping. The force did provide the Commission with a summary statement of the contacts that its members had with OHIP. However, the details were sketchy. Information about the frequency of incidents in the RCMP's use of medical information in investigating cases involving security clearances and counter-espionage was only obtained after the Commission asked the RCMP to conduct an internal investigation of their records.

The RCMP's methods were similar to those used by OHIP. Members of the Security Service were assigned to the task of canvassing members of the Security Services about their recollections of incidents involving OHIP.²¹²

Both the Commission and lawyers representing the other parties were doubtful about the thoroughness of this approach. Mr. Patterson, from The Globe and Mail, questioned Superintendent Taylor, who was responsible for the Security Task Force, about the investigation into the Ridell affair. He asked the Superintendent, "would the RCMP have discovered the two letters (concerning Riddell) if it had not been provided with information that these two letters existed?"²¹³ Superintendent Taylor responded that "without the letters the RCMP would have been able to find similar letters in

due course, but it would have certainly been more difficult." ²¹⁴

Superintendent Taylor tried to reassure the Commission that every effort had been made by the RCMP in finding other examples, but the Commission had to keep in mind because of the size of the force ²¹⁵ and the number of records the RCMP had accumulated, one could never exclude the possibility that another case might come to the attention of the force ²¹⁶

In response to Superintendent Taylor, Mr. Patterson thought that a lot of people would find it very hard to believe that in all the history of the force the only example that could be found was the example brought forward to the McDonald Commission. ²¹⁷ Mr. Patterson believed that this issue was more than a problem of the RCMP's filing system, since it also involved public confidence in the ability of the RCMP to conduct its investigations. ²¹⁸

Unfortunately, the temporary operational files for this investigation had been destroyed prior to the McDonald Commission. ²¹⁹ It was destroyed as part of normal administrative procedures. ²²⁰ Therefore, the Commission had no written record by which to assess the accuracy of the RCMP's investigation into the use of medical information for disruptive purposes. It was only through diligence, persistence and some luck that the Commission was able to uncover incidents involving the RCMP and OHIP. However, the Commission was unable to uncover the names of the RCMP's informers for the source behind Lawrence Martin's story.

(4) The RCMP and Lack of Accountability

The Commission's efforts to find the frequency of contacts between the RCMP and OHIP were also frustrated by the administrative structure of the RCMP, like OHIP,²²¹ the RCMP is a very large and complex organization.²²² During the 1970s the RCMP was divided into two sections, criminal investigations and national security, both with their own independent administrative structures. RCMP Chief Superintendent R.R. Schramm, acting commanding officer of the RCMP's O Division in Ontario, knew little about matters relating to national security because the national security people reported directly to Ottawa and were not accountable to their senior provincial officers.²²³

In February 1978, during the early days of the Commission's hearings Attorney-General Roy McMurtry received a letter from RCMP Chief Superintendent R.R. Schramm informing him that the investigations of the RCMP files had revealed that OHIP had been contacted on two separate cases involving the security clearances of two federal civil servants.²²⁴ The RCMP had previously informed Mr. McMurtry that there had been only one case involving the use of medical information.²²⁵ The Chief Superintendent said that this earlier information was incorrect, and that he had only learned about these two cases on February 14, 1978.²²⁶ Furthermore, as the hearings progressed the Commission would learn from RCMP officials about still further incidents, including the Thunder Bay

operation ²²⁷ and the Riddell affair. ²²⁸

The Commission was dependent on the voluntary cooperation of the the RCMP, since the Commission did not have the jurisdictional powers to compel detailed information from the RCMP, a federally constituted force, that was not fully answerable to provincial authorities for its actions. ²²⁹

The Supreme Court of Canada was unsympathetic towards the Krever Commission's dilemma. If Justice Martland had adopted Chief Justice Laskin's more sophisticated approach of balancing the wider public policy interests in the disclosure of information, ²³⁰ he would have been more aware of the importance of the Krever Commission's work. Hopefully, he would also have been more supportive in helping the Krever Commission to fulfill its mandate. But this did not happen. Instead, the Supreme Court proved to be an obstacle the Krever Commission could not overcome.

At the beginning of this Chapter, Wilson and Burke described government departments and agencies as complex, fragmented institutions, whose goals and objectives are often vague and ill-defined. ²³¹ Wilson's and Burke's theories of bureaucracy provide a useful analytical framework for examining the way in which the complex and fragmented administrative structure of OHIP and the RCMP, and the lack of accountability and clear objectives within these two institutions created obstacles for the Krever Commission. The bureaucratic environment hindered the

dissemination of information and record-keeping. It also fostered the organizational values to which Wilson referred, such as deference towards authority.²³² But before a definitive conclusion about these tendencies can be reached a more detailed study of the Commission's files and OHIP and RCMP employees would be required. This case study supports the complexity theories of Wilson and Burke, but it also demonstrates the limitations of Kent Roach's organizational accountability theory.²³³ In this situation there was little accountability within OHIP and the RCMP. Above all, the Chapter illustrates the complexity and the impenetrability of government. Without the cooperation of OHIP officials and employees and members of the RCMP, the Krever Commission had to rely on its own investigative skills, persistence and sometimes luck in trying to piece together the decision-making process within these two institutions.

Some of the obstacles the Krever Commission encountered, such as jurisdictional limitations are related to the constitution and therefore cannot be easily resolved. However, other obstacles examined in this chapter may be more amenable to reform. Proposals for improving access to Royal Commissions and public inquiries will be examined in the next chapter.

Endnotes for Chapter Three

1
See Chapter One at 15.

2
This was not a situation where officials from OHIP or the RCMP were involved in an overt cover-up to hide the "truth" from the Krever Commission. Nor was it a situation where members of the Legislature refused to divulge information to the Commission claiming parliamentary privilege. Parliamentary privilege is a privilege extended to members of the Legislature that allows them to freely express their views in the Assembly or a committee without fear of libel, slander or defamation. See Erskine May, Parliamentary Privilege, 21st ed. (London: Butterworths, 1989) at 69. This privilege is also recognized by statute. See (Ont.) Legislative Act, R.S.O. 1970, c.240. However, statutory law and common law do not grant a member of the Legislature the privilege to refuse to disclose the source or content of a communication made to him/her by a informer. See Reference Re Legislative Privilege (1978), 83 D.L.R. (3d) 161 (O.A.C.).

Justice Krever concluded in his report that the Minister of Health and the Deputy Minister did not know about the existence of the OPP on the premises of OHIP's Yonge Street's office. See Ontario, Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Report of the Commission of Inquiry into the Confidentiality of Health Information, vol.2 (Toronto: Queen's Printer, 1980) (Commissioner: Justice Horace Kreever) at c.16 at 59 [hereinafter Krever Report].

3
Each of these obstacles will be examined individually. However, there is overlap. For example, national security will be referred to in the discussion on jurisdictional limitations, since national security has been held to fall under the federal powers of peace order and good government (s.91) and defence (s.91(7)) of the Constitution Act, 1867 (U.K.), 30 & 31 Vic., c.3. [hereinafter Constitution Act, 1867]. Therefore, it is not an area that can be investigated by a provincial inquiry. See provincial inquiry. See Chapter Two at 40. Quebec (Attorney General) v. Canada (Attorney General) (1978), [1979] 1 S.C.R. 218. On the other hand, provincial legislatures have the power

to create commissions of inquiry to investigate matters relating to the administration of justice under s.92(14) of the Constitution Act, 1867. At the time of the Krever Commission, this section was also thought to give provincial legislatures the power to create commissions of inquiry to investigate specific criminal acts committed by the RCMP. See Chapter One at 23-24.

4

Letter of Mr. Tom Belton, Associate Archivist, Archives of Ontario, to Laurie Campbell (1 June 1995).

5

See Chapter Two note 15.

6

Letter of Mr. Jim Suderman, Archivist Archives of Ontario to Laurie Campbell (12 November 1996).

7

The initial request was submitted on April 29, 1996. It took nine months for the Deputy Attorney General to arrive at a decision. Part of the reason for the delay was the poor lines of communication between the Ministry of the Attorney General and the Archives of Ontario. Both were making assumptions about the administrative procedure and who decided whether access should be granted. Lack of corporate memory in the Ministry on how to handle situations involving access to restricted records of public inquiries added to the confusion. Comments based on interviews with Mr. Jim Suderman on June 2 and August 14, 1996.

8

Letter of Ruth Malliard, Coordinator, Freedom of Information and Protection of Privacy, Ministry of the Attorney General to Laurie Campbell (16 December 1996). These documents have been marked "permanent closure". This means that access to these documents will be denied for 100 years.

9

Supra note 3.

10

See Chapter Two at 42.

11

A.O. RG18-187, RC#P376, File: Transcript, vol.20 (9 June 1978) at 125.

12

Ibid. (Ont.) Public Inquiries Act, R.S.O. 1990, c. P.41, s.11 says that "nothing is admissible in evidence at an inquiry that would be inadmissible in a court by any privilege under the law of evidence." [hereinafter (Ont.) Public Inquiries Act].

13

Ibid. at 125. The wording of the original Order-in-Council was clarified by the Ontario government at the request of Justice Krever. The amended Order-in-Council gave the Krever Commission the mandate to investigate "any activities, practices or other conduct by any person, firm corporation, or organization which coerced, induced, persuaded or otherwise prompted any ... misconduct, negligence or other improper activity" See Order-in-Council 1129/78 s.1(3) as reprinted in Krever Report, supra note 2, vol.1 at vii-viii.

14

Ibid. at 123.

15

Ibid. at 121.

16

See at 71-72.

17

See Chapter Two at 42-45.

18

Supra note 11 at 126. There is no indication from Mr. Pennington's submission that he was aware of the Supreme Court of Canada's decision in Quebec (Attorney General) v. Canada (Attorney General) (1978), [1979] 1. S.C.R. 218. Although the final decision was not rendered until the fall of 1978, hearings had taken place during May which were covered by the press. Therefore, Mr. Pennington would have know about the Court's proceedings. However, the more likely reason for Mr. Pennington's concession was that he knew that he was failing in his attempt to prevent the disclosure of RCMP information which was his primary goal. Therefore, he resorted to the stonewalling tactic of using police informer privilege to protect the names of the RCMP's informants.

19

Ibid. at 132.

20
Supra note 3.

21
Superintendent Michael Spooner was responsible for the Security Service division in Southwestern Ontario.

22
The Thunder Bay operation was part of the RCMP's monitoring of alleged "violence-prone" individuals and groups who were suspected of posing a threat to Canada's national security. The operation involved the investigation of two individuals who were members of the Canada, Marxist/Leninist Group. The two had represented the Party in the 1974 federal election. Justice Krever found it disquieting that the RCMP would carry out a surveillance of two individuals who had run for Parliament on behalf of a lawful political party. See A.O. RG18-187, RC#P376, File: Transcript, vol.62 (24 November 1978) at 119 and Krever Report, supra note 2, vol. 2, c.16 at 11.

23
Quebec (Attorney General) v. Canada (Attorney General) (1978), [1979] 1 S.C.R. 218 [hereinafter Quebec (Attorney General) v. Canada (Attorney General)] See Chapter One at 23-24 and Chapter Two at 40.

24
Ibid. at 220.

25
Ibid.

26
Ibid.

27
Ibid. at 219.

28
(Ont.) Public Inquiries Act, supra note 12. Section 7 gives Commissions the power to summon witnesses to produce evidence that is relevant to the subject matter of the inquiry. See Chapter One at 16.

29
Krever Report, supra note 2, vol.2, c.16 at 12.

30

Ibid.

31

Solicitor-General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Record in Ontario et al. (1981), 128 D.L.R. (3d) 193 (S.C.C.) [hereinafter Health Records case].

32

Ibid. at 226.

33

See at 80-89.

34

A.O. RG18-187, RC#P376, File: Transcript, vol. 65 (4 December 1978) at 103. The Constitution Act, 1867 couches provincial legislative power in terms which clearly impose legislative restrictions on the scope of the power. Section 92, which deals with the allocation of the legislative powers to the provinces opens with the words "In each province"; and section 92(14) which deals with the administration of justice contains the phrase "in the province". These phrases indicate the territorial limitation on provincial legislative power. See Peter Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) at 268.

35

A.O. RG18-187, RC#P376, File: Transcript, vol. 65 (4 December 1978) at 107.

36

Ibid.

37

Ibid. at 104.

38

Ibid.

39

Ibid. at 113. However, a Commission of inquiry does not have the power to make findings of criminal or civil liability. A Commission's findings do not have either penal or civil consequences, nor can it levy any sanctions against an individual called upon to testify at a hearing. See Chapter One at 23 and 25.

40

Supra note 3.

41

Access to Information Act, S.C. 1980-81-82-83, c.111.

42

Ibid. s.15(2)a-f.

43

In 1969, the Royal Commission on Security was created by the federal government to review Canada's needs and practices in the field of national security. See RCMP Handling, Storage and Destruction of Medical Information, A.O. RG18-187, R.C.#P383, File: Brief No.210, Part 1.

44

Ibid. at 88.

45

Ibid. at 90.

46

Ibid.

47

Chief Superintendent Spooner testified that there were thirty-five situations involving security clearances, political extremism and political espionage. This estimated number represented a small fraction of the number of contacts that the RCMP made with OHIP and members of the health profession to obtain medical information. See A.O. RG18-187, R.C.#P373, File: Transcript, vol.20 (9 June 1978) at 87. Superintendent Donald Harold Heaton and Chief Superintendent Michael Spooner testified that to their knowledge there were approximately 368 occasions where members of the RCMP had obtained medical information from physicians and hospital employees without prior consent from patients. See Health Records case, supra note 31 at 199. Justice Krever in his Report stated that "there were hundreds of situations in which the RCMP obtained biographical information from OHIP employees." Examples of the contacts made by the RCMP are summarized in his Report. They include investigations involving illegal immigration, tax fraud, and illegal drugs. See Krever Report, supra note 2, vol.2, c.16 at 23-38.

48

This case was known as the Soviet Spy case. It involved a Russian foreign agent who posed as Gordon Lonsdale, a Canadian born in Cobalt, Ontario in 1924. Medical records were used to help reveal his true identity. The case received considerable coverage by the press. See Brenda Large, "OHIP data helped solve a spy case" The Globe and Mail (29 November 1977) at 5 and Thomas Claridge, "How medical records unmasked a Soviet Spy" The Globe and Mail (10 June 1978) at 1.

49

The Niagara investigation centred on a deep cover agent operating in the Niagara district. For details of the investigation see A.O. RG18-187, R.C.#P376, File: Transcript, vol. 62 at 110-118 (November 1978) and Krever Report, supra note 2, vol.2, c.16 at 7-9.

50

The Commission's hearings focused on two federal civil servants who were the subjects of security clearance investigations. Security clearances are conducted to determine the loyalty and the reliability of civil servants before they are allowed to have access to classified information. In both cases the RCMP officer who conducted the investigation was concerned about the mental health of the two civil servants in question. In conducting his investigations the RCMP officer approached OHIP and was allowed access to their confidential medical files. See A.O. RG18-187, R.C.#P376, File: Transcript, vol.63 (27 November 1978) and Krever Report, supra note 2, vol.2, c.16 at 13-22.

51

Section 4(b) applies. Under this section matters involving personal safety may not be disclosed if the interest of the person affected, or the interest of the public outweighs the desirability of adhering to the principle that hearings ought to be open to the public. For example, during the Commission's hearings the Niagara investigation was still active. Evidence relating to this investigation was heard in camera. However, in order to protect the identity of the informer the name of the informer was not released. See A.O. RG18-187, R.C.#P376, File: Transcript, vol.62 (24 November 1978) at 108.

52

Ibid.

53

Supra note 7.

- 54 Thomas Claridge, "Krever allowed to read parts of the Mounties' secret health file" The Globe and Mail (28 March 1979) at 5.
- 55 Ibid.
- 56 Ibid.
- 57 Ibid.
- 58 Official Secrets Act, R.S.C. 1970, c. 0-3.
- 59 "RCMP disruptive data not from medical source: Krever" The Globe and Mail (29 March 1979) at 30.
- 60 Ibid.
- 61 Ronald D. Manes and Michael P. Silver, "Police-Informer Privilege" in Ronald D. Manes and Michael P. Silver, eds., The Law of Confidential Communications in Canada (Toronto: Butterworths: Canada, 1996) at 212 [hereinafter The Law of Confidential Communications].
- 62 Ibid. at 216.
- 63 T.G. Cooper, Crown Privilege (Auroa: Canada Law Books, 1990) at 190 [hereinafter Crown Privilege].
- 64 Crown Privilege, supra note 63 at 191.
- 65 Ibid.
- 66 A.O. RG18-187, R.C.#P376, File Transcript, vol.20 (20 June 1978) at 121.

67

Crown Privilege, supra note 63 at 190-191.

68

Supra note 66 at 121.

69

Ibid. at 123.

70

Ibid.

71

Ibid. at 122.

72

See at 63-64.

73

Supra note 66 at 133.

74

(Ont.) Public Inquiries Act, supra note 12. Section 6(1) says where the authority to appoint a commission under this Act or the authority of a commission to carry out its activities is questioned, the Commission or upon the request of the affected individual who issued the challenge, shall state a case in writing to the Divisional Court based on the material facts and the grounds upon which the authority of th commission was established.

75

Re Inquiry into the Confidentiality of Health Records in Ontario (1978), 21 O.R. (2d) 402 (Ont. H.C. Div. Ct.) at 406 [hereinafter Re Inquiry into the Confidentiality of Health Records in Ontario].

76

The decision was delivered by Justice Osler with Justices Holland and Robins concurring.

77

Re Inquiry into the Confidentiality of Health Records in Ontario, supra note 75 at 406.

78

Ibid. at 403.

79

Ibid. at 408.

80

Supra note 62.

81

Supra note 75 at 408.

82

Ibid. at 403. Under R.R.O. 1970, Reg. 729, s.48(1) of the Public Hospitals Act, R.S.O 1970, c.378 a hospital board, subject to certain exceptions, shall not permit any person to remove, inspect or receive information from a medical record.

83

Ibid. at 403.

84

Ibid. at 404.

85

Ibid. at 410. The Health Disciplines Act, 1974, S.O. 1974, c.47 gave the College of Physicians and Surgeons of Ontario the power to govern the conduct of its members in accordance to the Act and its Regulations.

86

Ibid. at 411.

87

Re Inquiry into the Confidentiality of Health Records In Ontario (1979), 24 O.R. (2d) 545 (O.C.A.) at 563.

88

Ibid. Health Disciplines Act, 1974, S.O. 1974, c.47 [hereinafter Health Disciplines Act].

89

O. Reg. 577/75, s.26 and s.21. See Chapter Two at 49 for new regulations governing professional misconduct.

90

Supra note 87 at 565.

91

Re Inquiry into the Confidentiality of Health Records in Ontario, supra note 75 at 406.

92

See at 86-89.

93

James P. Taylor, "The Health Records Case: Judicial 'Misprescription'?" (1985) 5 Sup Ct. L. Rev. 229 at 365 [hereinafter Taylor].

94

Supra note 75 at 403.

95

See at 73.

96

Supra note 75 at 403.

97

Supra note 95.

98

Supra note 75 at 411.

99

Krever Report, supra note 2, vol.1, at 12.

100

See at 63 and 69.

101

The decision was also appealed by the Canadian Civil Liberties Association. However, the Association's appeal was against the second part of the Court's ruling - that a privilege existed with respect to physicians and members of other self-governing professions who were not under the control of a hospital board.

102

Supra note 87. The decision was two to one. Justice Dubin wrote the decision for the Court with Justice Wilson concurring. Justice Brooke dissented.

103
Ibid. at 546.

104
Ibid. at 557.

105
Ibid. at 563.

106
Ibid. at 566.

107
Ibid.

108
See Chapter Two at 44-45.

109
Supra note 87 at 547.

110
Ibid.

111
Ibid. at 54.

112
Ibid.

113
See Chapter Two at 44.

114
Ibid. at 47.

115
Taylor, supra note 93 at 333.

116
Health Records case, supra note 31 at 220.

117
Ibid. at 204.

118
Ibid. at 205.

119

Ibid.

120

The decision was 5 to 7. Justices Martland, Ritchie, Estey, McIntyre and Chouinard concurring. Chief Justice Laskin and Justice Dickson dissented.

121

Health Records case, supra note 31 at 206.

122

Marks v. Beyfus (1890), 25 Q.B.D. 494.

123

Health Records case, supra note 31 at 218.

124

Ibid.

125

D. v. National Society for Prevention of Cruelty to Children,
[1978] A.C. 171.

126

Health Records case, supra note 31 at 222.

127

Ibid. See also at 71-72 for detailed discussion of the public policy rationale for police informer privilege. The same argument was used by the RCMP's lawyer Mr. Pennington before the Krever Commission. See at 63 and 72.

128

Ibid. at 223.

129

Ibid. at 225.

130

Ibid.

131

Ibid. at 207.

132

Ibid. at 211.

133

Ibid. at 213.

134

Ibid. at 214.

135

Ibid. at 215.

136

Ibid. at 214.

137

Ibid.

138

Ibid. at 213.

139

Ibid. at 215. Chief Justice Laskin's comments are based on Lord Hailsham's comments in N.S.P.C.C. . Lord Hailsham believed that every court of law must begin with a determination not to permit either party to deliberately withhold relevant and admissible evidence about the matter in dispute. To do so would run the risk of relevant information from being disclosed, thus preventing justice between the two parties from being achieved. Any attempt to withhold relevant evidence must therefore be justified and must be jealously scrutinized.

140

Ibid. at 213.

141

Ibid. at 215.

142

Ibid. at 216.

143

Ibid.

144

Dennis B. Evanson, "The Development and Power of the Informer Privilege: The Health Records Inquiry Case"(1983) 9 Queen's L.J. 207-225 [hereinafter Evanson].

145

Jeffrey B. Harris, *The Solicitor General For Canada et. al. v. The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario: Opening the files for the RCMP*" (1983) 12(3) Man. L. J. 399-405 [hereinafter Harris].

146

Evanson, *supra* note 144 at 212.

147

Ibid.

148

Ibid.

149

Harris, *supra* note 145 at 404.

150

Ibid.

151

Ibid.

152

Health Records case, *supra* note 31 at 215.

153

See Chapter Two at 43-45.

154

Health Records case, *supra* note 31 at 226.

155

Ibid.

156

Ibid.

157

Ibid.

158

Supra note 106.

159

Health Records case, note 31 at 224.

160

Ibid. at 226.

161

Bisaillion v. Keable, [1983] 2 D.L.R. (4th) 193 (S.C.C.) at 195.

162

James Q. Wilson, Bureaucracy What Government Agencies do and Why they do it (New York: Basic Books, 1989) at ix [hereinafter Wilson].

163

John P. Burke, Bureaucratic Responsibility (Baltimore: John Hopkins University Press, 1986) at 2.

164

Ibid. at 35.

165

Mr. Fetherston, OHIP's General Manger, did send out a directive to OHIP senior officials outlining the guidelines for releasing information to third parties, including the police. The Directive stated that "inquiries from a law enforcement agency may only be provided pursuant to a subpoena issued by a court of competent jurisdiction." However, the Directive was issued in December, 1977, a month after Lawrence Martin's article had been published in The Globe and Mail. See A.O. RG18-187 R.C.#P415, File: C-7-11-- Enrollment Branch Directive (9 December 1977).

166

Wilson, *supra* note 162 at ix.

167

Ibid. at 36.

168

Ibid.

169

In his Report Justice Krever said, "It is clear that the prevailing belief prior to November, 1977, was that co-operation with the police when information was requested was expected and required." See Krever Report, *supra* note 2, vol.2, c.16 at 6.

170

Health Insurance Act, 1972, S.O. 1972, c.91 as am. by S.O. 1974, c.60 and c.86, s.44(e).

171

Wilson, supra note 162 at 51.

172

See note 180.

173

Wilson, supra note 162 at 91.

174

Ibid.

175

OHIP is only part of the Ministry's structure but it is a very large organization. In the 1970s, it comprised two divisions the Health Insurance Division and the Finance and Administrative Division. These two divisions were divided into seven branches. Each of these branches was divided into several sections. The Insurance Claims Branch had a central office in Toronto and nine district offices throughout Ontario. Many of the district offices controlled satellite offices. See Ministry of Health Reporting Relationships within the Organizational Elements under Study (Applicable to years 1976-1978), in Krever Report, supra note 2, vol.3, figure 9 at 136. and vol.2, c.16 at 2. See also Chapter Two at 38-39.

176

See Chapter Two at 39.

177

Mr. Buchanan was Director of OHIP's Insurance Claims Branch. Mr. Fetherston instructed Mr. Buchanan to conduct two telephone surveys. The first was to determine whether any inquiries from police sources had been made for enrollment data. The second phone survey was conducted in respect to the RCMP and requests for medical information. No records were kept of the telephone surveys conducted by the district offices. See A.O. RG18-187, R.C.#P414, File: C-7 OHIP.

178

Mr. Harnett was Director of OHIP's Enrollment Claims Branch. Mr. Harnett failed to inform the Minister of Health, Mr. Timbrell and the Krever Commission that OHIP was providing

information to the federal Immigration Department. This relationship was revealed only as a result of the Commission's own independent investigation. See Krever Report, supra note 2, vol. 2, c.16 at 70.

179

Krever Report, supra note 2, vol.2, c.16 at 70.

180

Ibid. at 71.

181

A.O. RG18-187, R.C.#P377, File: Transcript, vol.54 (6 November 1978) at 61.

182

Ibid.

183

Ibid.

184

Thomas Claridge, "No proof RCMP used OHIP files to disrupt radicals, probe told" The Globe and Mail (17 November 1978) at 30.

185

Krever Report, supra note 2, vol.2, c.16 at 6.

186

Ibid.

187

Ibid.

188

A.O. RG18-187, R.C.#P416, File: C-8-17-4 Ministry of Health Working Party, The Confidentiality of Health Records in Ontario: Report of the Ministry of Health Working Party Summary at iii.

189

Ibid.

190

Ibid.

191

This situation was similar to which occurred in the later stages of the Tainted Blood Inquiry. The federal government and the provinces decided that they could not wait for Justice Krever's final Report. It was decided by the federal government and the provinces that action had to be taken to create a new blood agency to restore the public's faith in the Canadian blood system. The federal government and the provinces wanted to act quickly in order to reassure the public that they were in control. They probably also hoped that this commitment to reforming the blood system would detract from any possible allegations of misconduct by government officials that Justice Krever might make in his final Report.

192

Supra, note 188 at i.

193

Ibid. at ii.

194

A.O. RG18-187, R.C.#P416, File: C-8-17-4 Letter of Mr. Harvey Strosberg, Counsel to the Commissioner to Mr. W.A. Backley, Deputy Minister, Minister of Health (3 November 1978).

195

Ibid.

196

See Chapter One at 16.

197

See Chapter One at 26-27.

198

A.O. RG18-187, R.C.#P416, File: C-18-17-4 Memo to Mr. Harvey Strosberg from Carene Smith (22 September 1978).

199

Supra, note 184. The failure to record minutes of important meetings was also a problem for the Somalia Inquiry. When questioned by Commissioner Letoruneau why the Somalia Working Group did not keep records of its daily meetings, General Boyle said, "it never dawned on him to keep minutes, and that he did not believe that the daily proceedings would be of importance." See David Pugliese, "Relaxed Boyle breaks

silence, but tough questions to come" The [Ottawa] Citizen
(13 August 1996) at A".

200

A.O. RG18-187, R.C.#P376, File: Transcript, vol.54
(6 November 1978) at 20.

201

A.O. RG18-187, R.C.#P414, File: C-7 OHIP, Interview
Ms. Carene Smith with Mr. Buchanan, Director of Insurance
Claims.

202

Supra note 181 at 30.

203

A.O. RG18-187, R.C.#P377, File: Transcript, vol.83
(12 February 1979) at 87.

204

Ibid. at 88.

205

Ibid.

206

Ibid.

207

See Chapter Two at 38.

208

Krever Report, supra note 2, vol.2, c.16 at 6.

209

Ibid. at 23.

210

Ibid. at 71.

211

Ibid.

212

A.O. RG18-187, R.C.#P377, File: Transcript vol.89B,
(9 March 1979) at 18.

213

Ibid. at 20.

214

Ibid.

215

Ibid. at 26. The size of the RCMP force during the 1970s was approximately 20,000. This included domestic and overseas personnel.

216

Ibid.

217

Ibid.

218

Ibid.

219

Ibid. at 18.

220

Ibid. The destruction of files was also a problem for the Somalia Inquiry. The logbooks containing information about the events which took place in Somalia were located at a military base in Kingston. The records were destroyed because the Kingston officers decided, on their own, that the records were not important and were taking up too much space at the base. The records had been transferred to computer files but it was uncertain if all of the records had been copied. The shredding of the documents was done in violation of an order issued by the Somalia Inquiry. General Boyle testified that until the Inquiry he did not know that the logbooks had been destroyed. The General informed the Inquiry that an investigation would commence immediately. This example illustrates the problem that can occur when there is a lack of accountability within an organization. See Peter Desbarats, Somalia Cover-up: A Commissioner's Journal (Toronto: McClelland & Stewart, 1997) at 154 and David Pugliese, "Military shredded Somalia logs, Boyle reveals" The [Ottawa] Citizen (14 August 1996) A1.

221

Supra note 175.

222

Supra note 215.

223

Ontario, Legislative Assembly, Standing Committee on the Administration of Justice, "Estimates, Ministry of the Attorney General" in Debates, No.J-14 (2 November 1978) at J-330.

224

Ontario, Legislative Assembly, Debates, No.8 (28 February 1978) at 169.

225

Ibid. at 168.

226

Ibid. at 169.

227

Supra note 22.

228

Krever Report, supra note 2, vol.2, c.16 at 12. See also Chapter Two notes 15-16.

229

Supra note 34.

230

Health Records case, supra note 31 at 215-216.

231

See at 98.

232

See at 99.

233

See Chapter One at 26.

CHAPTER FOUR:

SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR IMPROVING ROYAL
COMMISSIONS' AND PUBLIC INQUIRIES' ACCESS TO GOVERNMENT INFORMATION

Introduction

This chapter summarizes the findings of this thesis and looks at some possible legislative and judicial reforms which would help Royal Commissions and public inquiries obtain access to government information, particularly information pertaining to national security and criminal investigations.

As seen in Chapter One, ¹ Royal Commissions and public inquiries perform a valuable function in making government information public. Justice La Forest, dissenting ² in Dagg v. Canada (Minister of Finance) ³ said:

The overarching purpose of the access to information legislation ... is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats ⁴ remain accountable to the citizenry.

Justice La Forest's comments recognize the importance of public access to information as discussed in Chapter Two. ⁵ Both the Canada Evidence Act ⁶ and federal and provincial information acts can help Royal Commission and public inquiries to access information which is vital to their investigations. Courts can also assist Royal

Commissions and public inquiries, both by the way they interpret access legislation and by their approach to evidence and testimony at commission and inquiry proceedings. As seen however, both the legislative and judicial roles need strengthening.

The chapter will consider the following possible legislative reforms: bringing police informer privilege under a balancing test in the Canada Evidence Act; ⁷ giving inquiries full party status under the federal Access to Information Act; ⁸ adding a "public interest override" to that Act; ⁹ adding penalties to federal and provincial information acts ¹⁰ for destroying documents or withholding information as currently proposed under the Beaumier bill ¹¹ before Parliament; and enacting whistle-blowing ¹² legislation to protect government employees who wish to disclose government information.

The section on judicial reform will look at the role courts can play in making information more accessible to Royal Commissions and public inquiries. The chapter will consider the courts' approach to enforcing access legislation and to testimony and disclosure of evidence before individual inquiry proceedings. In the latter situation, the Canada Evidence Act only covers the refusal of government to disclose information before inquiry proceedings. However, the Supreme Court has devised a common law test in R. v. S. (R.J.) ¹³ and Branch. ¹⁴ This is a flexible and balanced test that balances the state's need to obtain evidence

with an individual's right to remain silent and receive a fair trial. This test was applied in Phillips¹⁵ and contrasts sharply with the Supreme Court's position in the Health Records case.

In light of the position of the Supreme Court in the Health Records case¹⁶ and Quebec (Attorney General) v. Canada (Attorney General),¹⁷ and the document tampering and destruction of records by the Department of National Defence during the Somalia Inquiry¹⁸ and the Canadian Blood Committee prior to the tainted Blood Inquiry,¹⁹ reforms are needed to address the problems encountered by the Krever Commission, and generally, by Royal Commissions and public inquiries in obtaining access to government information. However, these problems cannot be satisfied by one simple reform. Both statutory and judicial reforms will be required. Changes to the Canada Evidence Act will provide for the balancing of interests rather than the exclusion or inclusion of one particular interest, for example, the public interest in public safety, and would facilitate the weighing of competing public and private interests. This would assist Royal Commissions and public inquiries in seeking evidence during inquiry proceedings. In situations at common law where statutory provisions do not apply,²⁰ the balancing test used by the Supreme Court in

Phillips could be used by Royal Commission and public inquiries in obtaining evidence from witnesses at inquiry hearings. Finally, changes to access to information legislation and whistle-blowing legislation would lift undue barriers against provision of information by government officials themselves. This would assist Royal Commissions and public inquiries in accessing information prior to and during the course of inquiry hearings.

Although administrative problems, were an important factor in preventing the Krever Commission from obtaining government information, solutions for improving the internal dissemination of information, and accountability within OHIP and the RCMP will not be addressed. Justice Krever's Report²¹ made recommendations concerning OHIP's disclosure of information to the police and law enforcement agencies. Justice Krever recommended that only the district manger of OHIP or a person designated by him or her be permitted to disclose enrollment information to the police, and that a log be maintained to record requests made by the police.²² Justice Krever also recommended that OHIP report annually to the Minister of Health the number of requests received from the police and the Department of Employment and Immigration.²³ The Ministry of Health's annual reports and the Health Insurance Act are both silent as to whether Justice Krever's recommendations were implemented. I made a request to OHIP for information regarding procedures concerning the dissemination of information within OHIP, as will as how requests from the RCMP

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and the police were processed. I was informed by OHIP that the information which I sought was not readily available.²⁴ I was also told that my request raised the issue of balancing freedom of information with protecting the privacy of OHIP subscribers.²⁵ Ironically, in light of the topic of this thesis, I experienced the same problem that the Krever Commission encountered in conducting its investigations.

Clearly there is a need to ensure that public inquires have access to information that might not be readily available to the public itself. Without access to internal documents it is impossible to determine if any changes occurred in the administrative procedures within OHIP in the aftermath of the Krever Commission. It is also difficult to make recommendations²⁶ to improve the record keeping or the accountability within OHIP or the RCMP. After presenting a summary of the findings to this point, the chapter will address these issues.

FINDINGS

(1) Lack of Jurisdictional and Constitutional Powers

In chapter one, it was stated that this thesis would attempt to show that the Krever Commission did not possess the power required to fulfill its mandate.²⁷ Chapter Three suggests that the Krever Commission lacked the power to carry out the mandate in its constituent Order-in-Council.²⁸ However, the Krever Commission's lack of power was not simply due to the scope of

its mandate. It was also a result of constitutional limits to a provincial government's powers to create a public inquiry to investigate matters involving the RCMP.²⁹ These limits were clearly defined by the Supreme Court of Canada in Quebec (Attorney General) v. Canada Attorney General).³⁰ The Ontario Government lacked jurisdiction to empower the Krever Commission to compel the RCMP to reveal who was responsible for investigations relating to national security, such as the Thunder Bay operation.³¹

Another special kind of constitutional obstacle which prevented the Krever Commission from fulfilling its mandate was the territorial limitation to a province's jurisdiction to enact legislation.³² The Constitution Act, 1867 does not allow a province to extend its legislative powers beyond its geographical boundaries.³³ The Ontario Public Inquiries Act³⁴ gave the Krever Commission power to summon witnesses residing in Ontario. The Act does not apply to individuals residing outside Ontario. In consequence, the Krever Commission could not compel Lawrence Martin to return from Washington, D.C. to testify before the Commission and thereby was denied the opportunity to question Mr. Martin about the source of his story.³⁵

(2) National Security

National Security loomed behind the jurisdictional question and the Keable controversy of Quebec and it was a major obstacle

preventing the Krever Commission from obtaining adequate access to information about the RCMP investigations. Although the Krever Commission was able to obtain some information from the RCMP, the Ontario Public Inquiries Act,³⁶ the Official Secrets Act,³⁷ and the restrictions placed by the Solicitor General on access to the Riddell files, now make it difficult to know precisely how much information the Krever Commission was able to obtain.

National security was more than a constitutional barrier to the Krever Commission. The issue of national security also involved a clash between competing interests - the need to protect the privacy of individuals versus public safety and the protection of citizens from terrorism and espionage.³⁸ However, as Chief Justice Laskin pointed out in his dissent, there was no indication that the police were actually or imminently concerned with prosecutions.³⁹ Instead, there was evidence that the RCMP placed a higher importance on public safety than on protecting an individual's right to privacy.⁴⁰

(3) Police Informer Privilege

Police informer privilege was perhaps the most significant obstacle preventing the Krever Commission from obtaining the names of hospital employees and physicians who had provided members of the RCMP with medical information without prior authorization. The federal Solicitor General conceded that the names of the RCMP's informers were relevant to the work of the Krever Commission,⁴¹

but the Solicitor General appealed the Ontario Court of Appeal's decision to the Supreme Court of Canada. He was concerned to prevent future provincial governments from investigating matters relating to the activities of the RCMP and national security, both matters which fall under the jurisdiction of the federal government.⁴²

In deciding in favour of the federal government, the Supreme Court agreed with Justice Brooke that the basis of the police informer privilege is the public's interest in public safety and the effective administration of the law.⁴³ In the detection and prevention of crime, informers are an important source of information. To ensure that citizens will not be afraid of providing the police with information, their identities need to be protected.⁴⁴ On the other hand, as Justice Brooke said maintaining the confidentiality of an individual's health records is a private matter.⁴⁵ In this situation the Supreme Court decided that public's interest in public safety must prevail.

(4) The Courts and their Role in Resolving the Conflicts of Police Informer Privilege and National Security

It was in the courts that the Krever Commission lost the battle to obtain access to the names of the RCMP informants. The Supreme Court of Canada extended police informer privilege to civil proceedings and public inquiries,⁴⁶ despite Chief Justice Laskin's opinion that in its absolute form, the privilege should

be restricted to public prosecutions and to criminal proceedings.⁴⁷ The Chief Justice said that apart from these situations, the courts should have the discretion to decide on a case-by-case basis the extent to which there should be disclosure, depending on the nature of the proceeding.⁴⁸

The division within the Supreme Court of Canada reflected the division within the lower courts. The judges there had disagreed on whether to give priority to the public interest in law enforcement or the public interest in maintaining the confidentiality of an individual's health record. Justice Osler of the Divisional Court of Ontario tried to resolve this conflict by abandoning the privilege for physicians and hospital employees governed by the Public Hospitals Act, and retaining it for physicians outside of the control of a hospital board.⁴⁹ This approach failed to provide a coherent answer to the question of whether or not the identity of the physicians, who disclosed information to the RCMP should be privileged.

In contrast, Justice Dubin of the Ontario Court of Appeal maintained that the confidentiality of health records should be protected by the court. Justice Dubin believed if the Ontario legislation and regulations governing the confidentiality of health information were not upheld, a patient's right to privacy would be illusory.⁵⁰

Justice Brooke disagreed with Justice Dubin. Justice Brooke believed that the public interest in crime detection and national security should prevail over the protection of the confidentiality of health information, which he viewed as a private interest.⁵¹

Justice Martland of the Supreme Court of Canada agreed with Justice Brooke. Justice Martland said that regardless of the form of the civil or criminal proceeding involved, the public policy behind the police informer privilege is the same.⁵² This policy is to advance the public interest in preventing crime and threats of terrorism and violence.⁵³

Writers Jeffrey Harris⁵⁴ Dennis Evanson⁵⁵ argue that Justice Martland failed to take into consideration the harm that would result from this narrow view of public policy. They point out that public harms can include violation of an individual's privacy, erosion of the relationship between a physician and a patient, and the loss of public confidence in the law enforcement system.⁵⁶

Another harmful effect of Justice Martland's decision is the broad powers that it gives to the police to decide what information can be disclosed. Jeffrey Harris believes that the Supreme Court's judgment is so wide that it effectively makes any question relating to police informer privilege a nonissue in future cases.⁵⁷ Evanson argues that giving the police so much power is undesirable because they are capable of making mistakes about the nature and the

importance of the evidence. Moreover, Evanson believes that the decision not to disclose information on the basis of this privilege should not be left to one party. Instead, he argues that the decision should rest with the courts or political bodies, where there is some level of political representation or scrutiny available.⁵⁸

Evanson and Harris are right to question whether the police should be given such broad powers in respect to the disclosure of relevant information. In the situation examined in this thesis, even though the RCMP appeared to have abused the police informer privilege, Justice Krever was denied access to relevant information. Without full disclosure, it will never be known whether the RCMP used coercion or pressure to obtain information. It will be impossible to verify the extent to which doctors provided the RCMP with information or to determine whether the RCMP obtained information in some other manner.⁵⁹

The effect of the Health Records case and Quebec (Attorney General) v. Canada (Attorney General) is to severely restrict Royal Commissions, especially provincial Royal Commissions, in investigating matters concerning the RCMP. The Supreme Court decisions in Nelles⁶⁰ and Starr⁶¹ place further restrictions on Royal Commissions. The effect of the last two decisions is that public inquiries cannot investigate the alleged criminal actions of a specific individual. Public inquiries cannot name

names or hold individuals accountable for their actions because individuals named may face future criminal prosecutions. Possible means of assisting Royal Commissions and public inquiries in their investigations into matters involving criminal activities and national security will be examined below.⁶²

(5) Lack of Cooperation and Administrative Deficiencies

Lack of cooperation on the part of OHIP and the RCMP, and administrative deficiencies within OHIP and the RCMP were not the most important factors in preventing the Krever Commission from obtaining access to information. Nevertheless, they were contributing factors, generating delay and confusion. This lack of cooperation can be attributed to the preoccupation of officials with the internal operations of OHIP, and the priority they gave to the efficient processing of claims over maintaining the confidentiality of subscriber's records.⁶³ Fear of self-incrimination and being held accountable for breaches in confidentiality,⁶⁴ and a general deference towards law enforcement⁶⁵ were also contributing factors.

Poor management of information within OHIP, and lack of accountability on the part of OHIP⁶⁶ and the RCMP⁶⁷ for the activities of their employees slowed and complicated the work of the Krever Commission. OHIP employees gave conflicting testimony about the dissemination of OHIP's policy on the disclosure of medical information.⁶⁸ Poor record keeping within OHIP⁶⁹ and the

RCMP⁷⁰ made it difficult for the Krever Commission to determine how often the RCMP received medical information without proper authorization.

Wilson's and Burke's theories of bureaucracy⁷¹ helped explain how the size, administrative practices within OHIP and the RCMP, and the behaviour of OHIP officials and members of the RCMP were factors that made it difficult for the Krever Commission to understand the decision-making process within these two institutions. Their theories also showed the limitations of Kent Roach's use of organizational accountability theory in making government organizations accountable for actions of misconduct or negligence.⁷² This is not to say that government organizations should or cannot be held accountable for their actions. However, as this thesis has demonstrated, it is not easy to hold government organizations accountable for their actions. The Krever Commission was unable to hold the RCMP, a federal institution accountable to a provincial public inquiry for its actions.⁷³ A key reason for the failure of the Krever Commission to compel the RCMP to cooperate fully is found in the constitutional division of powers between the federal government and the provincial government of Ontario.⁷⁴ In the absence of a formal constitutional amendment or a sweeping judicial interpretation, this obstacle is unlikely to change. However, despite constitutional barriers there are some reforms that can offer the hope of improved access by Royal Commissions

to government information. Suggestions for legislative reforms will now be examined.

RECOMMENDATIONS FOR REFORMS

The suggestions considered here are mainly judicial and legislative reforms. They relate either to access to information in the course of individual inquiry and commission proceedings, or to access to information in the course of their more general investigatory functions. For the former, the Phillips⁷⁵ and the Canada Evidence Act⁷⁶ suggestions are most relevant; for the latter the access, privacy, and whistle-blowing suggestions are most relevant.

Amendments to the Canada Evidence Act will deal specifically with amendments to sections 37 and 38 of the Act. In 1982, these two sections replaced s. 41 of the Federal Court Act⁷⁷ and codified what was known in common law as Crown privilege, but which is today more commonly referred to as "public interest immunity".⁷⁸ Sections 37 and 38 deal with the disclosure of government information in civil and criminal proceedings. Under s.37(1) of the Canada Evidence Act the federal government can object on public interest grounds to the disclosure of information before a court.⁷⁹ This is balanced by s.37(2) of the Act where:

a court may examine or hear the information and may order the disclosure of information, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public

interest in disclosure outweighs in importance the specified public interest.⁸⁰

Section 37 of the Act provides a balancing framework, similar to the balancing framework used by Chief Justice Laskin in the Health Records case, which allows a court to balance competing public interests. But it is not clear that this section includes national security or international relations, although s.38(1) of the Act⁸¹ implies that s.37(1) does include national security and international relations. Section 37(1) does not cover police informer privilege. It will be argued that s.37(1) needs to be clarified to include public interests such as national security and police informer privilege, and that section s.37(2) be amended to specify some of the factors to be considered by the courts in weighing competing public interests.⁸²

Federal and provincial access to information legislation also did not exist at the time of the Krever Commission. As discussed earlier in Chapter Two, both federal and provincial governments have realized the need to provide access to information while at the same time recognizing the importance of protecting the privacy of individuals.⁸³ For example, access to information legislation allows citizens and residents of Canada to have access to government information.⁸⁴ However, as will be seen later it does not apply to Royal Commission or public inquiries.⁸⁵ Privacy legislation protects access to personal information that is

collected and is under the control of government agencies.⁸⁶

Neither the right of access to information, nor the right to privacy is absolute.⁸⁷ There are discretionary exemptions and mandatory exemptions, which require government institutions to refuse disclose certain types of information. Examples of discretionary exemptions are sections 15 and 16 of the Access to Information Act, which deal with national security and law enforcement.⁸⁸ An example of a mandatory exemption is s.19(1) of the Access to Information Act, where the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s.3 of the Privacy Act.⁸⁹ The Ontario privacy legislation also has similar provisions.⁹⁰

If an individual is refused access to government information an application to review the government's decision may be made to the Federal Court.⁹¹ Under the procedure for judicial review, a burden of proof is placed on the head of the government institution to prove that she or he has the authority to refuse disclosure.⁹² If the Court finds that the head of the institution is not authorized to refuse disclosure then the Court shall order the head of the institution to disclose the information.⁹³ Where the head of a government institution refuses to disclose information on the bases of sections 15 or 16 of the Act the Court, on the grounds that the head does not have

reasonable grounds to refuse disclosure, shall order the head of the institution to disclose all or part of the requested record.⁹⁴

In making this decision the courts have used an injury test. The test is based on the wording of sections 15 and 16 of the Access to Freedom and Information Act.⁹⁵ The Court considers what injury would occur to public safety if the information was disclosed. If the injury is greater than the public benefit in the disclosure of the information, then the information will not be disclosed. The same test was used by Justice Martland in the Health Records case. Justice Martland decided that, in the detection of crime and national security, the public interest required that the names of the RCMP informants be kept confidential.⁹⁶

It is suggested that courts need to go beyond the use of an injury test and to subject the government's objections to disclosure to a more comprehensive and critical analysis. One way to do this would be by adopting something similar to the approach used by Chief Justice Laskin in the Health Records case.⁹⁷ Government must offer proof in support of confidentiality claims, such as that of informer privilege and national security. The approach used by Chief Justice Laskin will be examined later in looking at how courts can assist Royal Commissions to obtain access to government information. In the context of access and

privacy legislation, this judicial approach would probably also need to be supported by statutory amendments.

Access to government information could also be improved by amending the Access to Information Act to give inquiries full status as information requesters; including a public override provision that would compel government institutions to release government information if it is in the interest of public health or safety, and providing penalties and fines for destroying or refusing to disclose government records.

Detailed suggestions for improving the Canada Evidence Act and the Access to Information Act will be made below, along with whistle-blowing legislation.

(i) Amending the Canada Evidence Act; the Need for Clarification and the Inclusion of Police Informer Privilege

The amendments suggested here for to the Canada Evidence Act would assist inquiries in seeking access to information subject to "public interest" confidentiality claims, in the course of inquiry hearings. During the hearings of the the Krever Commission, the government invoked the police informer privilege. Subject to one or two exceptions, this privilege is absolute.⁹⁸ It is suggested here that claims based on police informer privilege should be clearly subjected to judicial review, and that these and similar privileges⁹⁹ should be subject to a comprehensive balancing test. Judicial review should not be based

only on an injury test.¹⁰⁰ Government should be obliged to make a convincing case for such claims. In most situations, government is operating from a position of relative power and must not abuse the special power of Crown privilege. Government exercises Crown privilege on behalf of the public and must be held accountable to the public for its actions. Claims based on police informer privilege and national security should be limited to exceptional circumstances and should require specific proof. Justice Krever,¹⁰¹ Justice Dubin,¹⁰² and critics such as Jeffrey Harris¹⁰³ and Dennis Evanson¹⁰⁴ have shown that other important interests such as confidentiality, due process of law and the administration of justice, and the ability of the provinces to enforce legislation or to investigate matters of public interest can be jeopardized in the interest of national security. Government must not be allowed to make a claim based on national security or police informer privilege, as in the Health Records case, where the evidence may insufficient to support it.¹⁰⁵ Government must do more than to base its claims on principle. Government must prove its case on the basis of demonstrable fact and merit.

The Canada Evidence Act should be amended to require that government claims based on police informer privilege and national security would be subject to judicial review by the courts.¹⁰⁶ This could be done by amending sections 37 and 38 to include

police informer privilege and national security.¹⁰⁷ As discussed earlier, section 37 of the Canada Evidence Act¹⁰⁸ does contain a balancing framework which allows a court to balance competing public interests. However, the factors to be considered in balancing competing public interests require clarification. This could be done by an amendment to s.37(2) of the Act which would specify some of the factors to be considered in the weighing process. Such factors would include the nature of the proceedings, the relevance of the information, the identity of the informers, and the public interest that would be served by the information being disclosed. These factors were taken into consideration by Chief Justice Laskin in the Health Records case.¹⁰⁹ Other factors to take into consideration include the seriousness of the charge; the admissibility of documentation; and whether the applicants have established that there are no other reasonable ways of obtaining the information.¹¹⁰

An objection to disclosing information on the basis of this privilege would be treated in the same way that an objection based on national security is treated under s.38 of the Canada Evidence Act.¹¹¹ Under s.38(5) sensitive information relating to national security or international relations is heard in an in camera session by the courts.

However, amending the Canada Evidence Act does not help situations where an inquiry seeks access to information outside

the course of its hearing proceedings. In this situation reforms to access to information legislation would assist an inquiry in seeking access to information subject to "public interest" confidentiality. It is imperative that Royal Commission and public inquiries have access to information needed for their investigations. The Somalia Inquiry ¹¹² and the Tainted Blood Inquiry ¹¹³ are recent examples of refusals, or delays in releasing requested material, and crucial documents having been destroyed. To facilitate access, Royal Commissions and public inquiries should be granted status under federal and provincial statutes.

(ii) Amending Access to Information Legislation to include

Royal Commissions and Public Inquiries

In the initial Order-in-Council, it was requested that all government ministries, boards, agencies and commissions provide assistance to the Krever Commission to the fullest extent to enable the Commission to carry out its mandate. ¹¹⁴ However, as seen in Chapter Three neither OHIP or the RCMP gave the Krever Commission their full cooperation. ¹¹⁵ Under the Access to Information Act and the Ontario Freedom of Information and Privacy Act individuals are given the right to access government legislation. ¹¹⁶ However, access to information legislation does not apply to Royal Commissions and public inquiries. By amending access to information legislation to include Royal Commissions and public inquiries, an inquiry such as the Krever Commission could

use access legislation to obtain government information that has been denied to it. If an inquiry is denied access to information requested under access to information legislation then it would be able to take advantage of the judicial review process provided under the Access to Information Act.¹¹⁷ With full party status as an information requester under access legislation, an inquiry would have more rights than it would as a mere intervener. Its party rights would include the right to appeal and to adduce evidence. However, making such an amendment to access legislation is only the first step. As discussed earlier, other amendments to access legislation are needed to improve access to government information. The next reform that will be examined is the extension of a public override provision. This provision would allow exemptions in access legislation to be overridden where this is justified by public interests such as public health and safety.

(iii) Amending the Access to Information Act to extend the public interest override provision

In his 1994 review¹¹⁸ of the federal Access to information Act, the Information Commissioner recommended that the Act be amended to extend the Act's public interest override provision. It already applied to third party interests.¹¹⁹ A public interest override would authorize the disclosure of any record to the public

if a department head believed that the record reveals a significant harm to public interest. Public interest would be defined to include law enforcement, administration of justice and national defence and security.¹²⁰ The recommendations were based on the draft wording of s.11(1) of the Ontario Freedom of Information and Protection of Privacy Act.¹²¹

The Report said, "an effective public interest override would go a long way towards opening up federal legislation and possibly be much more preferable and practical than adjusting the injury test."¹²² However, the effectiveness of a public override would depend upon its wording. The wording can apply to all or some disclosure exemptions within an act.¹²³ However, the head of the institution would have the discretionary power to determine whether a public interest exists, and might refuse disclosure if he or she believed that there were insufficient public interest to warrant disclosure. But if the head of a department refused to disclose information, then the Information Commissioner could still review the refusal, and use the public override as the basis for arguing that there is a public interest in having the information disclosed.¹²⁴

The Report noted that Ministers were reluctant to use this section of the Act, because if the information was to be released in the public interest, they should have released the information before receiving a request for access.¹²⁵ However, the more likely

reason is that Ministers are reluctant to release information out of fear that the disclosure may embarrass the government or incur the displeasure of business. The irony here is that Royal Commissions and public inquiries are required to go to great public expense to investigate public harm resulting from government's failure to release information because of a fear of public embarrassment. ¹²⁶

If heads of government departments cannot be encouraged to be public-minded, then fines and penalties may be needed to serve as a deterrent for the willful or possibly even negligent obstruction of access to government information.

(iv) Amending Access to Information Legislation to Include

Penalties for Obstructing Access to Government Information

The Access to Information Act states that it is an offence to obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner from performing their duties under this Act. ¹²⁷ Every person who contravenes this section is guilty of an offence and liable on a summary conviction to a fine not exceeding one thousand dollars. ¹²⁸ A similar offence and penalty is included in the Ontario Freedom of Information and Protection of Privacy Act. ¹²⁹

These two Acts could be strengthened by adding a provision that would explicitly make it an offense for any person who refuses to disclose requested documents under these Acts, or falsifies

destroys, mutilates, alters, or does not keep required records. Two private members' bills containing such a provision have been introduced in the House of Commons.¹³⁰ Both bills also say that everyone who commits this offence is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars or both.¹³¹ The penalty may be harsh, but these two private members' bills were introduced in response to the Somalia document tampering scandal.¹³² Colleen Beaumier who introduced Bill C-208 said, "Those in public service must serve, and if they betray public trust, then they must be held accountable."¹³³ The bill has recently been passed by the House in an unanimous vote of 203-0.¹³⁴ However, Colleen Beaumier was forced by the Liberal cabinet to make changes to her bill before the cabinet would support it.¹³⁵ The Justice Minister, Anne McLellan opposed the severity of the penalties in the original bill.¹³⁶ The length of imprisonment has now been reduced to two years.¹³⁷ The bill still requires the approval of the Senate. Despite the cabinet's reluctance in supporting Beaumier's bill this is still an encouraging sign that government is moving towards improving access to government information.

However, it is necessary to go further than trying to deter government employees from failing to disclose information. Government employees who want to speak out about negligence or misconduct need to be protected from fear of job dismissal or

other forms of recrimination. This could be done by enacting whistle-blowing legislation.

(v) Implementing Whistle-blowing Legislation

During the Krever Commission hearings delays occurred because of reluctance of OHIP employees to provide information about OHIP administrative procedures regarding the confidentiality of subscriber's health information.¹³⁸ although Mr. Fernandez and Mr. Adams,¹³⁹ did provide the Commission with valuable information, perhaps other employees¹⁴⁰ would have been more willing to participate if they had some protection from possible retaliation by senior management.

Whistle-blowers in government are public servants who disclose to the public confidential government information about anticipated or actual government wrongdoings.¹⁴¹ Guidelines to inform public servants when they are authorized to disclose information are often vague and contradictory.¹⁴² At common law, a public servant owes to his or her employer the general duties of loyalty, good faith, and, under appropriate circumstances, confidentiality.¹⁴³ Public servants who engage in whistle-blowing will be disciplined not only for general disloyalty, but because they will have contravened the oath of secrecy¹⁴⁴ which they are required to take as employees of the government. Public servants may also be guilty of offences under the Criminal Code¹⁴⁵ and the Official Secrets Act.¹⁴⁶

When acting in good faith, public servants are protected from criminal and civil liability if they release information under the Access to Information Act.¹⁴⁷ Under the Ontario Freedom of Information and Protection of Privacy Act, the head of an agency shall disclose any information to the public, if the head has reasonable grounds to do so and that the record reveals a grave risk to the environment or to the health or safety of the public.¹⁴⁸

There should be federal and provincial legislation to deal with whistle-blowing. One possibility is to enact legislation that is similar to the U.S. Whistleblower Protection Act of 1989.¹⁴⁹ Under this Act federal government employees are protected from retaliation by their agency if they disclose information about government wrongdoing to the Special Counsel, which is an independent body.¹⁵⁰ The Ontario Law Reform Commission has recommended that a similar system be established in Ontario.¹⁵¹ The Commission believes that such a system would permit legitimate whistle-blowing and immunize such employees from disciplinary or other actions.¹⁵²

Inge Hansen, while serving as Information Commissioner of Canada, suggested that an office of Ombudsman be created to serve as an intermediary to investigate public servants' complaints. An Ombudsman office would have the independence, resources and the goodwill to bring forward plausible evidence of government

wrongdoing.¹⁵³ Both suggestions provide that information being disclosed should be held confidential while investigations are being conducted. However, the Ontario Law Reform Commission's proposal gives the Special Counsel more power. In the Ontario Law Reform Commission's proposal, the Special Counsel can seek a court order to have the information released. The Court must decide whether the public's interest to disclosure outweighs government interest in keeping the information confidential.¹⁵⁴

To make the Ontario Law Reform Commission's proposal work requires that the Special Counsel and the courts work together. This means that legislation by itself is insufficient protection for public servants. The courts must become involved, sometimes with legislative help. This chapter will now look at the role courts could play in making government information more accessible.

(vi) The Role of the Courts in making Government Information

more accessible to Royal Commissions and Public Inquiries

Courts could assist Royal Commissions and public inquiries to obtain government information in two ways. First, with legislative help, they could take a more comprehensive and balanced approach to reviewing government claims for refusal to disclose information based on claims of national security and police informer privilege. This development would assist commissions and inquiries to obtain information as part of their general investigatory function.

Second, courts could work to clarify the self-incrimination protections which are generally available to those who testify before public inquiries. On several occasions, witnesses did not want to appear before the Krever Commission for fear of self-incrimination.¹⁵⁵ As will be seen in R. v. S.(R.J.)¹⁵⁶ and Branch¹⁵⁷ the Supreme Court has devised a test that can be adapted to be used by Royal Commissions and inquiries to compel witnesses to testify.¹⁵⁸

As suggested earlier, government claims of police informer privilege and national security should be clearly and explicitly subject to judicial review.¹⁵⁹ This requirement for review would be part of the Canada Evidence Act.¹⁶⁰ The Supreme Court of Canada must subject government claims based on national security and police informer privilege to a more comprehensive and demanding critical analysis than in the Health Records case. Since the Health Records case, access to information legislation has been enacted to assist individuals in accessing government information. But in situations involving access to information relating to national security, the Act has done little to improve access. In Maislin¹⁶¹ and later in cases such as Information Commissioner v. Prime Minister of Canada,¹⁶² the Federal Court has said that the basic principle of the Act is public access to information and that this principle should be the foundation on which to interpret the operative provisions of the Act. Nevertheless, the Federal Court

has used a narrow interpretive approach in cases such as X. v. (Canada) Minister of National Defence¹⁶³ and Ternette v. Canada (Solicitor-General).¹⁶⁴ In both X. v. (Canada) Minister of National Defence and Ternette the applicants were denied access to information based on the wording of s.15 of the Act.¹⁶⁵ In X. v. (Canada) Minister of National Defence Justice Denault for the Trial Division said that the wording of s. 15 of the Act did not mandate him to balance him to balance public interests in disclosure.¹⁶⁶ Instead he was mandated to determine whether the explanations provided for disclosure were reasonable.¹⁶⁷ In the opinion of Justice Denault the government institution had reasonable grounds to refuse to disclose the records or parts thereof as the disclosure could be reasonably be expected to be injurious to the conduct of international relations.¹⁶⁸

In Ternette, a similar approach was used by Justice MacKay. Justice MacKay said that this case raised the important issue of the balance between an individual's right to know what information about himself or herself is held by the government, and the public interest requirement to protect the state and its institutions against subversion.¹⁶⁹ However, in Justice MacKay's decision, there is no discussion about the possible harm to the applicant, if his request was denied. Justice MacKay accepted the submission of the respondent that injurious results could occur if the

information was released.¹⁷⁰ The RCMP was involved in gathering information concerning individuals involved in suspected subversive activities. The information the RCMP had about Mr. Ternette could be devastating to Mr. Ternette's reputation and career. Without access to his personal files Mr. Ternette would never know what information the RCMP had about him.

The courts are limited by the wording of sections 15 and 16 of the Access to Information Act. However, instead of only a narrow injury test, the courts should be encouraged to adopt a broader balancing approach similar to that used by Chief Justice Laskin. In his dissent, Chief Justice Laskin developed a test to set the limits to claims based on police informer privilege. The test involves a case-by-case analysis, which balances the public interest in allowing the disclosure of relevant information, including the identity of the informer, against the existence of a countervailing public interest which might make disclosure in a particular proceeding undesirable.¹⁷¹

Chief Justice Laskin argued that the same approach should be taken in a Royal Commission of Inquiry where there is a public interest that goes beyond any particular case, and the purpose is to make recommendations aimed at legislative reforms. In this situation Justice Krever was investigating breaches of confidentiality supported by legislation and regulation.¹⁷² The names of the RCMP informers were crucial to the Commission,

and Chief Justice Laskin did not believe that the counsel for the Solicitor General and the RCMP had provided sufficient evidence to support their claim that the police informer privilege should be applied in this case and the names of the informers should not be disclosed. ¹⁷³

But it is not enough just to encourage courts to use this approach. What is needed is amendments to the Access to Information Act that would specifically direct courts to weigh all relevant disclosure interests involved in any discretionary power to withhold information.

Where there is a clear statutory basis for interest balancing, there are signs that the Supreme Court of Canada is prepared to use this approach liberally. In Dagg, ¹⁷⁴ the Court dealt with the issue of confidentiality and access to government information. The issue was whether the information contained in the Minister of Finance's personnel logs constituted "personal information" within the meaning of s.3 of the Privacy Act, ¹⁷⁵ and whether the Minister failed to exercise his discretion properly in refusing to disclose the requested information. ¹⁷⁶ The majority of the Supreme Court ¹⁷⁷ decided that the information contained in the logs was not personal information as defined under s.3 of the Privacy Act. ¹⁷⁸ The majority also said that the Minister had erred by placing on the appellant the burden of demonstrating that the public interest in disclosure outweighed any privacy interest. ¹⁷⁹

They pointed out that s.8 of the Privacy Act does not require that a burden of proof be placed on an individual who is requesting information. Instead, it simply says that the Minister must be satisfied that the public interest in disclosure clearly outweighs privacy.¹⁸⁰

Speaking for the four dissenting judges, Justice La Forest disagreed.¹⁸¹ He argued that the wording of the definition of "personal information" under s.3 of the Privacy Act was broad enough to include the personnel logs.¹⁸² Justice La Forest said, "the language is deliberately broad and entirely consistent with the great pains that have been taken to safeguard individual liberty."¹⁸³ He also said that it was a reasonable expectation to employees that sign-in books would not be revealed to the general public.¹⁸⁴ A reasonable person would not expect strangers to have access to detailed systematic knowledge of an individual's location during non-working hours, even if that location is his or her workplace.¹⁸⁵

In Dagg, the Supreme Court was confronted with a somewhat similar dilemma to that which faced the Krever Commission. Both were faced with the issue of public access to information. However, in Dagg the Court was faced with competing public and private interests - whether the public's interest in access or the employee's right of privacy should prevail. On the other hand, although individual privacy was a background issue for the Krever Commission,

the Krever Commission was faced with competing public interests - the public interest in access and the public interest in effective law enforcement and national security.

The Dagg case is important because it contains the first decision by the Supreme Court of Canada under the Access to Information Act.¹⁸⁶ Whereas the Federal Court has restricted itself to a formalistic approach to the act,¹⁸⁷ the Supreme Court of Canada, both the majority decision¹⁸⁸ and the dissenting decision,¹⁸⁹ demonstrate a willingness by the Court to balance public interest in access to information and privacy. The Court's acknowledgment of the importance of privacy is important, for if a court does not keep in sight the intrinsic value of privacy,¹⁹⁰ the right to privacy will be supplanted by other claims. When making decisions regarding the disclosure of information, a court has to balance principles of access to information and privacy, as well as the need for due process and the effective administration of law. A court also has to examine the evidence supporting the claims for refusal to disclose information based on national security and police informer privilege. It might seem a Herculean task to untie such a Gordian knot. In the task of trying to balance the relevant public and private interests, there may be no ultimate "answer". Nevertheless, in the Health Records case, Chief Justice Laskin demonstrated the advantage of at least addressing a broader range of questions.

The courts can also help Royal Commissions and public inquiries to obtain evidence from witnesses who refuse to testify. In the case of the Krever Commission, members of the Ministry of Health refused to participate in the Commission's hearings for fear of being held accountable for acts of wrongdoing.¹⁹¹ The Supreme Court in R. v. S.(R.J.) and Branch devised a two-stage analysis that balanced the state's need to obtain evidence for a valid public purpose and the individual's right to remain silent and to have a fair trial.¹⁹² The first stage of the analysis is to consider the nature and public importance of the proceedings, the purpose for which the compelled testimony is sought, and the likely importance of the testimony.¹⁹³ In the situation of public inquiries the courts must look at the statute under which the inquiry was authorized and the terms of reference.¹⁹⁴ If the overall purpose reveals an illegitimate purpose as in Starr,¹⁹⁵ then the witness will be exempted from testifying. If the purpose of the inquiry is legitimate then the witness will have to testify. The second stage of the analysis requires the court to balance the interest of the witness against the interest of the state in receiving the required evidence. The result of the balancing will depend upon the circumstances of each case.¹⁹⁶ In some cases, it may have to be supplemented by the more specific balancing requirements of the Canada Evidence Act.

This general common law test was applied by the Supreme Court in Phillips, a case which involved two mine managers who were charged with criminal offences in connection with the explosion at the Westray Coal Mine. The Court said that the Westray Inquiry into the mining explosion was a legitimate inquiry of substantial public importance.¹⁹⁷ Under the second stage of the analysis the Court said that without the testimony of the two managers the work of the Inquiry would be severely impaired.¹⁹⁸ Not having the two testify would aggravate public cynicism about the ability of the government to investigate the circumstances of the disaster properly.¹⁹⁹ The Court also said that there are protections available to an accused compelled to testify before a public inquiry.²⁰⁰ The Court decided that the two mine managers should be compelled to testify before the Inquiry. They were not being called to demonstrate their criminal guilt. The reason for their appearance was to obtain evidence that was vital to the objectives of the Inquiry.²⁰¹

The Supreme Court's decision in Phillips recognizes the value of Royal Commissions in holding public institutions accountable for their actions. The decision also points out that Royal Commissions and the Charter provide protections for witnesses appearing before commission and inquiry proceedings. At the same time, the decision acknowledges that additional measures may be

needed to protect the rights of witnesses. The test formulated by the Court in Phillips is designed to balance the need to protect the rights of witnesses against a Royal Commission's need to fulfill its public mandate in investigating acts of wrongdoing.

Because Phillips relates to the common law approach to obtaining evidence from witnesses at inquiry hearings, it is unfortunate that this decision was not available at the time of the Krever Commission. The Krever Commission was a legitimate inquiry investigating an issue that was of dominant public concern. The purpose of the Commission was not to incriminate individuals,²⁰² or to obtain evidence for prosecution.²⁰³ Witnesses who testified received protection under the Canada Evidence Act and the Ontario Public Inquiries Act. The objectives of the Commission were to review legislation and regulations about confidentiality of health information, and to make recommendations on how confidentiality could be preserved.²⁰⁴ But the Commission was also given a mandate to investigate acts of negligence and misconduct.²⁰⁵ In these treacherous waters, where negligence and criminal liability flow into each other, the decision in Phillips could have been very helpful to the Krever Commission.

CONCLUSION

It is important that the courts assist Royal Commissions in obtaining access to government information. The assistance of

the courts is like the fourth leg of a table, the other legs being amendments to the Canada Evidence Act, amendments to the federal and provincial information acts, and the implementation of whistle-blowing legislation. Solutions have to be found to give Royal Commissions and public inquiries the support they need to access confidential information. Better access is required to government information used in the formulation of public policy where secrecy cannot be justified on the grounds of public safety. At the same time, the government must respect and protect privacy rights and other forms of confidentiality that fall outside government activities. This thesis argues that the Krever Commission lacked sufficient powers to complete its mandate. However, giving the Commission more powers would not have completely resolved its problems. The solution also lies with government and its commitment to make information more accessible. Government cannot hide behind the shield of national security and claims of police informer privilege. In the aftermath of the Somalia Inquiry and the Tainted blood scandal, it does not appear that government will be changing its practices soon. Without government's support, the four-legged table will collapse. What will be left is a pedestal stand, with the courts the main support for access to information. However, as the Health Records case has shown, Royal Commissions and public inquiries cannot rely on the courts alone for the support they need.

Endnotes for Chapter Four

- 1 See Introduction at 3.
- 2 Justice La Forest wrote the dissenting decision for Justices L'Heureux-Dubé, Gonthier and Major JJ.
- 3 Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 [hereinafter Dagg]. The decision was 5 to 4. Justice Cory wrote the majority decision for Justices Sopkina, McLachlin, Iacobucci JJ. and Chief Justice Lamer. La Forest J., dissenting spoke for himself and L'Heureux-Dubé, Gonthier, and Major JJ.
- 4 Ibid. at 405.
- 5 See Chapter Two at 48-51.
- 6 Canada Evidence Act, R.S.C. 1985, c. C-5 [hereinafter Canada Evidence Act].
- 7 Canada Evidence Act, supra note 6 at s.37.
- 8 Access to Information Act, S.C. 1980-81-82-83, c.111 [hereinafter Access to Information Act]. Section 4 of the Access to Information Act says that subject to this Act, every citizen or resident of Canada has a right of access to government information. The Act does not apply to government departments, agencies or institutions.
- 9 The Ontario information act already contains such a provision. See Freedom of Information and Protection of Privacy Act, S.O. 1987, c.25, s.11(1) [hereinafter Freedom of Information and Protection of Privacy Act]. Under s.11(1) of the Act a government head shall disclose any record to the public if the head has reasonable and probable grounds to believe that it is the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

- 10
Supra note 8 and 9.
- 11
Bill C-208, An Act to amend the Access to Information Act, 1st Sess., 36th Parl., 1997.
- 12
For the purpose of this thesis whistle-blowing is defined as the overt or covert disclosure of government information about real or anticipated government wrongdoing to persons outside a government organization. The term whistle-blowing has been defined in various ways. At its most general level whistle-blowing is the disclosure by public servants of confidential information to the public about acts of government wrongdoing. However, there is disagreement about whether the leaking of government information is a form of whistle-blowing, and if whistle-blowing can occur within a government organization. For a brief discussion about the debate on the definition of whistle-blowing see Kenneth Kernaghan, "Whistle-blowing in Canadian governments: ethical, political and managerial considerations" (1990/91) 22(1) Optimum: The Journal of Public Sector Management at 34 [hereinafter Kernaghan].
- 13
R. v. S. (R.J.), [1995] 1 S.C.R. 451. See Introduction at 9.
- 14
British Columbia Securities Commission v. Branch, [1985] 2 S.C.R. 3 [hereinafter Branch].
- 15
Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995], 2 S.C.R. 97 [hereinafter Phillips].
- 16
Solicitor-General of Canada et al. v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario et al. (1981), 128 D.L.R. (3d) 193 (S.C.C.) [hereinafter Health Records case]. See Chapter Three at 80-90.
- 17
Quebec (Attorney General) v. Canada (Attorney General) (1978), [1979] 1 S.C.R. 218. See Chapter Three at 65-66.

18

Canada, Information Commissioner of Canada, Annual Report of the Information Commissioner of Canada 1996-1997 (Ottawa: Supply & Services, 1997) at 12. See also Peter Desbarats, Somalia Cover-up: A Commissioner's Journal (Toronto: McClelland & Stewart, 1997) at 61-62, 80-81, 90-92, 96-97 and 116-119.

19

Ibid. Annual Report.

20

The Canada Evidence Act sections 37-39 applies only to the disclosure of government information.

21

Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario, Report of the Commission of Inquiry into the Confidentiality of Health Information (Toronto: Queen's Printer, 1980) [hereinafter Krever Report].

Since Justice Krever released his Report legislative changes have occurred. Section 38(4) of the Health Insurance Act, R.S.O. 1990, c. H.6 which governs the release of medical information for the purpose of reviewing allegations of professional misconduct has been repealed. (See Chapter Two at 46). This section has been replaced by the An Act to Achieve Fiscal Savings and to Promote Economic Prosperity through Public Sector Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda, S.O. 1996, c.1, Schedule H Amendments to the Health Insurance Act and the Health Care Accessibility Act, s.32(4). This new section clarifies which information can be provided by OHIP. This section stipulates that information shall not be disclosed if the General Manager believes that the information is not relevant for the purpose or reviewing allegations of a physician's incompetence or acts of professional misconduct.

Other legislation such as the Regulated Health Professions Act, S.O. 1991, c.18 include provisions for protecting the confidentiality of health information. The Ontario government has issued two discussion papers on the issue of protecting the confidentiality of health information. The first paper Ontario-Principles for Proposed Legislation on Health Care Information Access and Privacy was released by the Ontario Ministry of Health in 1992, but was not released to the public.

For a summary of the proposals see Heather Mary Hobart, "A Legislative Proposal Addressing the Access to and Disclosure of Health Information" (LL.M. Thesis, Dalhousie University, 1995 [unpublished]). The second paper was released by the former Minister of Health Jim Wilson in Toronto in 1996. The Minister of Health admitted that despite legislative reforms there is still no protection from the disclosure of an individual's entire health record in open court, and that very little exists that regulates all aspects of the creation, storage and disclosure of health information. See "Focus on Confidentiality of Health Care Information" Health Law in Canada (1997) 17(3) at 67-69.

22

Krever Report, supra note 21, vol.1, c.2 at 15-16.

23

Ibid. at 16.

24

Interview with Ms. Wendy Burgess, OHIP Registration and Claims Branch, Kingston, Ontario (9 October 1997). I was informed that a written response could be prepared for me. But this would take time and would involve consultation with OHIP's legal branch to ensure that confidentiality within OHIP was not breached.

25

Ibid.

26

Government can pass legislation that can establish objectives, for example the purpose of the Access to Information Act is to provide citizens with a right of access to information. Government can also create offences, for example making it an offence to destroy government documents, but it is difficult for government to pass legislation that can effectively control the behaviour of government employees.

27

See Introduction at 2.

28

See Chapter Three at 61.

29

See Chapter Three at 65-67.

30

Ibid. at 65.

31

Ibid. at note 22.

32

Ibid. at note 34.

33

Ibid.

34

Ibid. at 67.

35

Ibid. at 67-78.

36

Ibid. at 70.

37

Ibid. at 71.

38

See Chapter Two at 42-45. See also Chapter Three at 69.

39

Health Records case, supra note 16 at 213. See also Chapter Three at 85.

40

Health Records case, supra note 16 at 214-215.

The position taken by the Solicitor General and the RCMP reflected the position taken by the Royal Commission on Security which said, "We have little sympathy with the extreme suggestions that inquiries about persons should not be undertaken because of the individual's "right of privacy". See Chapter Three at 69.

41

Health Records case, supra note 16 at 200.

42

Ibid. at 205. See also Chapter Three at 81.

43

See Chapter Three at 83.

44

Ibid.

45

Ibid. at 79.

46

Ibid. at 80.

47

Ibid. at 84.

48

Ibid. at 84-85.

49

Ibid. at 74.

50

Ibid. at 76.

51

Ibid. at 79.

52

Ibid. at 83.

53

Ibid.

54

Jeffrey Harris, "The Solicitor General for Canada et. al. v. The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario: Opening the Files for the RCMP" (1983) 12(3) Man. L.J. 399 [hereinafter Harris]. See Chapter Three at 86.

55

Dennis B. Evanson, "The Development and Power of the Informer Privilege: The Health Records Inquiry Case" (1983) 9 Queen's L.J. 207 [hereinafter Evanson] See Chapter Three at 86.

56

See Chapter Three at 86.

57

Harris, *supra* note 54 at 404.

58

Evanson, *supra* note 55 at 225.

59

See Chapter Three at 76. The RCMP testified there was no use of coercion or pressure used to obtain information from physicians and hospital employees. See Health Records case, *supra* note 16 at 217.

60

See Chapter One at 22.

61

Ibid.

62

See Chapter Four at 154.

63

See Chapter Three at 92.

64

Ibid. at 94-95.

65

Ibid. at 91 and 94.

66

Ibid. at 96-100.

67

Ibid. at 100-101.

68

Ibid. at 97-98.

69

Ibid. at 99-100.

70

Ibid. at 90-92.

71

Ibid. at 90-91.

72

Ibid. at 103-104.

73

Ibid. at 66.

74

Ibid. at note 3.

75

Supra note 15.

76

Supra note 6.

77

Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10.

78

Canada (Attorney General) v. Sander, [1994] B.C.J. No.998, (B.C.C.A.) at para. XXIII (QL).

79

Canada Evidence Act, supra note 6. Section 37(1) says a minister of the Crown may object to a disclosure before a court, orally or in writing, that information should not be disclosed on the grounds of a specified public interest.

80

In situations not involving national security or international relations, objections will be heard by a superior court.

81

Canada Evidence Act, supra note 6. Section 38(1) says that where an objection to the disclosure is made under subsection 37(1) on grounds that the disclosure would be injurious to international relations or national defence or security, the application may be determined in accordance with subsection 37(2) only by the Chief Justice of the Federal Court, or an other judge of the Court designated by the Chief Justice.

82

See Chapter Three at 84. These were the factors taken into consideration by Chief Justice Laskin in the Health Records case. For other factors see Chapter Four at 146.

83

See Chapter Two at 48-50.

84

Supra note 8.

85

See Chapter Four at 147.

86

See Privacy Act, being Schedule II of the Access to Information Act, S.C. 1980-81-82-83, c.111 [hereinafter Privacy Act] and (Ontario) Freedom of Information and Protection of Privacy Act, s.21 and Part III Protection of Individual Privacy.

87

Colin McNairn and Christopher D. Woodbury, Government Information: access and privacy (Toronto: Caswell, 1989) (looseleaf) at 3-1.

88

Access to Information Act, supra note 8. Section 15 says the head of an institution may refuse to disclose any record requested under this Act if there are reasonable grounds the disclosure would be injurious to the conduct of international affairs, the defence of Canada or the detection, prevention or suppression of subversive or hostile activities. Under s.16 of the Act the head of a government institution may refuse to disclose any government record, if there is a reasonable expectation that the disclosure of the information would be injurious to the enforcement of any law of Canada or a province, or the investigation into criminal activities or activities suspected of constituting a threat to Canada's security.

Sections 14 and 16 of the Ontario Freedom of Information and Protection of Privacy Act, supra note 9, also makes specific reference to law enforcement, defence and national security. Under s.14 a head may refuse to disclose a record where the disclosure could reasonably be expected to interfere with law enforcement. Section 16 says a head may refuse to disclose any record where the disclosure could reasonably prejudice the defence of Canada or be injurious to the detection or suppression of espionage, sabotage or terrorism.

89

Privacy Act, supra note 86 at s.3. "Personal information" means information about an identifiable individual that is recorded in any form.

90

(Ont.) Freedom of Information and Protection of Privacy Act, supra note 9 at Part III.

91

Access to Information Act, supra note 8 at s.41. Under the (Ont.) Freedom of Information and Protection of Privacy Act, s.51 the Information Commissioner has the power to authorize a mediator to investigate the circumstances of an appeal and to try to effect a settlement of the matter under the appeal.

92

Access to Information Act, supra note 2 at s.48.

93

Ibid. at s.49.

94

Ibid. at s.50.

95

Ibid. s.15(1): "The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada ... or the detection, prevention or the suppression of hostile activities ..."

96

See Chapter Three at 83-84.

97

Ibid. at 84-85.

98

See Chapter Three at 71.

99

This would include privileges such as national security.

- 100
See Chapter Four at 143.
- 101
See Chapter Two 44-45. See also Chapter Three at 66.
- 102
See Chapter Three at 78-79.
- 103
See Harris at Chapter Three at 86. See also Chapter Four at 136.
- 104
Ibid.
- 106
See Chapter Three at 85.
- 107
See Chapter Four at 140-141. The Law Reform Commission of Canada has also made a similar proposal. See Law Reform Commission of Canada, Report on Evidence (Ottawa: Information Canada, 1975) (Chair: E. Patrick Hartt) at 82.
- 108
See Chapter Four at 141.
- 109
Ibid.
- 110
See Chapter Three at 85.
- 111
Khan v. Canada (T.D.), [1996] 2 F.C. 316 (F.C.T.D.) at 328.
- 112
Supra note 18.
- 113
Supra note 19.

114
Order-in-Council 3566/77, s.2 as reprinted in Krever Report, supra note 21, vol. 1 at vi. See also Introduction at 1.

115
See Chapter Three at 90-103.

116
Supra note 8.

117
See Chapter Four at 142.

118
Canada, Information Commissioner of Canada, Access to Information: A Critical Review (Ottawa: Supply and Services, 1994).

119
Access to Information Act, supra note 8 at ss. 18-20 contain a public interest override that applies to commercial, financial and technical information.

120
Supra note 118 at 29.

121
Supra note 9.

122
Supra note 118 at 29.

123
Supra note 87 at 3-4.

124
Ibid. at 3-5.

125
Supra note 118 at 29.

126
See Chapter Introduction at 3.

127
Access to Information Act, supra note 8 at s.67(1).

128

Ibid. at s.67(2).

129

(Ont.) Freedom of Information and Protection of Privacy Act, supra note 4 at s.61(d)-(f). There are no sanction or penalties under the Canada Evidence Act for the destruction or the refusal to produce documents.

130

See Bill C-208, An Act to amend the Access to Information Act, 1st Sess., 36th Parl., 1997 and Bill C-264, An Act to amend the Access to Information Act, 1st Sess., 36th Parl., 1997.

131

See Bill C-208, s.1 and Bill C-264, s.25.

132

Supra note 18.

133

Jim Bronskill, "The cost of betraying public trust: Government Agrees those who alter documents have to be punished" The [Montreal] Gazette (8 December 1997) at A1.

134

Sheldon Alberts, "House passes backbenchers MP's no-shredding bill" The National Post (17 Novemeber 1998) at A7.

135

Ibid.

136

Ibid.

137

Ibid.

138

See Chapter Three at 94-95.

139

Ibid. at 98.

140

Supra note 138.

141

Supra note 12.

142

Inge Hansen, "Freedom of Expression Whistleblowing and the Canadian Charters" (1990) 13 Canadian Parliamentary Review 30 at 31.

143

Ontario Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees (Toronto: Ministry of the Attorney General, 1986) at 35 [hereinafter Report on Political Activity].

144

Canada, Public Service Employment Act, R.S.C. 1985, c. P-33, s.23, sch.III. Under this section a federal public servant must swear an oath of secrecy affirming that without due authority she or he will not disclose any matter that comes to her or his knowledge in the course of her or his employment. Ontario public servants must take a similar oath under the (Ontario) Public Service Act, R.S.O. 1990, c. P.47, s.10(1).

145

Criminal Code, R.S.C. 1985, c. C-46, s.122 says every official who, in connection with his or her duties, commits a fraud or a breach of trust is guilty of an indictable offence, and is liable to imprisonment for five years. Under s.46(2)(b) everyone who without lawful authority, communicates or makes available military or scientific information that may be used to injure or harm the state is guilty of treason.

146

Official Secrets Act, R.S.C. 1985, c. O-5, s.4(1). Everyone is guilty of an offence, who wrongfully communicates confidential information that has been entrusted in their possession that relates to or is used in a prohibited places such as a defence establishment.

147

Hansen, supra note 142 at 31.

148

Supra note 8.

149

Whistleblowers Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended at 5 U.S.C. § 20 (1989)).

150

Kernaghan, *supra* note 12 at 41.

151

Report on Political Activity, *supra* note 143 at 313.

152

Ibid.

153

Hansen, *supra* note 142 at 32.

154

Report on Political Activity, *supra* note 143 at 351. The Ontario Law Reform Commission recommended that an application by the Special Counsel for an order that confidential information should be disclosed to the public be heard by the Supreme Court.

155

See Chapter Three at 94-95.

156

R. v. S. (R.J.), [1995] 1 S.C.R. 451.

157

British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3.

158

See at 161.

159

See at 140.

160

Ibid.

161

Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce, [1984] 1 F.C. 939 (F.C.T.D.).

162

Information Commissioner (Canada) v. Prime Minister Canada
(1992), 57 F.T.R. 180 (F.C.T.D.).

163

X. v. Canada (Minister of National Defence), [1992] 1 F.C. 77
(F.C.T.D.) [hereinafter X. v. Canada (Minister of National
Defence)].

164

Ternette v. Canada (Solicitor General) (1991), 86 D.L.R. (4th)
281 (F.C.T.D.) [hereinafter Ternette].

165

In X. v. Canada (Minister of National Defence) the applicant
was granted partial access to the requested information.
Justice argued that the respondents lacked reasonable grounds to
exempt material post dated 1942 and granted the applicant access
to this information.

166

X. v. (Canada) Minister of National Defence, supra note 163
at 106.

167

Ibid.

168

Ibid. at 107.

169

Ternette, supra note 164 at 283.

170

Ibid. at 300.

171

See Chapter Three at 84.

172

Ibid. at 85.

173

Ibid.

174

Supra note 3.

175

Privacy Act, supra note 86 at s.3. "Personal information" is defined as information about an identifiable individual recorded in any form.

176

Dagg, supra note 3 at 404.

177

Supra note 3.

178

Dagg, supra note 3 at 415.

179

Ibid. at 416.

180

Ibid.

181

Supra note 2.

182

Dagg, supra note 3 at 436.

183

Ibid.

184

Ibid. at 437.

185

Ibid.

186

Cristin Schmitz, "Mixed results for access in S.C.C.'s first decision under privacy legislation" (July 1997) 17 Lawyer's Weekly No. 11, 1(2).

187

See Chapter Four at 156.

188

Dagg, supra note 3 at 412.

189

Ibid. at 413.

190

See Chapter Two at 42-44.

191

See Chapter Three at 94-95.

192

Phillips, supra note 15 at 146.

193

Ibid.

194

Ibid. at 147.

195

See Chapter One at 22.

196

Phillips, supra note 15 at 148.

197

Ibid. at 150.

198

Ibid.

199

Ibid. at 151.

200

Protections are available under the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, ss.7, 11 and 13, the Canada Evidence Act, and the (Ontario) Public Inquiries Act. See Chapter One at 25.

201

Phillips, supra note 15 at 155.

202

See Chapter Three at 68 and 95.

203

Krever Report, supra note 21, vol.1, c.1 at 3.

204

See Chapter Two at 42.

205

Ibid.

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