IN THE MATTER OF an Inquiry pursuant to the ***Public Inquiries Act*** **2006**, SNL 2006, c. P-38.1

- and –

Pursuant to the ***Rules of Practice and Procedure*** of the Commission of Inquiry of the Muskrat Falls Project

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Submission of Her Majesty in Right of Newfoundland and Labrador

August 9, 2019

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1. Commissions of inquiry are a method of investigation that executive branches of government infrequently establish. Their purpose is usually to shed light on a matter of public importance that evokes passion in our communities materially greater than that generally associated with day-to-day political issues.

2. The events that a commission of inquiry examines are usually ones that raise questions about the very legitimacy of the democratic institutions for which we rightfully take great pride and for which are the envy of the majority of people in the world.

3. The Muskrat Falls Project ("MFP" or "Project") has prompted such a reaction. Many believe that this Project represents an existential threat to the Province. That sentiment is sufficiently widespread to make clear that The Commission of Inquiry Respecting the Muskrat Falls Project (the "Inquiry") is needed to explain the sequence of Project events that have created the challenges and sacrifices that are now confronting the people of the Province.

4. This Inquiry is needed to satisfy the public interest necessity of providing answers to the many questions that the MFP has raised.

5. The Lieutenant Governor in Council ("LGIC") established this Inquiry on November 20, 2017 pursuant to Order in Council 2017-339. Section 3 of the *Public Inquiries Act 2006* grants LGIC the power to establish a commission of inquiry.

6. However, the power to create a commission of inquiry may also be a prerogative power of the Crown that would be exercised by the executive branch of government. Legislation, such as the *Public Inquiries Act*, was enacted by legislatures to ensure that the power existed for "... commissioners to call and enforce the attendance of witnesses." (**Kelly v. Mathers** 1915 CarswellMan 163 Manitoba Court of Appeal). (Tab 1) A commission of inquiry established pursuant to the prerogative power did not possess the power of subpoena. A public inquiry act was necessary not to create the authority to establish a commission of inquiry but to create the authority necessary to subpoena witnesses.

7. Therefore, it is likely that the original authority for the legal basis of a commission of inquiry was the authority of the Crown exercised as a prerogative power. Commissions of inquiry were originally not created by legislatures but by the Crown or monarch and, subsequently, by the executive branch of government exercising prerogative powers.

8. Section 3 of the P*ublic Inquiries Act,* requires the LGIC to designate a minister responsible for the inquiry, and Section 4 provides for the Commission to deliver its final report to the responsible minister and for the minister to make the report public. The Order in Council, in this instance, directs the Commission to deliver the report to the Minister of Natural Resources. The House of Assembly could have specified that the report be delivered to the House itself when the *Public Inquiries Act* was enacted. However, the authority given to LGIC in section 4 supports the

notion that the establishment of a commission of inquiry is the exercise of prerogative power and in the domain of the executive branch of government.

9. One of the key characteristics of a commission of inquiry is its independence. Although established and funded by the executive branch of government, the commission of inquiry is entirely independent of executive influence from the executive branch. It does not exercise delegated authority; it is a government-funded, independent investigator with authority, resources and powers to obtain whatever information that it determines is necessary to enable it to fulfill its investigative and reporting mandate. Another key characteristic is the breadth of its investigative powers.

10. The independent nature and the breadth of the investigative powers of a commission of inquiry was considered in a ruling of the *Commission of Inquiry Concerning Certain Activities of the RCMP* also known as the "McDonald Inquiry". (RCMP Inquiry)(1978) 94 D.L.R. (3d) 365). (Tab 2) The following excerpt from the ruling is lengthy but it may be helpful to the Commission:

> *12 The Governor in Council, in creating such a Commission as this, asks this newly and specially created unit of the Executive branch of Government to examine some particular aspects of the Government (i.e., the Executive). The Executive branch, through its chosen Executive instrument, is examining itself. This must not be forgotten by those who expect the Commission to do as they wish and as it wishes (assuming they are one and the same). The Commission is created by the Executive (the Governor in Council) and its terms of reference can be altered -- indeed, its very existence can be abrogated -- by another Order in Council at any time.*

> *13 On the other hand, a Commission of Inquiry is not a unit of the Executive branch of Government like other Government Departments and agencies. Short of direction by Order in Council, it cannot be directed by a Minister or even by the Cabinet to interpret its terms of reference in a particular manner, or to follow this procedural course or that. It is for the Commissioners to interpret the instrument that gave birth to the Commission.*
>
> *14 Moreover, the Commissioners, unlike other arms of the Executive branch, are by statute given powers which members of the Executive branch of Government -- even "Royal Commissions" appointed under the Great Seal but not pursuant to statute -- do not enjoy: the power to summon witnesses, and to require them to give evidence on oath or affirmation, and to produce documents and things (all under s. 4 of the Inquiries Act), and "the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in a court of record in civil cases" (s. 5). These are extraordinary powers, ordinarily available neither to the common citizen nor to members of the Government service. These powers set commissioners appointed pursuant to Part I of the Inquiries Act apart from the remainder of the Executive.*

11. The primary role of a commission of inquiry is essentially to report on the facts and provide recommendations on the basis of those facts to the decision-making entity that created the Inquiry.

12. A commission of inquiry does not decide legal issues or matters. The Commission's role is somewhat analogous to the role of an expert retained to investigate and advise on a particular matter in issue. The "administrative" nature of the role of a commission of inquiry was commented upon by Commissioner McDonald in the McDonald Inquiry Ruling discussed earlier (Tab 2):

> *11 When the Governor in Council deemed it "expedient" to cause such an inquiry to be made, it created an organism of the Executive branch of Government to "investigate", "inquire", "report the facts" and "to advise" with respect thereto. The Commission is not a Court. It is not a branch of the judiciary. It fulfils Executive or administrative*

> *functions. As Cattanach, J., observed in* Copeland v. McDonald, Rickerd and Gilbert *(Federal Court of Canada, August 4, 1978), the gulf is wide between "the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative notwithstanding that both hold hearings".*

13. The LGIC established this investigation as a commission of inquiry. The executive branch of government could have chosen a different method of investigating the circumstances of the MFP. Ed Ratushny at page 114 of his text "The Conduct of Public Inquiries", (Tab 3) identifies five other types of investigations that the executive branch could have been created to investigate the Muskrat Falls Project. A commission of inquiry was chosen for a number of reasons but two of the paramount reasons were independence of a commission of inquiry and the transparency of its process. Ed Ratushny at page 141 of his text (Tab 3), discusses the source of the commission of inquiry's independence.

> *Once a commission of inquiry has been established, the interpretation of its terms of reference is the role of the commissioner rather than the government. This is so even though the commission owes its entire existence and its mandate to the government.*

14. The Crown's interest is this Inquiry is that a final report is published which the people of the Province can accept as a thorough and carefully-considered explanation of what happened with the MFP. To that end, it is important that the findings and recommendations in the final Commission Report are independent and that they are perceived as independent and not subject to any political or commercial influence. The desired outcome is a Report containing findings of fact and recommendations in which the public can have confidence.

15. The role adopted by the Crown at the commencement of this Inquiry was a neutral one out of deference to the Commission's independence. The purpose of examination of witnesses by counsel for the Crown was to elicit facts which the Crown believed may be relevant to the terms of reference. The purpose of the examinations was not to suggest facts upon which the Crown would rely upon to advance a position on findings of fact or recommendations. Consistent with this approach, the Crown in this Submission will not be suggesting to the Commissioner that he not make any particular findings or recommendations. The Crown's role is to assist and not advocate.

16. In its Application for Standing before the Commission (Tab 4), the Province outlined its plan to participate in the hearing in this "neutral" manner as follows;

> *11. The Province's participation in the Inquiry would further the conduct of the Inquiry. (s. 5(2)(b) of the Act) The Province is furthering the work of the Inquiry by producing documents which are essential to the work of the Inquiry. The Province can also further the work of the Inquiry in a manner unlike any other party. The Terms of Reference focus on the operation of two related organizations: the Province and Nalcor. The Province is able to assist the Commission in understanding the operation of the Province including the relationship between the Premier's Office, Cabinet Secretariat, Government Departments and Crown Corporations.*
>
> *12. The Province's participation would also contribute to the openness and fairness of the Inquiry. The Province created this Inquiry and the Terms of Reference. The goal of the Inquiry is to grant the Commissioner the power and authority to determine how and why the Muskrat Falls Project was the project chosen to address the energy demands of Newfoundland and Labrador and also to determine why the Project's costs were higher than projected. The answers to these questions are important to the Province for many reasons, not the least of which is to address the Province's role in the creation and supply of electricity in particular and the Province's role in the economy in general. Furthermore, large projects have historically played an important part in the economy of Newfoundland*

and Labrador whether these projects were carried out by the Province or private industry. The lessons learned regarding the Muskrat Falls Project may be important to the future of the economic and political life of Newfoundland and Labrador.

17. In this Application for Standing (Tab 4) the Province also stated the following:

> *19. The Province further advises the Commission that, at the present time, the Premier and Ministers of the Crown will not apply for standing separate from the standing that may be granted Her Majesty in Right of Newfoundland and Labrador. The Premier and Ministers of the Crown understand that they are entitled to have counsel present while they are interviewed and during testimony before the Commission. Further, the Premier and the Ministers understand that counsel would also have standing before the Commission for the testimony of each of these individuals. Finally, the Premier and the Ministers wish to advise the Commission that they may subsequently apply for further standing if the need arises which need is not currently apparent. This standing would be further to the standing that they are granted as witnesses before the Commission pursuant to the Rules of Procedure.*

18. The Application recognized that the Crown is a different entity than the executive branch of government.

19. The usage of the word "Crown"..."dates from earlier times when all powers of government were vested in the monarch and were exercised by delegation from the monarch." (Hogg at Tab 5 page 10.2) In his discussion on the usage of the word Crown, Hogg suggests that the word is often used to mean government. For example, reference is made to the "Crown" prosecuting a case, expropriating property, or being sued for breach of contract. In the context of this Inquiry, the Province is using the word Crown to mean Her Majesty in Right of Newfoundland and Labrador.

20. In order to understand the meaning of the word Crown that is being applied in this submission it is necessary to consider power and authority that the Crown exercises in the political system of the Province of Newfoundland and Labrador.

21. The Crown or Lieutenant Governor enjoys prerogatives powers and these are exercised based upon convention. Prerogative powers include the power of: appointment of the Premier; dismissal of the Premier; dissolution of the House of Assembly; and prorogation of the House.

22. The Crown possesses other prerogative powers and the nature and extent of those powers are relevant considerations in the operation of government and in the judicial review of government activity.

23. For example, In *Ross River Dena Council v Canada* 2002 SCC 54 (Tab 6), the Supreme Court of Canada addressed whether the royal prerogative meant that the Crown continued to possess the power to create reserves. The Court found that the Crown still possessed a prerogative power to create reserves, and stated at paragraph 54 of the judgement that:

> *The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute [has] occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute".*

24. The Court also observed that the Crown, in a sense, assents to the diminution of its prerogative powers because the assent of the Crown is necessary to enact the very statutes that eliminate or circumscribe those powers.

25. Generally, the prerogative powers possessed by the Crown are exercised by the executive branch of government.

26. For example, as suggested earlier, the original authority for the establishment of a commission of inquiry likely was, as was the case with reserves, the authority of the Crown exercised as a prerogative power.

27. Legislation, such as the *Public Inquiries Act*, were enacted to ensure that the power existed for "... commissioners to call and enforce the attendance of witnesses." (Kelly v. Mathers 1915 CarswellMan 163 Manitoba Court of Appeal) (Tab 1). The power to create a commission of inquiry existed as a prerogative power. The statute did not create the authority to establish a commission of inquiry and the *Public Inquiries Act* may not have extinguished that prerogative power. Convention dictates that the Crown is unlikely to exercise the power to create a commission of inquiry except when the executive branch of the government does so on the Crown's behalf.

28. Generally, the powers belonging to the Crown are exercised through an executive committee of ministers (Executive Council), chosen and led by the Premier, and "responsible" to the House of Assembly for their policies and for the activities of government. Nonetheless, the existence of a prerogative power remains a consideration in the judicial review of executive action.

29. The Province submits that the Crown's approach to the exercise of its powers, prerogative and otherwise, is informed by the principles and conventions upon which our democracy is based. Similarly the Crown's approach to this Inquiry is similarly informed.

30. Newfoundland and Labrador is a parliamentary democracy in which the law is the supreme authority. Parliament in the Province consists of two distinct elements: the Crown and the legislature. Legislative power is vested in "Parliament"; to become law, legislation must be assented to by each of Parliament's constituent parts (i.e., the Crown, and the legislature).

31. Before a Bill becomes law, the Crown must assent to the Bills that are passed by the legislature. Before an Order in Council has the force of law, the Crown must also assent to orders issued by the executive branch of government. The Crown is acting as Lieutenant Governor in Council when it assents to orders issued by Executive Council.

32. The Crown, by convention, assents to the legislation it is asked to consider both statutes and regulations. However, convention also provides that the Crown only assents to legislation from the legislature if a majority of the members of the House voted for passage of the Bill. With respect to legislation (i.e. regulations) issued by the executive branch of government, convention provides that the Crown assents to legislation issued by the executive branch of government if the executive branch of government enjoys the confidence of the House or the legislature.

33. The Crown remains an essential and important institution in the Province's political system. The system operates with little attention because, generally, the actors in our system of government understand and accept the conventions which underpin our particular type of democracy. The primary interest of the Crown is the preservation of our political institutions through which democracy is practiced.

34. The role adopted by the Crown at the commencement of this Inquiry was a neutral one out of deference to the commission of inquiry's independence and the desired outcome of this commission of inquiry: a final report which is received by the citizens of the Province as an independent and authoritative account of the Project.

35. Therefore, in the context of this Inquiry, it is in the interests of the Crown that the Commission writes and publishes a final report which the citizens of the Province perceive to be independent and authoritative. An independent and authoritative report is the desired outcome of this exercise of a prerogative power.

36. This approach to this Inquiry may be questioned from time to time by some including the Commission itself. However, the Crown must interpret its own role in relation to this Inquiry. That role is not to shape or influence the findings of the Commission. The role of the Crown is to preserve political institutions upon which democracy is practiced.

37. In conclusion, the commission has heard a remarkable amount of information in a short period of time. It is now engaged in the daunting prospect of reporting on what happened with this Project and how its consequences might be managed, going forward to mitigate their impact on the people of the Province. The burden is a heavy one. As the Commission begins the final stages of this process, the Crown asks that the Commission consider the following quote from the historian E.H. Carr in his book "What is History" in its deliberations (Second Edition, Tab 7).

> *The facts of history are indeed facts about individuals, but not about actions of individuals performed in isolation, and not about the motives, real or imaginary, from which individuals suppose themselves to have acted. They are facts about the relations of individuals to one another in society and about the social forces which produce from the actions of individual results often at variance with, and sometimes opposite to, the results which they themselves intended.* (Page 129)

The foregoing is respectfully submitted on behalf of Her Majesty in Right of Newfoundland and Labrador this 9th day of August, 2019.

Peter Ralph, QC
Co-Counsel

Nick Leamon
Co-Counsel

TAB 1

1915 CarswellMan 163
Manitoba Court of Appeal Go to

Kelly v. Mathers

1915 CarswellMan 163, 23 D.L.R. 225, 25 Man. R. 580, 32 W.L.R. 33, 8 W.W.R. 1208

Kelly, et al. (Plaintiffs) Appellants v. Mathers et al (Defendants) Respondents

Howell, C.J.M., Richards, Perdue and Cameron, JJ.A.

Judgment: August 2, 1915

Counsel: *E. Anderson*, K.C., and *W.A.T. Sweatman*, for plaintiffs, appellants
C.P. Wilson, K.C., *J.B. Coyne* and *H.T. Symington*, for defendants, respondents

Subject: Public; Constitutional; Evidence

Related Abridgment Classifications

Administrative law

X Public inquiries

Administrative law

XII Practice and procedure
XII.5 Public inquiries

Constitutional law

V Representatives of Crown
V.2 Lieutenant Governors
V.2.a General principles

Constitutional law

IX Determining constitutionality
IX.1 General principles

Evidence

XIV Privilege
XIV.7 Incriminating questions
XIV.7.a Limits of protection

Headnote

Administrative Law --- Public inquiries — Jurisdictional issues

Administrative Law --- Public inquiries — Practice and procedure — Witnesses

Constitutional Law --- Representatives of Crown — Lieutenant Governors — General

Constitutional Law --- Determining constitutionality — General

Evidence --- Witnesses — Privilege — Incriminating questions — Limits of protection — Statutory limits

Constitutional Law — Appointment of Commission by Lieutenant-Governor — Sworn Evidence — Report.

The Lieutenant-Governor-in-Council has power to appoint commissioners for the purpose of making enquiries concerning public matters, taking sworn evidence thereon and reporting the result of such enquiries.

Table of Authorities

Words and phrases considered:

COMPEL THEM TO GIVE EVIDENCE

. . . the powers given by the [*Inquiries Act*, R.S.M. 1913, c. 34] to summon witnesses and to require them to give evidence and to produce documents are beyond question, and are, as declared by c. 34, the same as those of a Court of law in civil cases. The words "to compel them to give evidence" are evidently intended to include the production of documents, which is one way, and an effective way, of giving evidence. To withhold these powers from the Commissioners would, or might, have the effect of rendering the Act nugatory. We must give the words used a fair, large and liberal, not a narrow, construction. I refer to Maxwell on Statutes, 5th ed., at pp. 576 et seq. and authorities there quoted. It is to be strongly presumed that the powers given will be exercised with discretion and with due regard for the rights of all parties interested.

Appeal by plaintiff from a judgment of Prendergast, J., 31 W.L.R. 931. Appeal dismissed, Richards, J.A. dissenting.

Howell, C.J.M.:

1 A careful reading of ch. 34, R.S.M. and the prior statutes of which it is a continuation, shows that the legislature assumed that the Lieutenant-Governor-in-Council had power to appoint Commissioners to make enquiries concerning public matters. The original Act is known as *The Public Inquiries Aid Act* 1873. This statute law has been in force in this Province in practically its present form for more than 40 years and this is the first time its power has been questioned in legal proceedings.

2 An Act of the Province of Upper and Lower Canada, 9 Vict. ch. 38, with the title "An Act to empower Commissioners for enquiring into matters connected with public business to take evidence on oath" contains the following recital:

> Whereas it frequently becomes necessary for the executive government to institute enquiries on certain matters connected with the good government of this Province.

3 The Act then proceeds to give powers to the commissioners practically in the terms of the Manitoba statute first mentioned. It, however, protects witnesses from answering questions which tend to criminate them, and this Act seems to be the progenitor of all Canadian legislation on this subject. An Act giving the same powers became by 31 Vict. ch. 38, the law of the Dominion of Canada and so continued to be the law until the revision of the statutes of Canada in 1906, when, for some reason, the procedure was changed and by ch. 104 the statute declares that the Governor-in-Council may

> whenever he deems it expedient cause enquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

4 The Act then provides that commissioners may be appointed to hold the enquiry who may summon witnesses and compel them to attend, produce and give evidence just as provided in the Manitoba statute.

5 Many of the Provinces in the Dominion and perhaps all, had statutes similar to the Manitoba statute, but since the Dominion legislation of 1906 some of the Provinces have changed their laws and adopted legislation similar to that of the Dominion.

6 In New Zealand the Governor issues commissions of enquiry without any statutory authority but simply because he is the chief executive officer, and a statute there confers power on the commissioners similar to those in the Manitoba statutes. The power to issue commissions without legislative authority is assumed there. See the language of Chief Justice Stout in *Jellicoe v. Haselden*, 22 N.Z.L.R. 349 at p. 350.

7 In New South Wales it is also by the legislature taken for granted that the Governor of the State has power to issue a commission of enquiry and by *The Royal Commissions Evidence Act* of 1901, s. 3, power is given to the commissioners to summon and examine witnesses and to punish for refusal to give evidence.

8 It is apparent after this brief review of legislation that in Canada practically ever since the establishment of responsible government and for many years past in Australia and New Zealand the legislatures have assumed that the Governor or Lieutenant-

Governor-in-Council has power to issue commissions of enquiry, and on this assumption powers are by statute given to the commissioners to call and enforce the attendance of witnesses. The Manitoba statute simply provides that upon four subjects if commissions are issued the commissioners shall have power to call witnesses and enforce their attendance. As I read the Dominion Act, it does not materially differ from the Manitoba Act. It provides that upon certain subjects the Governor-in-Council may issue a commission and in such cases witnesses shall be compelled to attend, but it does not declare that as to other matters commissions of enquiry shall not issue.

9 I see no reason why the Governor-General-in-Council might not issue a commission to enquire as to the number of people in Canada who were left-handed, the only trouble would be that there would be no power to enforce the attendance of witnesses.

10 Throughout Canada during all the time this legislation was the law, a great many very important commissions were issued, some extremely prominent and perhaps none more so than the Pacific Scandals Commission, and yet this is the first time where in a court of justice the point has been raised that the Lieutenant-Governor-in-Council has no power to issue a Commission of enquiry.

11 In New Zealand and Australia the statutes say that in all cases where commissions are issued the commissioners shall have power to enforce the attendance of witnesses and this has led to some litigation there.

12 In New Zealand there was an Act passed known as *The Commissions of Enquiry Act*, 1908 which is practically in the terms of the recent Canadian statute above referred to, that is the statute authorized in direct terms the issue of commissions for certain enquiries on certain limited subjects with power to call witnesses. In a certain case of bribery by a judicial officer a commission was issued to enquire into the matter and in some way the matter came before the Court of Appeal in *Cock v. Atty.-General*. 28 N.Z.L.R. 405. The matter was disposed of so far as the statute is concerned by holding that the subject matter of the enquiry did not come within those provided for in the second section of the statute of 1908. On p. 419 this portion of the case is disposed of as follows:

> We think, therefore, that the Governor-in-Council was not authorized by the Commissions of Enquiry Act to appoint Mr. Justice Sim to make these enquiries.

13 The matter was not, however, disposed of by holding as above, for it was argued that as the Governor-in-Council had power generally to issue Commissions and as s. 15 of *The Enquiries Act*, which was apparently a continuation of their statute first above referred to, authorized all commissioners appointed by the Governor-in-Council to compel witnesses to attend and give evidence, the witnesses were under this provision bound to attend and give evidence. On this branch of the case the court held that to issue a Royal Commission, and under it to invoke the general powers of their statute with all its drastic provisions of taking evidence and ordering payment of costs was either in violation of 16 Charles I, ch. 10, which abolished the Court of Star Chamber, or it indirectly established a new Court to investigate the charge in question and the Court decided against the validity of the Commission.

14 If I have properly grasped the reasons for judgment in that case I conclude that if the New Zealand statute had been wider and had declared that where a commission of enquiry was issued by the Governor-in-Council to investigate also a matter of the class to which the charge in that case belonged there should be power to call and examine witnesses, then I think the decision would have been the other way. In other words, the omnibus power given to enforce the attendance of witnesses in all matters where commissions are issued must be limited to matters which would not be contrary to existing law unless the statute in direct terms authorizes it.

15 The statute of New South Wales came up for judicial interpretation before the High Court of Australia by way of appeal from the State Court in the case of *Clough v. Leahy*, 2 Com. L.R. 139, wherein the law as to Royal Commissions is fully discussed.

16 In considering Australian cases it is well to keep in view the wide difference between the constitutional laws of Australia and of Canada. Apparently the Federal Government has no more powers in the former than the Federal Government of the United States. It is also well to keep in view s. 71 of *The Australian Constitutional Act* whereby it is declared that the judicial power of the commonwealth shall be vested in Federal Courts similar to Art. 3, s. 1, of the United States constitution; quite different from and more restrictive than s. 101 of *The B.N.A. Act*. We are not troubled either in

the Provinces or in the Dominion by the constitutional restrictions which became the subject of discussion in *Robertson v. Baldwin*, 165 U.S. 275.

17 In the Australian case above referred to, the Chief Justice at p. 153 states as follows:

> It has been the practice in New South Wales and I believe in most if not all parts of the British Dominions for many years for the Crown from time to time to appoint Commissioners to make enquiry ...

18 The case practically decides that the Crown may like an individual make enquiries and can do so by appointing persons by Letters Patent charged with the duty of enquiring; of course these parties so appointed have no power to take evidence on oath unless some statute gives that power and of course the persons so appointed must act lawfully. The Governor-in-Council cannot even by Letters Patent empower commissioners to act contrary to law. The learned Chief Justice towards the end of the case uses this language:

> It is not necessary to consider whether the statute enlarges the Governor's power to issue such commissions. If the view I have expressed is a correct one there is no need to enlarge it.

19 In 1902 and by amendment in 1912 the Parliament of the Commonwealth of Australia passed an Enquiry Act on the lines of the present Canadian statute above referred to. It empowers the Governor-General by Letters Patent to issue commissions

> to make enquiry into and report upon any matter specified in the Letters Patent and which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth.

20 It is to be observed that the Act provides that the legislation shall not in any way limit or prejudice the power of the King or the Governor-General to issue any commission of enquiry. The statute gives wide and drastic powers to compel the attendance of witnesses and for production of documents and for the giving of evidence and penalties may thereunder be imposed to the extent of £ 500.

21 A commission was issued by Letters Patent, appointing certain gentlemen to inquire into and report upon the sugar industry in Australia, and more particularly in reference to – (a) growers of sugar cane and beet; (b) manufacturers of raw and refined sugar; (c) workers employed in the sugar industry; (d) purchasers and consumers of sugar; (e) costs, profits, wages and prices; (f) the trade and commerce in sugar with other countries; (g) the operation of the existing laws of the Commonwealth affecting the sugar industry; and (h) any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient.

22 Under this commission certain questions were submitted to the Colonial Sugar Refining Co. and its officers, which company was incorporated under the laws of the State of New South Wales and the Company carried on its business there and in other States of the Commonwealth and in foreign parts. The Company and its officers refused to answer a large number of the questions and an action was begun by them against the commissioners and the Attorney-General to restrain the proceedings. The case was heard in appeal in the High Court of Australia and is reported as *The Colonial v. Atty.-Gen.*, 15 Com. L.R. 182. The Court being divided, the case was referred to the Privy Council and is reported as *Atty.-Genl. v. Colonial Sugar Refining Co.*, [1914] A.C. 237.

23 I approach the consideration of this case with hesitation because the decision of Lord Haldane has been a subject of adverse criticism in law journals in both England and Canada.

24 By the Australian Constitutional Act all legislative power as to peace, order and good government of the people remains in the several federated states unless by direct terms it is vested in the Commonwealth. S. 51 of the Act vests in the Commonwealth power to make laws for the peace, order and good government of the Commonwealth with respect to 36 specific subjects enumerated in detail; three other subjects are added which need not be considered here. There is a further provision in the constitution that it may be amended, giving thereby wider powers to the Commonwealth, the procedure for this purpose is provided in s. 128 and requires the assent of electors, the preliminary steps for which must originate in the Federal Parliament by an Act duly passed as therein provided.

25 S-s. 39 of s. 51 extends the right to legislate as to peace, order and good government to

> matters incidental to the execution of any power vested by this constitution in the Parliament or in either House thereof or in the government of the Commonwealth.

26 It is well to keep all this legislation in view for the proper consideration of the last mentioned case.

27 All the Judges in the High Court of Australia held that *The Commissions Act* was within the powers of the Parliament, but the Chief Justice and Judge Barton held that the powers conferred by the Act did not authorize the Commissioners to compel the attendance of witnesses to give evidence on matters, information as to which is relevant only to possible amendments to the constitution under s. 128 and it was held by them that therefore a large proportion of the proposed questions and production was beyond the powers of the Commission. I conclude from the judgments that if by the constitution Parliament could have legislated on the subject without the aid of s. 128 the case would have been differently decided. It seems clear that by the constitution Parliament has only the powers given by s. 51, and the "matters incidental" referred to in s-s. 39 are those incidental to these specific matters enumerated in the preceding subsections and not to powers which Parliament might thereafter acquire under s. 128. The states under s. 107 had the absolute right over the liberty of the subject in all respects except as granted by s. 51 and the Federal Parliament had no power to take away that right by compelling witnesses under heavy penalty to give evidence against their will upon subjects which might some day by the consent of the people be brought within the federal power. The other two judges held that all the questions should be answered.

28 Lord Haldane gave the judgment in the Privy Council. On p. 255 he states:

> It is of course true that under the section the Commonwealth Parlia ment may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or enquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making. And the field of the Royal Commissions Acts which are to apply to any Royal Commission, whether issued under statutory authority or under the common law powers of the Crown — goes far beyond any of the first thirty-six of the classes of subjects enumerated in the section.

29 He then proceeds to decide with the Chief Justice and Barton, J. that there was no power to make inquiries under oath as to matters relating to some future powers which might be got by the Federal Parliament by an amendment of the Constitution under s. 128 and he adds:

> No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, has been actually exercised, and until it has been it cannot be prayed in aid. ... It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board of Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion.

30 Again on p. 257, His Lordship states:

> And until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts, in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth Legislature. ... Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the Sugar Industry contemplates in order to make its enquiry effective.

31 This language has been the subject of keen controversy. The Chief Justice and Barton, J. held that the objectionable questions should not be answered because there was no power to pass the statute in such wide and inclusive language, but they held that it must be read in a very limited way so as to exclude the objectionable questions and by so construing and limiting the statute they held it within the power of the Federal Parliament. After giving the judgment of the Lord Chancellor anxious consideration, I construe it to be simply a declaration that the statute read in its ordinary and clear language, while in some respects within legislative power, yet in chief and mainly giving rights far beyond the legislative power was *ultra vires*. It was strongly urged that the case decided that to make such legislation good the Act must in specific language set forth the subject upon which the Commissioners may enforce the attendance of witnesses.

32 If this is the true construction of the case then the Canadian as well as the Manitoba statute is *ultra vires*. I think the case is not an authority to support that proposition.

33 It was also urged that the Manitoba statute did not in direct language give power to issue commissions of enquiry. The statute of Upper & Lower Canada above referred to, the statute of Canada, 31 Vict. ch. 38, the statutes of the various Provinces including Manitoba, the statutes of New Zealand, of New South Wales and the Australian Statute of 1902, all assume that the Governor in Council has this right and legislate on that assumption. Chief Justice Stout before mentioned assumed the power to exist and finally the Chief Justice of Australia, the head of that distinguished Australian Court, held that the Governor-in-Council had a right to inquire into matters of public interest like a private individual if he chose. The method taken is to issue letters patent in the King's name to certain commissioners to make inquiries and this is commonly called a Royal Commission. Colonial governments and legislatures have assumed that this power existed and have on this assumption acted and legislated, and I can see no reason why they should not so assume. I think there is such power, but if not, then the legislature, by assuming that the power existed and by giving power to the appointees, by necessary implication, authorized the issue of such commissions.

34 To me it is clear that the four matters referred to in the Manitoba statute are all within the legislative competence of this Legislature and to investigate the transactions of the Government and its officials and the contractors connected with the erection of the Legislative Buildings clearly come within the first two matters mentioned in the statute.

35 It was urged in the argument that the Commissioners were not empowered to and should be restrained from making a report and finding of fact. If they do, I do not see what harm it can do to anyone. Commissioners are appointed to make enquiries for the benefit of the Executive. Take the case of ordinary Royal Commissions without power to call witnesses, are they to take down questions and answers given by those who are willing to give information and simply return this to the Executive? Are they to make enquiry and then not tell what they have found out as the result of the enquiry? They make an enquiry to find facts, to find the conditions of matters, and having informed themselves, they hand over this information. Without a report it seems to me their work would be incomplete.

36 Objection is taken that the enquiry is usurping matters reserved for the Courts and this point has been discussed in Australian cases. It is sufficient to point out that legislation as to property and civil rights are within the legislative control of the Provinces and our courts are not given the exclusive rights which are given to the Commonwealth courts above commented on.

37 The fair and reasonable meaning to be given to the statute, to my mind, empowers the Commissioners to procure evidence both written and verbal and therefore they can compel witnesses to give evidence and to produce documents. The words "to compel them to give evidence" following words giving them power to order production of documents is simply to compel the party called to give evidence written or verbal or both.

38 This case has been argued on both sides with great skill and counsel have given much assistance in this matter.

39 The appeal is dismissed with costs and the action is dismissed with costs.

***Richards, J. A.* (dissenting):**

40 I am of opinion that the question involved in this case has been settled by the judgment of the Judicial Committee of the Privy Council in *Atty.-General for the Commonwealth of Australia v. The Colonial Sugar Refining Co., Limited*, [1914] A.C. 237.

41 *The Imperial Act* under which the Commonwealth of Australia gets its powers of government, only gives to it such powers as are by the Act specifically named, leaving, practically, all other governmental powers vested in the several States which compose the Commonwealth.

42 Under *The B.N.A. Act* the position reversed, the Dominion Parliament getting all powers not specifically given to the provinces. So that, with us, the provinces are limited similarly to the limitations imposed upon the Commonwealth in Australia.

43 I find — and I say it with the utmost deference — difficulty in following the reasoning by which their Lordships of the Privy Council arrived at their decision in that case. But their conclusion seems to me to be plainly stated, and it binds me.

44 It holds, I think, distinctly that a general Act, giving power to the Executive to issue commissions of enquiry, is beyond the powers of the Commonwealth Parliament to enact, and that such acts are only valid when limited to enquiries into matters specifically named in them. If that view of its effect is right, I can not see how to distinguish the case of our general Act now in question.

45 It is argued that, irrespective of the statute, the Lieutenant-Governor has, by delegation to him of the Royal Prerogative, power to issue commissions of enquiry. In the view I take, that need not be discussed here, because the Prerogative, even if delegated, does not extend to authorizing the Commissioners to compel the giving of evidence under oath, or to punish for refusal to testify.

46 If the Act in question is merely one to supplement powers held under the Prerogative it is, under the Australian case, on no better footing than if it were an act empowering the appointment of Commissioners to enquire.

47 I would allow the appeal.

Perdue, J.A.:

48 For the reasons more fully set forth in the judgments of the Chief Justice and Mr. Justice Cameron, I agree in the conclusion that the Lieutenant-Governor-in-Council has power to issue a commission for the purpose of investigating matters of purely provincial character, that is to say, matters which fall strictly within one of the classes of subjects assigned exclusively to a provincial legislature. The Act respecting Commissioners to make enquiries concerning Public Matters, R.S.M. 1913, ch. 34, assumes that the Lieutenant-Governor-in-Council possesses the powers to issue commissions of enquiry, a power which by itself would not entitle the commissioners or persons named to compel the attendance of witnesses or to administer oaths. The Act was passed for the purpose of augmenting the powers of the executive in these and other respects. If the Lieutenant-Governor-in-Council does not possess the power to issue such a commission the Act is wholly meaningless. The legislature of the Province could, if necessary, confer that power, and where it declares that, "Whenever the Lieutenant-Governor-in-Council deems it expedient to cause enquiry" &c., he "may by the commission in the case confer upon the commissioners" power of summoning witnesses, &c., it must be taken that the necessary power was intended to be conferred upon him, if it was not already possessed by him. There are many instances to be found where statutes have been held to grant extensive powers by implication. See *R. v. Greene*, 17 Q.B. 793, 21 L.J.M.C. 137, *Cullen v. Trimble*, L.R. 7 Q.B. 416, 41 L.J.M.C. 132, *Ex parte Martin*, 4 Q.B.D. 212, *Maxwell on Statutes*, 5th ed., 575-581.

49 The Act, R.S.M. ch. 34, carefully confines the powers granted in respect of commissions to the four following subjects: (1) any matter connected with the good government of the Province; (2) the conduct of any part of the public business thereof; (3) the conduct of any institution therein receiving provincial aid; and, (4) the administration of justice therein. All of these are purely provincial matters. The investigation purporting to be authorized by the Commission attacked in the present case comes under either (1) or (2) of the above subjects, in some respects it may come under either of them. At all events the investigation is intended to deal with matters which are strictly within the legislative powers of the Province.

50 It was strongly argued that the recent decision of the Privy Council in *Atty.-Gen. for Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237, was a conclusive authority

supporting the plaintiffs' contention in the present case. Lord Haldane in giving judgment in the Australian case has pointed out the wide difference that exists between the power to make laws conferred upon the parliament of the Commonwealth and that possessed by the parliament of Canada. The former obtained its powers by transfer from the federating Colonies. It received power to make laws for the peace, order and good government of the Commonwealth. He says:

> But this power is not conferred in general terms. It is unlike the corresponding power conferred by s. 91 of *The Canadian Constitution* Act of 1867, restricted by the words which immediately follow it. These words are "with respect to," and then follows a list of enumerated specific subjects.

51 *The Australian Royal Commissions Acts*, however, purported to empower the Governor-General to issue commissions to persons authorizing them to make enquiry into and report upon any matter specified in the letters patent, "and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth." Power was given to summon witnesses, to administer oaths, to compel the attendance of witnesses and the giving of evidence, and to impose fine or imprisonment in cases of disobedience or contempt. It was held that none of the subjects of legislation, enumerated as those assigned to the Commonwealth Parliament, related to

> that general control over the liberty of the subject which must be shewn to be transferred from the individual States if it is to be regarded as vested in the Commonwealth.

52 *The Royal Commissions Acts*, it was pointed out, were not restricted to any particular subject of legislation or enquiry and there was no legislation which might give sanction to the enquiries that were being made by the Commission referred to in the case. The Acts were therefore held to be *ultra vires* in so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents or otherwise enforce compliance by the members of the public with its requisition. The decision rested upon the ground, as I understand it, that the Acts were too wide and purported to authorize enquiries which included matters over which the jurisdiction of the Commonwealth Parliament did not extend and to give powers which were not within the scope of its constitutional authority to confer.

53 The commission in the present suit is issued by the Lieutenant-Governor-in-Council of a Province of the Dominion with the additional powers conferred by a statute passed by the legislature of the Province. Within its own field of legislation the Province is supreme: *Hodge v. Reg.*, 9 App. Cas. 117 at p. 132, 53 L.J. P.C. 1. Comprised in that field we find the following amongst other subjects: —

> (13) property and civil rights in the Province:
>
> (14) the administration of justice in the Province, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in those courts;
>
> (15) the imposition of punishment, by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section;
>
> (16) generally, all matters of a merely local or private nature in the Province.
>
> No. 13 confers upon the Province in the exercise of provincial powers control over the liberty of the subject.
>
> No. 14 places the administration of justice and all the machinery of the civil courts within the control of the Province.
>
> By No. 15 the provincial legislature may impose fine or imprisonment for disobedience of a law enacted by that body.
>
> No. 16 has been interpreted by the Privy Council as follows:
>
> In s. 92, No. 16 appears to them (their Lordships) to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration.

54 See *Atty.-Gen. (Ont.) v. Atty.-Gen. (Dom.)*, [1896] A.C. 348, at p. 365, 65 L.J.P.C. 26.

55 Under the above clauses a provincial legislature possesses the very powers which Lord Haldane showed to be lacking in the Commonwealth Parliament. The Act in question in the present case, R.S.M. ch. 34, carefully confines the investigations authorized by it to provincial matters. In my opinion, the Privy Council decision relied upon by the plaintiffs is not applicable to the present case.

56 It is true that difficulties may arise during the taking of evidence, as to whether questions that may be asked do or do not exceed the scope of the investigation, but the mere apprehension that such questions may arise, or that a proper ruling may not be given when they do arise, is not a ground for restraining the enquiry. We must assume that the Commissioners will conduct the inquiry strictly within their powers.

57 I think the power to report is necessarily implied from the words used in s. 1 of ch. 34. It would be useless to enquire or to investigate unless the commissioners made known the result.

58 I think the appeal should be dismissed.

Cameron, J.A.:

59 This action. is brought by the plaintiffs against the Honourable Thomas Graham Mathers, the Honourable Daniel A. Macdonald and the Honourable Sir Hugh J. Macdonald, who are named as Commissioners in the Commission issued pursuant to Order-in-Council dated April 19, 1915, which was supplemented by the further Order-in-Council, dated June 23, 1915, all of which are set forth in the statement of claim. The Attorney-General is also a defendant in the action. The Commissioners were directed to make enquiries into certain matters relating to the erection of the new Parliament Buildings by the Government of this Province for the construction of which the plaintiffs were the contractors. It is asked by the statement of claim that the orders-in-council and the Commission be declared *ultra vires* and void, that, if they are *intra vires*, it be declared that the Commissioners are not authorized to compel the giving of evidence or the production of documents, and that the plaintiffs should not be required to attend and give evidence or produce their books and papers. It is further asked that an injunction be granted res training the defendants from further proceeding under the Commission and from compelling the plaintiffs to attend to give evidence or produce their books or from making any order of commitment for refusal to attend.

60 The Commissioners, in their defence, admit the allegations in the statement of claim setting forth the orders-in-council, the commission, the assembling and sittings of the Commissioners pursuant thereto and those allegations stating that the Commissioners have directed the plaintiffs to appear to give evidence and produce their books and papers which the plaintiffs have refused to do, that the Commissioners have intimated their intention to issue an order to commit the plaintiffs in the event of their refusal so to attend, and that it is the intention of the Attorney-General of the Province to bring an action against the plaintiffs for a return of a large amount of money alleged to have been illegally and improperly paid over to them and to take criminal action against the plaintiffs with reference to matters arising out of the enquiry held by the Commissioners should the facts appear to justify same.

61 By consent the motion for judgment was heard on the pleadings before Mr. Justice Prendergast, who dismissed it. On this appeal, by consent, further material on behalf of the plaintiffs was allowed to be used. This additional material refers to proceedings before the Commissioners and now forms part of the record.

62 The first question raised is as to the authority and jurisdiction of the Legislature of this Province to pass the Act, ch. 34, R.S.M. "An Act respecting Commissioners to make Inquiries Concerning Public Matters." This has been in force in this Province since 1873, it having been originally passed as 36 Vict., ch. 21. In its terms it is strictly confined to this Province. As to the power of the Legislature so to enact it seems to me beyond doubt. Amongst the numerous decisions dealing with the powers of the Provincial Legislatures under s. 92 of *The British North America Act*, I refer to *Hodge v. Reg.*, 9 App. Cas. 117, particularly at p. 132, 53 L.J.P.C. 1,

> When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by

> delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme.

63 This luminous statement has stood for more than thirty years as an authoritative definition of the powers of our local legislatures. It has been amplified by other decisions of the Privy Council such as that in *Maritime Bank v. New Brunswick Receiver General*, [1892] A.C. 437, 61 L.J.P.C. 75. I regard the matters set forth in ch. 34 as amongst those over which the legislature is supreme. That the statute is general in form is, to my mind, no objection to it. That it does not make or authorize such enquiries incidental only to future legislation is, I think, immaterial. The Imperial Parliament could pass such legislation and if that be so there can be no doubt of the authority of the Provincial Assembly, legislating within its ambit of powers.

64 The decision of the Judicial Committee in *Atty.-General v. Colonial Sugar Co.*, [1914] A.C. 237, was cited to us. In my reading of that case it was made to depend on peculiar provisions of the Australian constitution, different from what are to be found in our constituent act. It was held that the Australian Federal Government, received only those powers that were expressly delegated to it by the several states, which retained those not so delegated. Consequently the rights and remedies given by the Royal Commission Act then in question, not having been ceded by the states, could not be exercised by the Commonwealth Government. This differentiates the Australian system from our own, which is thus set forth by Lord Watson in *The Maritime Bank Case*, p. 441.

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. ... But in so far as regards those matters which by s. 92 are specially reserved for provincial legislation, the legislature of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act.

65 It was further argued that the statute, ch. 34, R.S.M. does not in its terms authorize the orders-in-council or the commission in question. I confess I can see no great difficulty on this point. The matters involved were and are transactions relating to the construction of a provincial public building, purely a local and provincial undertaking. I would read the words in the Act "any matter connected with the good government of this Province" in no restricted sense. "Good government" is intended to be a term of wide meaning and is used in *The B.N.A. Act* itself. To my mind it involves and connotes the ideas of public welfare, of public business and of public purpose. And where charges are made that the provincial moneys have been wrongfully expended in connection with the construction of a provincial public building, it seems to me clear that they affect the public welfare, and the good government of the Province, and are properly the subject matter of investigation under the Act. Moreover, such moneys must have been expended by the provincial government through its proper departments and thereby the transactions in question were part of the public business of the Province. I entertain no doubt that the orders-in-council are properly founded and the Commission also. We must give this Act, which must be deemed to be remedial in its character, such a fair, large and liberal construction and interpretation as will best insure the attainment of its object in accordance with the rule of construction laid down in our *Interpretation Act* (s. 13, ch. 105, R.S.M.).

66 The Lieutenant-Governor of this Province is on the same footing as to prerogative and power as the Lieutenant-Governors of the other Provinces: *Lefroy* on *Legislative Power in Canada*, p. 104, n. That is evidently the meaning of s. 2 of *The Manitoba Act* when applied to the office of Lieutenant-Governor. Ss. 64 and 65 of *The British North America Act* refer, when taken together, to all the Provinces originally entering confederation. There is no reason that I can see for drawing or attempting to draw any distinction between the authority of the Lieutenant-Governor of this Province and those of the others. That power is expressly declared in *The Executive Government Act*, ch. 67, R.S.M. so far as the Legislature of Manitoba can enact.

> A Lieutenant-Governor when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all the purposes of Dominion government.

67 Lord Watson in *Maritime Bank v. Receiver General, supra*, p. 443.

68 The right of the Crown to appoint Commissioners to make enquiries has been long established. It was the lack of power on the part of the Commissioners to enforce attendance of witnesses and to compel them to give evidence that required supplementing by legislation. This appears from the title of the first Canadian Act, ch. 38, 9 Vict. Statutes of Canada, "An Act to empower Commissioners for inquiring into matters connected with the public business, to take evidence on oath."

69 This subject is dealt with at length by Griffith, L.J. in *Clough v. Leahy*, 2 Com. L.R. 153, in his judgment on appeal from the Full Court of New South Wales. He refers to the Dolly's Brae Commission in Ireland and to the Sheffield Com mission in connection with which a special Act of Parliament was passed compelling the attendance of witnesses and protecting those who gave evidence from civil and criminal consequences.

70 In *Clough v. Leahy, supra*, the statute dealt with, given in the report at p. 140, indicates a recognition of the pre-existence of the power of the executive to appoint Commissioners. The status referred to in the Sheffield case, ch. 8, 30-31 Vict., indicates precisely the same thing.

71 It is true that the Act does not contain specific words authorizing the Lieutenant-Governor-in-Council to appoint Commissioners. But the Act is entitled "An Act respecting Commissioners to make enquiries Concerning Public Matters." And when the Act itself says:

> the Lieutenant Governor may, by the commission in the case, confer upon the commissioners or persons by whom such inquiry is to be conducted the power of summoning before them any party or witness &c.

72 the existence of power to appoint is clearly presupposed and implied.

73 That the investigations of the commissioners may, in their ramifications, involve matters not within the provincial jurisdiction cannot surely have the effect of invalidating the orders-in-council or the commission. The object of the commission is plainly not to displace the ordinary tribunals but to secure information in the public interest. It is auxiliary to, and not in lieu of, the courts of justice.

74 It is objected that the Act gives no power to authorize the commissioners to make a report. But the Act speaks of the Lieutenant-Governor-in-Council deeming it expedient "to cause an enquiry to be made" and of their "full investigation of the matters into which they are appointed to examine" and these expressions infer conclusions from, as well as listening to and perusing, the evidence, and such conclusions may certainly be asked for from, and submitted by, the Commissioners. Even on the hypothesis that the power to ask the Commissioners to report is not implied in the Act, it seems to me there is nothing whatever to prevent the Lieutenant-Governor-in-Council requesting the Commissioners to do so.

75 A full investigation in complicated matters involving a conflict of evidence where the Commissioners have heard many witnesses testifying in person, would certainly be unsatisfactory and incomplete without an expression of their conclusions.

76 It is the fact that civil proceedings have been taken and are now pending against these plaintiffs by the Attorney-General for the recovery of the sums mentioned in the order-in-council. And it may be that ultimately criminal proceedings will be instituted. But neither the fact nor the possibility can have the effect of invalidating the orders-in-council or the commission here in question. The imposition of punishment, by fine, penalty or imprisonment for enforcing any law of the Province passed within its jurisdiction is specifically given to the Province by s-s. 15 of s. 92 of *The B.N.A. Act*. As a result, I think the powers given by the Act to summon witnesses and to require them to give evidence and to produce documents are beyond question, and are, as declared by ch. 34, the same as those of a court of law in civil cases. The words "to compel them to give evidence" are evidently intended to include the production of documents, which is one way, and an effective way, of giving evidence. To withhold these powers from the Commissioners would, or might, have the effect of rendering the Act nugatory. We must give the words used a fair, large and liberal, not a narrow, construction. I refer to *Maxwell* on *Statutes*, 5th ed. at pp. 576 *et seq.* and authorities there quoted. It is to be strongly presumed that the powers given will be exercised with discretion and with due regard for the rights of all parties interested.

77 It does appear to me clear there is much to favor the contention that this is not a case for exercising the discretionary right to grant an injunction. If the Act in question,

or the orders-in-council, are invalid then a declaration to that effect puts an end to the matter. If, however, they are valid and the only questions in dispute are as to the right of the Commissioners to summon witnesses, compel their attendance and impose penalties for non-attendance or refusal to answer, then the occasion for action has not yet arisen. Upon the execution of an order or warrant for committal, the occasion would arise and there would be opportunity to test the validity of the proceedings. Here the plaintiffs have not been subpenaed and no questions of any kind have been addressed to them. The position is different from that in the *Attorney General v. Colonial Sugar Co. Case, supra*. There is no necessity, however, for dealing further with this point.

78 In my opinion the appeal must be dismissed.

Appeal dismissed, Richards, J.A., dissenting.

End of Document

TAB 2

94 D.L.R. (3d) 365
Canada Commission of Inquiry

Canada (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police), Re

1978 CarswellNat 686, 44 C.C.C. (2d) 200, 94 D.L.R. (3d) 365

Re Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police

D.C. McDonald, J., Chairman, G. Gilbert, Q.C., D.S. Rickerd, Q.C.

Judgment: October 13, 1978
Docket: None given.

Counsel: *J. F. Howard, Q.C.*, for Commission
J. R. Nuss, Q.C., M. Robert, for Solicitor-General of Canada

Subject: Criminal; Criminal

Commission of inquiry

Hearings — Commission established to investigate R.C.M.P. — Commission in receipt of confidential Government document relating to national security — Whether evidence of such documents to be received in camera or in public — Inquiries Act, R.S.C. 1970, c. I-13.

Commission of inquiry

Evidence — State privilege — Extent to which State privilege applicable to proceedings of Commission — Extent to which Commission bound by assertion of Solicitor-General that public interest requires matters to be heard in camera — Inquiries Act, R.S.C. 1970, c. I-13.

A commission of inquiry, appointed pursuant to the Inquiries Act, R.S.C. 1970, c. I-13, is neither a Court nor a branch of the judiciary, but rather fulfils executive and administrative functions. In establishing a Commission, the Executive branch of Government is examining itself. However, unlike other units of the Executive branch, a Commission cannot be directed to interpret its terms of refer-ence in a certain fashion or to follow a certain procedural course. It is for the Commissioners themselves to interpret the instrument that gave birth to the Commission. The appointment of members of the judiciary as Commissioners ensures that the inquiry will be conducted at arm's length from the Executive, and with judicial, non-partisan impartiality.

Accordingly, it is for the Commissioners themselves to determine whether evidence shall be received in camera. In particular, where the terms of reference of the Commission require that evidence relating to national security be received in camera, the Commission is not bound to accept the Solicitor-General's assertion that certain evidence relates to national security, but rather it is for the Commission to reach its own decision. Moreover, where the terms of reference direct the Commission to conduct proceedings in camera 'where the Commissioners deem it desirable in the public interest', the Commission is not bound to follow the direction of the Privy Council unless another Order in Council altering the Commission's terms of reference is made.

In deciding which matters should be received in camera, the principle of admissibility of evidence applicable to Courts do not necessarily apply. The very objects of a commission, unlike a Court, may include disclosure. Some of the factors pertinent to whether public or in camera hearings should be held are as follows: (1) the role of the Commission and the fact that the Commission is not directed to receive all its evidence in camera; (2) the rationale for privilege of discussions among officers of State in formulating public policy and the need to encourage candid exchange of opinions on policy; (3) the public interest in having disclosure of wrongdoing and the consequent inhibition of further abuses; (4) the status of the possessor or originator of the information; (5) the interest of witnesses 'charged' to know the testimony of senior officials from whom they may have derived authority to act.

Where the terms of reference of a Commission contemplate a 'full inquiry' into 'the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law' so as to 'maintain' public 'trust in the policies and procedures governing its activities', the Commission is not precluded from hearing evidence of ministerial knowledge of R.C.M.P. activities unrelated to national security, although the Commission is particularly charged to investigate and report on activities relating to national security.

[De Beauvoir v. Welch (1827), 7 B. & C. 266, 108 E.R. 722; Smith v. East India Co. (1841), 1 Ph. 50, 41 E.R. 550; Beatson v. Skene (1860), 5 H. & N. 838, 157 E.R. 1415; Conway v. Rimmer, [1968] A.C. 910; Lanyon Pty Ltd. v. Commonwealth of Australia (1974), 3 A.L.R. 58; Australian National Airlines Com'n v. Commonwealth of Australia (1975), 132 C.L.R. 582; Manitoba Development Corp. v. Columbia Forest Products Ltd. and GNC Industries Ltd., [1973] 3 W.W.R. 593; Attorney-General v. Jonathan Cape Ltd., [1976] Q.B. 752; Halperin et al. v. Kissinger (1975), 401 F. Supp. 272; Gartside v. Outram (1856), 26 L.J. Ch. 113; Initial Services Ltd. v. Putterill, [1968] 1 Q.B. 396; U.S. v. Nixon, President of United States et al. (1974), 418 U.S. 683; D. v. National Society for Prevention of Cruelty to Children, [1978] A.C. 171, refd to]

STATEMENT by the Commission of Inquiry concerning certain activities of the R.C.M.P., made in the course of the Commission's investigation, with regard to the hearing of testimony concerning Government documents.

D. C. McDonald, J.:

1. Introduction

1 From an early stage in the work of the Commission, the Commission has had full access to the files of the R.C.M.P. In order to do its work effectively, including preparation for hearings, it was desirable that the Commission obtain documents or photocopies of the documents from the R.C.M.P. This need was expedited by the terms of the following letter dated November 6, 1977, from Mr. J. F. Howard, Q.C., chief counsel to the Commission, to Mr. Joseph Nuss, Q.C., counsel for the Solicitor-General of Canada:

> Dear Mr. Nuss,
>
> This will confirm arrangements made between us with respect to the delivery to the Commission of the documentary material relating to matters outlined in our letter of October 17th, in Commissioner Simmonds' letter to me of October 26th, and in telephone conversations of October 31 between the Secretary of the Commission and Assistant Deputy Commissioner Quintal. It is understood that the arrangements will apply to future delivery of documentary material to the Commission unless different arrangements are made at the time.
>
> The material being delivered to the Commission at its request is subject to the following understanding:
>
> 1. The material is being delivered to the Commission to avoid the inconvenience of reviewing all of the documentary material at the RCMP Headquarters at this time as contemplated by the paragraph numbered 4 in the Order-in-Council establishing the Commission;
>
> 2. By delivery of the material, the Solicitor General of Canada (the Minister) will not have been taken to waive the position that some of the documents delivered, or parts thereof, fall under the directive in the paragraph No. 2 of the Order-in-Council establishing the Commission, as being material to be dealt with by the Commission in camera and expressly reserve the right to make such contention;
>
> 3. Should there be a difference in the view of the Commission and in the view of the Minister as to whether the direction in paragraph 2 referred to above applies to a particular document or part thereof and this difference of view cannot be resolved, it is understood that notwithstanding that the document has been delivered to the Commission, the delivery of such document shall not be invoked as a waiver of the right to the Minister to raise any objection, as to its introduction in evidence before the Commission and/or if so introduced that it be done at an in camera session, and the Minister shall be entitled to invoke any remedy or any provision of law which may be applicable to the final disposition of such view.

It is also understood that only those members of the Commission's staff who have the requisite security clearance and who require a particular document for the purposes of their work with the Commission shall have access to such particular document amongst those delivered to the Commission.

Yours very truly,

J. F. Howard.

Chief Counsel.

2 Pursuant to the terms of that letter, all documents requested by the Commission, or photocopies of them, have been transmitted by the R.C.M.P. to the Commission. Among these documents are many that fall within the class of what Mr. Nuss calls "Government Documents". That class according to Mr. Nuss, is as follows:

Documents relating to the proceedings of Cabinet and its Committees, documents relating to any other process of consultation among Ministers and/or officials, and documents emanating from Ministers and/or officials relating to the decision-making or policy formulation process including, but without limiting the generality of the foregoing:

1. Cabinet Papers

(a) Cabinet agendas, memoranda, minutes and decisions;

(b) Cabinet committee agendas, minutes and reports;

(c) Treasury Board submissions, minutes and certain decision letters.

2. Ancillary Papers

Ministerial briefing notes for use in Cabinet or in discussions or consultations among Ministers.

3. Other Records and Papers

Letters, memoranda, notes, records or other documents exchanged by Ministers and/or officials or describing discussions or consultations among Ministers and/or officials.

4. Opinion, Advice or Recommendations

Documents emanating from officials containing matter in the nature of opinion, advice or recommendation or notes or other matter that relates to the decision-making or policy formulation processes.

5. Documents containing quotations from any of the above documents.

3 Some of the documents in the R.C.M.P.'s possession originated in the R.C.M.P. Others are copies of documents theoretically originating from outside the R.C.M.P. but in part drafted by the R.C.M.P. -- such as memoranda to Cabinet ultimately signed by a Solicitor-General. Others are copies of documents originating outside the R.C.M.P., of which a copy had been sent to the R.C.M.P.

4 Outside the terms of Mr. Howard's letter, some documents falling within the categories enumerated by Mr. Nuss may be obtained by the Commission from sources other than the R.C.M.P., for example by subpoena, or from other Government Departments.

5 The examination of witnesses to date has not been hampered by the failure to resolve whether documents within the categories enumerated by Mr. Nuss may be received in evidence by the Commission in public. This is because the Commission has so far examined mostly witnesses who have been involved at the operational level in various investigative practices or actions, or other activities which, it may be argued, were "not authorized or provided for by law" (to use the words of paras. (a) and (b) of the Commission's terms of reference, which are set forth in Order in Council, P.C. 1977-1911). Such witnesses, by reason of their status, are unlikely to have been authors or recipients of, or to have had knowledge of, documents in the classes enumerated by Mr. Nuss.

6 However, the Commission is about to commence the examination of present and past senior officials of the R.C.M.P. and of Ministers to the extent that their evidence may be relevant to any of the issues of fact so far inquired into. It is clear that the

examination of these witnesses will in part require the production of a number of documents in the categories enumerated by Mr. Nuss, or at the very least the testimony of the witnesses about the contents of the documents or about the conversations or discussions recorded by the documents.

7 Some time ago the Commission indicated to counsel that it wished to hear representations as to whether such evidence should be received by the Commission in public or *in camera*. For that reason the Commission scheduled a day during which counsel might make their submissions. Those submissions were made on October 5th. These reasons for decision have been prepared as promptly as possible, in order that counsel may have the benefit of the Commission's opinion during the preparation for the evidence of senior officials and Ministers.

8 The question has been considered on the basis of the contention by Mr. Nuss and Mr. Michel Robert, his co-counsel, that these documents as a *class* ought not to be produced in public. The counsel who were heard on the matter were Mr. Nuss and Mr. Robert, who represent the Solicitor-General and "the interests of the Departments ('Ministères' in the French original) of the Government of Canada, including the Office of the Prime Minister" (statement by Mr. Nuss to the Commission, September 11, 1978, vol. 72, p. 11407), and Mr. Howard, chief counsel for the Commission.

2. The Nature of a Commission of Inquiry

9 In approaching this problem, it is desirable to keep in mind the purpose and function of a Commission of Inquiry.

10 The Commissioners were appointed under Part I of the *Inquiries Act*, R.S.C. 1970, c. I-13, pursuant to s. 2 of the Act which empowers the Governor in Council to "cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof". Clearly, the matters which this Commission is directed to deal with are connected "with the good government of Canada" and with "the conduct of any part of the public business" of the Government of Canada.

11 When the Governor in Council deemed it "expedient" to cause such an inquiry to be made, it created an organism of the Executive branch of Government to "investigate", "inquire", "report the facts" and "to advise" with respect thereto. The Commission is not a Court. It is not a branch of the judiciary. It fulfils Executive or administrative functions. As Cattanach, J., observed in *Copeland v. McDonald, Rickerd and Gilbert* (Federal Court of Canada, August 4, 1978), the gulf is wide between "the position of a judge in court and that of a fact-finding and advisory body which can only be classed as administrative notwithstanding that both hold hearings".

12 The Governor in Council, in creating such a Commission as this, asks this newly and specially created unit of the Executive branch of Government to examine some particular aspects of the Government (*i.e.*, the Executive). The Executive branch, through its chosen Executive instrument, is examining itself. This must not be forgotten by those who expect the Commission to do as they wish and as it wishes (assuming they are one and the same). The Commission is created by the Executive (the Governor in Council) and its terms of reference can be altered -- indeed, its very existence can be abrogated -- by another Order in Council at any time.

13 On the other hand, a Commission of Inquiry is not a unit of the Executive branch of Government like other Government Departments and agencies. Short of direction by Order in Council, it cannot be directed by a Minister or even by the Cabinet to interpret its terms of reference in a particular manner, or to follow this procedural course or that. It is for the Commissioners to interpret the instrument that gave birth to the Commission.

14 Moreover, the Commissioners, unlike other arms of the Executive branch, are by statute given powers which members of the Executive branch of Government -- even "Royal Commissions" appointed under the Great Seal but not pursuant to statute -- do not enjoy: the power to summon witnesses, and to require them to give evidence on oath or affirmation, and to produce documents and things (all under s. 4 of the *Inquiries Act*), and "the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in a court of record in civil cases" (s. 5). These are extraordinary powers, ordinarily available neither to the common citizen nor to members of the Government service. These powers set commissioners appointed pursuant to Part I of the *Inquiries Act* apart from the remainder of the Executive.

15 In addition, commissioners are usually persons who have not been members of the Executive branch. They are, in effect, brought temporarily within the ranks of the Executive to carry out the task of diagnosis and prescription. Very often a Judge is the sole commissioner or chairman of a group of commissioners. One reason a Judge is chosen is that his livelihood is secure in that he can be removed from office only by joint address of the Houses of Parliament. This fact, which lies at the root of the cherished independence of the judiciary, increases the likelihood that the inquiry will not be influenced by considerations to which ordinary segments of the Executive are susceptible. Putting it another way, it ensures that the inquiry will be conducted at arm's length from the Executive. It further ensures that all decisions taken by the Commission, whether procedural or substantive, will be commensurate with a Judge's duty to honour the principle that the reciprocal of judicial independence is judicial, non-partisan impartiality. Commissioners are appointed because of some real or imagined distinction or ability which the Governor in Council hopes they will bring to a dispassionate inquiry into the issues. Also, it is hoped that these qualities will enhance the possibility that their recommendations will enjoy public as well as governmental respect, so as to restore confidence and trust in that part of the business of Government which is under review. (Sometimes, commissioners may have no claim to merit other than stamina and a thick skin, which is all we claim for ourselves.)

16 Observers who expect that a commission of inquiry will be a mere instrument of the Government that created it are wrong. It is true that a commission is part of the Executive branch and does not exercise judicial functions. On the other hand, it is an instrument of self-criticism which, unlike the Executive branch which has created it, nevertheless by tradition exercises a spirit of detachment from the wishes of its creator as it pursues its assigned tasks, except in so far as those wishes have been expressed in the creating instrument and the general procedural law.

3. Who has the power to decide whether evidence shall be received in camera?

(a) Introductory

17 The Commission's interpretation of its terms of reference in this regard has not changed since it made its opening statement in Montreal on December 6, 1977. At that time we said:

> I turn now to a specific consideration of the discretion contained in paragraph 2 of the terms of reference. In respect of this direction, *it is for the Commission, and not for any other authority, to decide* whether any of the criteria referred to in the paragraph applies in a particular situation. (Emphasis added.)

18 We then discussed briefly some perceptions of the words "matters relating to national security" and continued:

> However, it does not follow that, simply because *the Commission decides* that a matter of police action does not relate to national security, evidence in respect of it will necessarily be heard in public. For *it is still open to the Commission to hold* that it would not be in the "public interest" to hear such evidence in public. (Emphasis added.)

19 The Commission then quoted a passage from the Salmon Committee's Report on Tribunals of Inquiry, published in England in 1966, which stressed that what the English called a Tribunal of Inquiry should have a wide discretion to meet cases where the public interest would require a hearing to be *in camera*. We then referred to the remaining criterion found in para. 2, which directs the Commission to hold its proceedings *in camera* when the Commissioners deem it desirable "in the interest of the privacy of individuals involved in specific cases which may be examined". We then concluded:

> The Commission hopes that this discussion of the circumstances in which *it may decide to hear evidence in camera* will demonstrate to all that it has devoted considerable attention to the problem. We wish to repeat that the general principle guiding the Commission will be the desirability of hearing evidence in public. (Emphasis added.)

20 Until the argument heard October 5th, there had been no indication from any counsel that his client did not accept the statements just quoted. However, the matter now having been raised, the Commission will state in detail its reasons for its

interpretation of para. 2, while emphasizing the conclusion is the same as was stated last December 6th.

(b) Who has the power to decide whether evidence must be received in camera because it relates to national security?

21 During the course of argument, Mr. Nuss asserted that where evidence "relates to national security", the Commission must accept the decision of the Solicitor-General that the evidence relates to national security. The Commission does not accept that view. The Order in Council says that the Commissioners

> 2. *be directed that the proceedings of the inquiry be held in camera in all matters relating to national security* and in all other matters where the Commissioners deem it desirable in the public interest or in the interest of the privacy of individuals involved in specific cases which may be examined.

(Emphasis is ours.) The Commission's interpretation of the direction is that, if the Solicitor-General makes a submission to the Commission that some particular evidence relates to national security, it is for the Commission to reach its own decision. While the Commission will give careful consideration and substantial weight to any reasonable submission made on behalf of the Solicitor-General, or on behalf of any other Minister of the Crown, that evidence relates to national security, the decision of the Minister is not conclusive.

22 While the Commission arrives by its own reasoning at this interpretation, it finds some comfort in knowing that at the time of the creation of the Commission the then Solicitor-General shared it. On July 6, 1977, the Honourable Francis Fox said (Hansard p. 7378):

> The terms of reference are quite clear that if, *in the opinion of the Commission*, there is a matter of national security which is at stake, it has the power and is indeed directed to sit in camera. (Emphasis is ours).

(c) Who has the power to decide whether it is desirable in the public interest that evidence be received in camera?

23 During the course of argument the Commission came to realize that the submission made by Mr. Nuss was not only that, on principle and on the authorities, all the documents on his list ought not "*in the public interest*" to be disclosed in public, but that the decision as to that matter does not rest with the Commission at all but rather with (he said) the Privy Council. Assuming that he and Mr. Robert appeared before this Commission on behalf of "the Privy Council", which is far from clear to us, we understand his submission to mean that, once the Privy Council has decided that such documents are not to be produced in public, that decision is binding upon the Commission.

24 The practical result of that proposition would be the same as the result of the proposition which we first understood Messrs. Nuss and Robert to be making, *viz.*, that in deciding whether the Commissioners "deem it desirable in the public interest" that the proceedings be held *in camera*, the authorities lead to only one possible conclusion -- that such documents must be received in evidence *in camera*. If the Commission were to accept that view of the authorities, then, as we have just said, the result would be decision being that of the Commissioners, on the merits of the case, and, on the other hand, the decision being that of "the Privy Council".

25 The question of the effect of such a decision of "the Privy Council" does not in fact arise for decision at this point, because Mr. Nuss did not advise the Commission that the Privy Council had decided that the Commission is not to receive any such documents in public. Such a decision could be made only by another Order in Council. If the Privy Council, by another Order in Council, should so decide, the Commission would then have to re-examine its position in the light of the terms of the new Order in Council.

26 However, at the present time, the Commission must interpret and apply the terms of Order in Council, P.C. 1977-1911, which created the Commission. The Order in Council states, in part, as follows:

> The Committee [of the Privy Council] further advise that the Commissioners:
>
> . . . . .
>
> 2. be directed that the proceedings of the inquiry be held in camera in all matters relating to national security and in all other matters *where the*

> *Commissioners deem it desirable in the public interest* or in the interest of the privacy of individuals involved in specific cases which may be examined.

(Emphasis is ours.)

27 Counsel for the Commission submits that the words of para. 2 of the Order in Council delegate to the Commission whatever power the Executive might otherwise have, to decide that certain evidence not be produced at all or not be produced in public. Mr. Nuss contends, however, that there can be no delegation of the power which, he says, must always rest with a Minister of the Privy Council to decide what it is in the public interest not to produce at all, or not to produce in public.

28 The Commission considers that by using the words found in para. 2 the Governor in Council has clearly directed the Commission to arrive at its own judgment as to whether, either in regard to a particular class of evidence or in regard to a particular item of evidence, it is "desirable in the public interest" that the proceedings be held *in camera*. It is well established by the authorities that the word "deemed" imports that a judgment is to be exercised: see *De Beauvoir v. Welch* (1827), 7 B. & C. 266, at p. 278, 108 E.R. 722.

29 For these reasons, the Commission's interpretation of Order in Council, P.C. 1977-1911, leads it to reject the contention that the decision as to what proceedings should be held *in camera* on the ground of "public interest" rests outside the Commission.

4. Considerations which the Commission may take into account in future specific cases

30 It is true that in a number of cases, although comments on the question have frequently not been essential to the decision, Judges in England, Australia and Canada have asserted an absolute privilege for Government documents originating at a high level: see, for example, *Smith v. East India Co.* (1841), 1 Ph. 50, 41 E.R. 550, and *Beatson v. Skene* (1860), 5 H. & N. 838, 157 E.R. 1415.

31 In *Conway v. Rimmer*, [1968] A.C. 910, several members of the House of Lords spoke without limitation of the privilege from production which applies to such documents. Lord Reid said [at p. 952]:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner working of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's* case [1942] A.C. 624, 642.) whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service."

Lord Hodson said [at p. 973] the privilege applied to, for example, "Cabinet minutes, dispatches from ambassadors abroad and minutes of discussions between heads of departments". Lord Pearce added [at p. 987] "Cabinet correspondence, letters or reports on appointments to office of importance and the like". Lord Upjohn added [at p. 993] "high level interdepartmental minutes and correspondence and documents pertaining to the general administration of the naval, military and air force services" and "high level inter-departmental communications". Incidentally, Lord Upjohn expressly rejected, as a *rationale* for the privilege, that it would encourage candour and freedom of expression. Instead, he said simply that the "reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to

learn of these high level communications, however innocent of prejudice to the state the actual contents of any particular document might be; that is obvious".

32 Australian cases in which the same view has been taken are *Lanyon Pty. Ltd. v. Commonwealth of Australia* (1974), 3 A.L.R. 58, and *Australian National Airlines Com'n v. Commonwealth of Australia* (1975), 132 C.L.R. 582.

33 On the other hand, in *Manitoba Development Corp. v. Columbia Forest Products Ltd. and GNC Industries Ltd.*, [1973] 3 W.W.R. 593, Nitikman, J., refused to recognize a class claim for privilege for [p. 594] "documents pertaining to the policy-making and decision-making conduct of the Executive Council of the Government of Manitoba". The privilege had been claimed on the ground that the production of the documents "would create or fan ill-informed or capricious public or political criticism".

34 These cases are of great interest. However, the Commission is not a Court of law. Principles of admissibility of evidence applicable to a Court of law do not necessarily apply to the proceedings of a commission of inquiry. That is well established by Court decisions. Moreover, some commissions of inquiry have as their subject-matter questions of the conduct of high officers of State. Unlike the role of a Court trying a case between private litigants or between a private litigant and the State, in a commission of inquiry such as this the very objects of the inquiry may include facts the disclosure of which -- whether through Government documents or not -- may "create or fan ill-informed or capricious public or political criticism".

35 Because of these differences between the role of a Court and the role of a commission of inquiry, it is incorrect to suggest that procedural rules applicable to litigation are applicable automatically to commissions of inquiry.

36 Even in the Courts, the recent judgment of Lord Widgery, C.J., in *Attorney-General v. Jonathan Cape Ltd.*, [1976] Q.B. 752, is of great interest. There, the issue to be decided was whether, upon the application of the Attorney-General, the Court should grant an injunction to restrain the defendant from publishing the memoirs of the late R.H.S. Crossman, a Cabinet Minister in the 1960's, which included his record of discussions in Cabinet. At p. 764, Lord Widgery, C.J., said:

> It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action, and the Attorney-General contends that not only will the court refuse to compel the production of such matters, but it will go further and positively forbid the disclosure of such papers and proceedings if publication will be contrary to the public interest.
>
> The basis of this contention is the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing (or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified.

At p. 765, Lord Widgery, C.J., said:

> ...it must be for the court in every case to be satisfied that the public interest is involved, and that, after balancing all the factors which tell for or against publication, to decide whether suppression is necessary.

At pp. 770-1, he said:

> The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.

> It is evident that there cannot be a single rule governing the publication of such a variety of matters. In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are not other facts of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.
>
> Applying those principles to the present case, what do we find? In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.
>
> The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.
>
> There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.

He then held that, 10 years having elapsed since the Cabinet discussions described in the memoirs, there ought not to be an injunction to restrain publication as he was not satisfied that "publication would in any way inhibit free and open discussion in Cabinet hereafter". He held likewise as to the disclosure of advice given by senior civil servants.

37 The Commission is not prepared to apply to its own proceedings a rule more absolute than that applied by Lord Widgery. The Commission will balance all the factors which tell for or against any document being made public.

38 The Commission does not intend to close its eyes to the importance which under certain circumstances the protection of State secrets could call for, whether this be done by keeping documents or oral evidence from public knowledge. But when this concern arises the Commission must invoke a number of factors which in each case will be weighed on their merits.

39 Without limiting the number of factors which may be pertinent in a particular case, the Commission readily recognizes that, faced by an objection to the giving of certain evidence in public on the grounds that it is of a secret nature, the Commission could take into consideration:

> 1. The role of a Commission of Inquiry. The Governor in Council did not direct this Commission to receive all its evidence *in camera*. Thus the Governor in Council may reasonably be taken to have accepted the principle of publicity articulated in the report of the *Royal Commission on Tribunals of Inquiry* (1966), chaired by Lord Justice Salmon, Cmnd. 3121, which we quoted in this Commission's opening statement on December 6, 1977 [p. 38, paras. 115-7]:
>
> > 115. ...it is ... of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.
> >
> > 116. When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.
> >
> > 117. It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however ... that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the

> hearing is not in secret would, in our view be a small price to pay for the great advantages of a public hearing.

2. Conflicting with the principle of publicity is the *rationale* of any privilege relating to state documents and discussions among officers of State. The Commission believes that the *rationale* must be found in more than an assertion that it would be "wrong" for such evidence to be disclosed, and it seems to us that the judgment of Lord Widgery, C.J., in the *Jonathan Cape* case rested not on any such sphinx-like *rationale* but on that of the extent to which the suppression of such evidence is necessary to encourage candid exchanges of opinions about policy among persons at high levels of Government, whether or not they actually had an expectation that the opinions were being exchanged in confidence. In most such situations there will have been an expectation of confidentiality, so that the effect is the same whether the *rationale* is the one or the other.

It will be noted that this *rationale* is designed to protect exchanges of *opinions* about policy. It is deserving of great weight where it is properly applicable. It is not applicable to statements of *fact*. The distinction was observed in *Halperin et al. v. Kissinger* (1975), 401 F. Supp. 272, where the Court said [at p. 274]:

> Executive privilege exists to protect the decision-making process. The guarantee of confidentiality assures freedom "to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"... The realm of advice, opinion, and policy formulation should be protected from public scrutiny in order to encourage candid discussion and independence by policy-makers in the executive branch.

It does not necessarily follow that statements of fact contained in records or memories of discussions, or in letters, require the same protection in order to encourage candid discussion and independence by policy-makers. Disclosure of such statements of fact will not always impede the Executive decision-making process, or deter future frank discussions by Government officers.

3. "The public has an interest in preventing government malfeasance. Exposure of past wrongdoing might inhibit future abuses of government employees". M. S. Wallace, "Discovery of Government Documents and Official Information Privilege", 76 *Col. L. Rev.* 142 (1976). Disclosure of crimes, frauds and misdeeds is permissible if the disclosure is justified in the public interest, in which case that public interest may override any private interest in confidence: *Gartside v. Outram* (1856), 26 L.J. Ch. 113; *Initial Services Ltd. v. Putterill*, [1968] 1 Q.B. 396 (C.A.). The same view of the public interest in the administration of criminal justice resulted in the rejection of a claim of "executive privilege" in *U.S. v. Nixon, President of United States et al.* (1974), 418 U.S. 683.

4. The status of the possessor or originator of the information may be significant. The older cases seem to treat all documents of the central Government as "state secrets" and accordingly, as a class, privileged from production. That view does not prevail today. Conversely, it cannot be assumed that documents of some other level of Government are to be treated differently *as a class: D. v. National Society for Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.).

5. As has already been observed, witnesses already heard by the Commission, whose conduct may lead the Commission to make a "charge" against them (to use the word found in ss. 12 and 13 of the *Inquiries Act*), may have a proper interest in knowing of the testimony of senior officials of the Security Service and of persons in high levels of Government from whom they may have received express or implied authority to carry out the acts under investigation.

40 This is not intended as an exhaustive list of the considerations which may be pertinent when the Commission must decide whether, in regard to a particular document or oral evidence, the proceedings should be *in camera*.

41 In quantitative terms it may turn out to be rare that the Commission will have to reach a decision as to what is in the public interest. Frequently, it should be possible for counsel to establish in public the existence of relevant facts without making specific reference to such documents and without eliciting oral testimony about discussions recorded by such documents. Again, in many cases a document in the class of "Government documents" will be one which will, in any event, in the Commission's view, "relate to national security", and thus be receivable *in camera* on that ground.

42 The Commission is optimistic that in the future, as in the past, a spirit of reasonableness will enable counsel and the Commission to arrive at a result in a particular case which achieves the Commission's desire to hear as much evidence as possible in public while at the same time ensuring both that the national security is not endangered and that the public interest is served.

43 The Commission also wishes to point out that if the ingenuity and diligence of counsel fails to find a way of solving a problem involving a document, the Commission will not decide that the document should be received in public, without first giving all counsel the opportunity to make representations. Then, if the Commission does not accept the representations made against public disclosure it will not cause the document to be produced in public without giving counsel reasonable time to seek such remedies or take such action as they may wish.

5. The Official Secrets Act, R.S.C. 1970, c. O-3, s. 4(1)

44 As was pointed out during argument, if the Commission, contrary to the submission of counsel for the Government Departments, including the Prime Minister's Office, should decide that a particular document should be received in evidence in public, it may be that the disclosure of the document would be a violation of s. 4(1) of the *Official Secrets Act*, the relevant parts of which read as follows:

> 4(1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that ... has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access ... owing to his position as a person who holds or has held office under Her Majesty...
>
> > (a) communicates the ... document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;

It might be said that a violation would occur in either of two situations:

> (a) One interpretation requires the adjectives "secret official" to be read as applicable only to the nouns "code word, or pass word". If so, it might be contended that any disclosure of a document or information entrusted to the Commission in confidence, would be a violation of s. 4(1) even if the document or information were not "secret official". There may be a violation when the Commission communicates *any* document or information which it had received in confidence from the Government (including the Privy Council Office or the R.C.M.P.), or has obtained it from the R.C.M.P. by virtue of the duty imposed upon the R.C.M.P. to provide access to the Commission to all its documents, or has obtained it from a Government Department by subpoena.
>
> (b) If, on the contrary, the adjectives "secret official" apply to "any ... document or information", then it is only documents and information which are "secret" and "official" that are covered by s. 4(1). Thus, the section would apply only to a document or information which is "Secret" or "Top Secret".

45 In each of these situations, a violation would occur only if the Commission does not have the "authority" to disclose it in public. There is an unresolved issue here, as to whether such authority must be given expressly or may be given by implication.

46 Moreover, in each of these situations, a violation would occur only if it were not "in the interest of the State" to communicate the document or information to the public by receiving it in evidence in public. It would be a nice legal question whether, in a particular case, receiving a certain document or information in evidence in public would be in the interest of the State, for it might be contended that the receipt of the evidence in public is in the interest of the State in that the State has an interest in the public having confidence in the proceedings of a commission of inquiry before which there are questions of the conduct of persons holding high public office.

47 These are difficult questions as to which the Commission need not now reach a conclusion, and as to which the Commission has received no indication what the position of the Attorney-General of Canada is. In *Attorney General v. Jonathan Cape Ltd.*, [1976] Q.B. 752 at p. 767, the Attorney-General of England and Wales conceded that the defendants were not in breach of the *Official Secrets Act*. During the course of argument, Mr. Nuss was unable to advise the Commission whether he and Mr. Robert appeared on behalf of the Attorney-General, at most he could say that he appeared on

behalf of Government "Departments" (in French, "Ministères") which would include the Department of Justice, but he was unable to assert that he had instructions to speak on behalf of the Attorney-General of Canada. Moreover, he admitted that he did not have any instructions in respect of the applicability of s. 4(1) of the *Official Secrets Act*.

48 So this aspect of the matter must be left, to be faced if and when a situation should arise which requires it to be considered by the Commission. In the absence of an opinion by the Attorney-General of Canada that the disclosure in public of any particular document or information, or of any particular class of documents or information, would be a violation of the *Official Secrets Act*, this decision of the Commission has been reached on the assumption that no such question arises.

6. Do the terms of reference preclude the Commission from hearing evidence of ministerial knowledge of activities by members of the R.C.M.P. unrelated to national security?

49 During the course of argument, Mr. Nuss submitted that when the Commission is inquiring into "the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada" (para. (c) of the terms of reference), it has jurisdiction to inquire into and report on "the policies and procedures governing" those activities. From his remarks we infer that, in his submission, the power to inquire into the "policies and procedures governing" those activities permits the Commission to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing "those activities", or to receive in evidence documents relating to the role of such persons.

50 However, as we understand Mr. Nuss, his submission is that when the Commission is inquiring into the matters referred to in paras. (*a*) and (*b*) and which do not relate to "policies and procedures" that govern the activities of the R.C.M.P. in the discharge of its responsibility to protect the security of Canada", the Commission does *not* have the power to hear the testimony of persons who are not and have not been members of the R.C.M.P. but have had a role in shaping or applying the "policies and procedures" governing those activities, or the power to receive in evidence documents relating to the role of such persons. It would follow logically that objection would be taken also to evidence by any member of the R.C.M.P. or any other witness as to the statements or conduct of persons who, although never members of the R.C.M.P., nevertheless, had a role in shaping the "policies and procedures" governing those activities.

51 This is a novel proposition as far as the Commissioners are concerned. It has not previously been advanced by counsel for the Solicitor-General, who now are counsel for the Departments of the Government of Canada.

52 On May 25, 1978, during the hearings into the relationship between the R.C.M.P. Criminal Investigation Branch and the Department of National Revenue, when objection was taken to the production in public of correspondence between two Ministers it was on the ground that in the public interest such correspondence ought not to be disclosed in public. It was not asserted either formally or informally to the Commission that the correspondence was immaterial as relating to a matter beyond the Commission's terms of reference.

53 While it is for the Commission to interpret for itself the provisions of P.C. 1977-1911, it is of interest to note the following statements made in the House of Commons on November 8, 1977, by the then Solicitor-General the Honourable Francis Fox, M.P. (Hansard p. 709):

> I believe that any fair observer would say the terms of reference that have been given to the Royal Commission are extremely wide.
>
> Why did we set up a Royal Commission of Inquiry? A Royal Commission of Inquiry was set up last July in response to a number of allegations that were made known to the government at that time. Prior to that the Leader of the opposition was pressing for a royal commission. He then asks the following question during this debate: "by whom were these acts committed and at whose direction?" I would venture to suggest that the basic purpose of the Royal Commission of Inquiry is to get at the bottom of exactly who committed the acts and at whose direction. I think if you look at the terms of reference --
>
> Mr. Speaker, an hon. member on the other side says change the terms of reference. If you look at the terms of reference --

> Mr. Clark: We have.
>
> Mr. Fox: If you have, I suggest you re-read them. They are extremely wide. I should like to make one point very clear once again, a point that has been made time and time again in the course of debate in the House, that is, that the chairman and members of that commission have all the powers required under the terms of reference to look at an illegal act, if there is one, and to follow the nexus all the way up to wherever it leads.

54 The Solicitor-General did not limit the applicability of his statement to illegal acts committed by members of the Security Service.

55 The Commissioners, who must themselves interpret P.C. 1977-1911 without relying on such a statement, do not accept the proposition now advanced by counsel for the Departments.

56 This Commission was appointed pursuant to Part I of the *Inquiries Act*, entitled "Public Inquiries". The first section in that Part of the *Inquiries Act* is s. 2, which reads as follows:

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

The Terms of Reference of this Commission of Inquiry are clearly concerned with both "the good government of Canada" and "the conduct of [a] part of the public business" of the Government of Canada. The preamble of Order in Council, P.C. 1977-1911, dated July 6, 1977, which appointed the Commissioners and stated the terms of reference, makes it clear that the Governor in Council was concerned that there be "full inquiry" into "the extent and prevalence of investigative practices or other activities involving members of the Royal Canadian Mounted Police that are not authorized or provided for by law", so as to "maintain" public "trust in the policies and procedures governing its activities" without which there cannot be "public" support of the R.C.M.P. "in the discharge of the responsibility to protect the security of Canada".

57 In other words, with respect to "investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law", the preamble indicates that the Commission is to inquire into "policies and procedures governing" the activities of the R.C.M.P. without limitation to the policies and procedures governing the Security Service of the R.C.M.P., for there can be public support for the work of the Security Service only if there is public trust in the policies and procedures governing all the activities of the R.C.M.P. of which it is a part.

58 Paragraph (a), in so far as it relates to investigative practices and activities not relating to matters of the security of Canada, must be read together with para. (b). If the Commission finds that an "investigative practice" or "action" or "other activity" has involved members of the R.C.M.P. and "are" or "was" not authorized or provided for by law, then the Commission has a duty to "report the facts" relating to any such investigative action or other activity involving persons who were members of the R.C.M.P.

59 The effect of Mr. Nuss' contention is that, in the absence of any duty being specified in para. (b) to report on "policies and procedures" governing such investigative action or other activity, the scope of the inquiry must stop short of inquiring into whether, for example, a Solicitor-General knew of an investigative practice that violated the provisions of a federal statute or that constituted a violation of the rights of citizens enforceable in the civil law and yet authorized the investigative practice to continue or at least condoned it by not directing that the practice cease.

60 To accept that view of the meaning of the Order in Council, in the Commission's view, would mean that the Commission would be precluded from rendering a full and proper "report" on the facts "relating to" any investigative action or other activity involving persons who were members of the R.C.M.P. that was not authorized or provided for by law. For it would require the Commission to attempt the difficult and artificial task of differentiating between the activities of the Criminal Investigation Branch of the R.C.M.P. and the Security Service of the R.C.M.P. in terms of considering the role and function of the Solicitor-General and of other Ministers of the Crown. Such a distinction would not be founded upon any satisfactory *rationale*.

61 Moreover, if the Commission were to accept the contention of Mr. Nuss, it would find itself in an invidious position when deciding as required by para. (b) what advice to

give to the Governor in Council "as to any further action that the Commissioners may deem necessary and desirable in the public interest". For example, the Commission will wish to consider what advice it will give to the Governor in Council as to whether the facts which the Commission reports, and the evidence of those facts, should be referred to the appropriate Attorney-General for his consideration.

62 Among the facts which the Commission will wish to report in some cases will be whether members of the R.C.M.P. who, in the opinion of the Commission have, or might be held in a Court to have, committed a wrongful act, were doing so upon the direction or with the consent or at least without the disapproval of a Minister of the Crown, for that might be a fact which any Attorney-General might consider relevant to the process of his deciding whether or not to prosecute the members of the R.C.M.P.

63 Conversely, the Attorney-General, while satisfied that he should launch a prosecution against a member of members of the R.C.M.P., might wish to prosecute all those against whom there is evidence upon which a prosecution might be successful as parties to the offence under s. 21 of the *Criminal Code* or to a conspiracy to commit an unlawful act.

64 Finally, to interpret the terms of reference in such a way as to permit the Commission to report on wrongful acts by members of the R.C.M.P. without also reporting on the extent to which they had from Ministers express or tacit authority to perform those acts would not only compel the Commission to deliver an incomplete report on the relevant facts but would also be unfair to the members of the R.C.M.P. who while "charged" by the Commission (to use the word found in ss. 12 and 13 of the *Inquiries Act*) would have reason to feel that facts tending to exonerate them perhaps from guilt and perhaps from punishment had not been inquired into, had not been reported upon, and would never come to the attention of the appropriate Attorney-General.

End of Document

TAB 3

The Conduct *of* Public Inquiries

law, policy, and practice

ED RATUSHNY

The Conduct of Public Inquiries: Law, Policy, and Practice

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developed a credible rapport with those most affected by the disaster. But a general election was called a few days later and he stepped down to run as a Liberal candidate. On 1 May 2006, the new prime minister, Stephen Harper, announced the appointment of retired Supreme Court justice John Major as the commissioner for this inquiry. The terms of reference are specific but relate to systemic issues as recommended by Bob Rae.[16]

B. ALTERNATIVE PROCESSES

This section examines alternatives to the establishment of a commission of inquiry to address problems with a high public profile that have shaken public confidence. It begins with the Mulroney-Schreiber affair as an illustration of an unsuccessful attempt to address the problem through a parliamentary committee. The story has a number of interesting and bizarre twists but also demonstrates the inadequacy of such a forum for addressing this kind of problem. It certainly has political overtones because a former prime minister of Canada was the central figure. But the gist of the task was to investigate very specific conduct and related events.

This section then canvasses criminal investigations, existing statutory mechanisms, departmental investigations, and informal inquiries. Each has features more suitable for different kinds of problems than the others.

1) Legislative Committees

The Mulroney-Schreiber saga provides a useful illustration of the nature of a parliamentary committee as a forum for addressing problems of public interest. It also illustrates its limitations. The committee that attempted to deal with this matter ended up with a single recommendation, namely, that the government appoint a commission of inquiry to deal with it.

The context is familiar to Canadians. Former prime minister Brian Mulroney stepped down from that office in 1993. In 1995 the subsequent Liberal government sought information from a Swiss bank and, in support of the request, claimed that Brian Mulroney had been engaged in

16 Air India Inquiry.

involved. The second concerned systemic aspects of public management. With respect to the sponsorship program, the commissioner was directed "... to submit, on an urgent basis, one or more reports, interim or final, of his factual findings." A separate report was to be submitted on the systemic aspects. The first report was published in early November 2005 and the reaction forced the government to call an election in January, which it lost. The final report was released shortly after.[69]

These are but a few of the many examples of provisions in terms of reference that guide the manner in which the specific subject matter of a commission of inquiry is to be addressed. They continue to evolve in nature and in different jurisdictions based on the cumulative experience of previous commissions. Their formulation depends upon legal and practical considerations as well as political judgment.

4) Interpretation and Amendment

Once a commission of inquiry has been established, the interpretation of its terms of reference is the role of the commissioner rather than the government. This is so even though the commission owes its entire existence and its mandate to the government: "It is for the Commissioners to interpret the instrument that gave birth to the Commission."[70] The reason is that the terms of reference are legal in nature; they define the commission's jurisdiction. This means that an erroneous interpretation by the commissioner is subject to judicial review by one of the parties or by the government.

Such a successful attack on a commissioner's interpretation of his mandate occurred in the Cornwall Inquiry.[71] The Ontario Court of Appeal unanimously agreed that Commissioner Normand Glaude's interpretation simply was not logical or reasonable and constituted jurisdictional error. The court said that "a high degree of deference" would be given to a commissioner by a reviewing court provided the evidence he sought to explore was reasonably relevant to the subject matter of the inquiry."

---

69 Gomery Inquiry.

70 *Re Commission of Inquiry* (1979), 94 D.L.R. (3d) 365 at 370 (Comm. of Inq.).

71 *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, [2008] O.J. No. 153 (C.A.) [*Cornwall*]. See also *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.).

TAB 4

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

The Honourable Richard D. LeBlanc, Commissioner

APPLICATION FOR STANDING

The Application of Her Majesty in Right of Newfoundland and Labrador ("the Province"), states that:

1. The Province hereby applies for standing in relation to the Commission of Inquiry Respecting the Muskrat Falls Project ("the Inquiry"). The Province intends to address three aspects to an application for standing in this Application: the procedure; the test for standing; and the level of participation to be granted to a party.

2. The Province submits that the substance and the procedure governing this Application are established by the *Public Inquiries Act* SNL c. P-38.1 ("the Act") and the *Rules of Procedure of the Inquiry* ("the Rules").

3. Pursuant to s. 5(1) of the Act, a commission of inquiry is required to give persons an opportunity to apply to participate if the commission believes that the persons have an interest in the subject of the inquiry.

4. With respect to the test for standing, Section 5(2) of the Act grants a commission authority to grant standing to a person. This section requires a commission to consider 3 factors before granting standing. This language suggests that the following factors listed in the section are not exhaustive:

   a) whether the person's interest may be adversely affected by the findings of the Commission;

   b) whether the person's participation would further the conduct of the Inquiry; and

   c) whether the person's participation would contribute to the openness and fairness of the Inquiry.

5. Ed Ratushny, in his book "*The Conduct of Public Inquiries" (2009)*, addressed the legal basis for the test for standing. (Page 186) "The basis for granting standing may be established by statute, the terms of reference, the principle of fairness, or the overriding discretion inherent in the role of the commissioner." **(TAB 1)**

6. In order to assess whether a person's interests may be *adversely affected* (s. 5(2)(a) of the Act) the Province suggests that it is necessary to consider this Inquiry's *Terms of Reference*. Section 4 of the *Terms of Reference* is as follows:

   The commission of inquiry shall inquire into:

   (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether

      (i) the assumptions or forecasts on which the analysis of options was based were reasonable;

      (ii) Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option; and

(iii) Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time.

(b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of Commission of Inquiry established this inquiry together with reliable estimates of the costs to the conclusion of the project including whether:

(i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,

(ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,

(iii) the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,

(iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,

(v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether

(A) the assessments were conducted in accordance with best practice,

(B) Nalcor took possession of the reports, including the method by which Nalcor took possession,

(C) Nalcor took appropriate measures to mitigate the risks identified, and

(D) Nalcor made the government aware of the reports and assessments, and

(vi) the commercial arrangements Nalcor negotiated were reasonable and competently negotiated;

(c) whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities was justified and reasonable and what was the effect of this exemption, if any, on the development, costs and operation of the Muskrat Falls Project; and

(d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.

6. For the purposes of this Application, the Province would summarize the subject matter of Section 4 in the following manner:

1) Nalcor's recommendation of the Muskrat Falls Project for sanction by the Province;

2) Project Management by Nalcor of the Muskrat Falls Project;

3) Decision by the Province to exempt the Muskrat Falls Project from oversight by the Board of Commissioners of Public Utilities (PUB);

4) The Sanction of the Muskrat Falls Project by the Province;

5) Oversight of the Muskrat Falls Project by the Province.

7. In order to assess this Application, the Province suggests that the Commissioner must be mindful of Section 6 of the *Terms of Reference* which states that: *"The commission of inquiry shall make findings and recommendations that it considers necessary and advisable related to section 4."*

8. Read together, the Province submits that the *Terms of Reference* and the Act grant the Commissioner the authority to make findings that could *adversely affect the interests* of the Province. The Pocket Oxford English Dictionary defines "adverse" to mean "harmful or unfavourable". **(TAB 2)** This dictionary defines "interest" as "a person's advantage or benefit". **(TAB 3)** The Province submits that adversely affect an interest means to engage in conduct which could be harmful or unfavourable to what is advantageous or beneficial to a person. A good reputation is clearly advantageous and beneficial to a crown corporation or a government. Any activity which is harmful or unfavourable to a reputation is adverse to an interest.

9. The Province submits that after considering s. 5(2)(a) the Commissioner should grant the Province standing. The *Terms of Reference* clearly authorize the Commissioner to make findings which could adversely affect Nalcor (see s. 4 of the Terms). This in turn could affect the interests of the Province as shareholder. (Nalcor is a Crown Corporation wholly owned by the Province by virtue of s. 3(3) of the *Energy Corporation Act* SNL 2001, c. E-11.01). **(TAB 4)** The findings against Nalcor would be in relation to the work that Nalcor has done on the Muskrat Falls Project including Nalcor's recommendation of the Muskrat Falls Project or Nalcor's management of the Project. Adverse findings against Nalcor could impact Nalcor's future operations in relation to the Muskrat Falls Project, other hydroelectricity activities, its oil and gas or fabrication activities. Any negative impact upon these activities would also have a negative impact upon the Province as the only shareholder of Nalcor.

10. The *Terms of Reference* also authorize the Commissioner to make findings which could adversely affect the interests of the Province more directly. The findings could be made in relation to the role of the Province in: i) the Sanction of the Muskrat Falls Project, ii) the exemption of the Muskrat Falls Project from oversight by the PUB, or iii) oversight of the Muskrat Falls Project. Any adverse finding could adversely impact the reputation of the Province and, thereby,

impact future activities carried out by the Province including in relation to the Muskrat Falls Project or other projects. Further, adverse findings could have an impact upon the political and economic life of the Province.

11. The Province's participation in the Inquiry would further the *conduct of the Inquiry*. (s. 5(2)(b) of the Act) The Province is furthering the work of the Inquiry by producing documents which are essential to the work of the Inquiry. The Province can also further the work of the Inquiry in a manner unlike any other party. The *Terms of Reference* focus on the operation of two related organizations: the Province and Nalcor. The Province is able to assist the Commission in understanding the operation of the Province including the relationship between the Premier's Office, Cabinet Secretariat, Government Departments and Crown Corporations.

12. The Province's participation would also contribute to the openness and fairness of the Inquiry. The Province created this Inquiry and the *Terms of Reference*. The goal of the Inquiry is to grant the Commissioner the power and authority to determine how and why the Muskrat Falls Project was the project chosen to address the energy demands of Newfoundland and Labrador and also to determine why the Project's costs were higher than projected. The answers to these questions are important to the Province for many reasons, not the least of which is to address the Province's role in the creation and supply of electricity in particular and the Province's role in the economy in general. Furthermore, large projects have historically played an important part in the economy of Newfoundland and Labrador whether these projects were carried out by the Province or private industry. The lessons learned regarding the Muskrat Falls Project may be important to the future of the economic and political life of Newfoundland and Labrador.

13. Finally, with respect to the test or criteria for being granted standing, Section 5 (4) of the Act states "A commission shall not make a report against a person until

the commission has given reasonable notice to the person of the charge of misconduct alleged against him or her and the person has been allowed full opportunity to be heard in person or by counsel." *Any person against whom a report* is made pursuant to this subsection is likely to be an employee, servant or officer with the Province or a person appointed by the Province to the board of Nalcor or appointed as the Chief Executive Officer with Nalcor, a Crown Corporation wholly owned by the Province. The Province submits that this circumstance reinforces the necessity of the Province participating as a party in all aspects of the Inquiry.

14. The last aspect of standing that the Province wishes to address is in relation to s. 14 of the Rules.

> *The Commissioner will determine the extent to which a party may participate. For example, a party may be granted standing for limited issues or portions of the hearings.*

15. The Province hereby requests that the Commissioner order that the Province be granted standing that entitles is to fully participate in all aspects of the Inquiry.

16. The Inquiry is reviewing the conduct of 1) the Province including the Premier, the Cabinet, Departments, Agencies and Crown Corporations; and 2) the officers, servants or employees of the bodies listed in paragraph 1. It is probable that every document proffered and every witness called will be relevant to the Province's interests, be they in relation to the Province itself or a crown corporation or an agency of the Province.

17. The Province hereby applies for the right to fully participate in the Inquiry including the right to adduce documents and witnesses. The Province acknowledges that the Commissioner has the authority to determine what evidence will be adduced during the Inquiry including documents and witnesses.

This means that the Province must be granted leave by the Commissioner to adduce documents, call witnesses or cross examine witnesses. Finally, the Province seeks the right to file written argument and to make oral argument with respect to any issue which may arise during the course of the inquiry including issues in relation to the ultimate findings and recommendations by the Inquiry.

18. The Province further advises the Commission that, at the present time, the Premier and Ministers of the Crown will not apply for standing separate from the standing that may be granted Her Majesty in Right of Newfoundland and Labrador. The Premier and Ministers of the Crown understand that they are entitled to have counsel present while they are interviewed and during testimony before the Commission. Further, the Premier and the Ministers understand that counsel would also have standing before the Commission for the testimony of each of these individuals. Finally, the Premier and the Ministers wish to advise the Commission that they may subsequently apply for further standing if the need arises which need is not currently apparent. This standing would be further to the standing that they are granted as witnesses before the Commission pursuant to the *Rules of Procedure*.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador this _____ day of March, 2018.

Peter Ralph, QC
Solicitor for Her Majesty in Right of
Newfoundland and Labrador

cc R. Barry Learmonth, QC
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TAB 5

CARSWELL

CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 1

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and being sued, and bound by the decisions of courts and other properly constituted tribunals. However, the state, although a legal person, is not subject to exactly the same laws as other legal persons, namely, corporations and private individuals. The state enjoys extensive powers that are not available to subjects: to collect taxes, to maintain an army, a police force and courts, and to exercise powers necessary to administer the myriad laws which regulate and provide state services in a modern society. In addition, the state enjoys certain privileges or exemptions from the general law of the land. Some of these are necessary to the effective exercise of state powers, for example, the privilege to withhold certain "classified" information from the courts. Others are the product of traditional notions of sovereignty, for example, the immunity of the state from certain kinds of legal proceedings.

In Canada, and in other Commonwealth countries which recognize the same Queen as the formal head of state, the state (or government) is commonly referred to as "the Crown". This usage dates from earlier times when all powers of government were vested in the monarch, and were exercised by delegation from the monarch. One could argue, with some support from the language of the Constitution, that this is still technically true of Canada today, but the theory bears no resemblance whatever to the actual lines of authority within Canadian governments.[2] Nevertheless, the "Crown" continues to be used as "a convenient symbol for the State", and we commonly speak of the Crown expropriating a house, of the Crown being sued for breach of contract, of the Crown being bound by a statute. In all of these propositions the state or the government could as well be used instead of the Crown.

There is only one individual at any time who is the Queen (or King). The Crown accordingly has a monolithic connotation, which has sometimes been articulated in dicta such as that the Crown is "one and indivisible". For nearly all purposes the idea of the Crown as one and indivisible is thoroughly misleading. Within the British Empire (or, later, the Commonwealth), once a territory acquired a degree of self-government, then, as to matters falling within the scope of self-government, the Queen was thereafter advised by her colonial ministers, not her British ministers; and the colonial government, with its power to raise taxes and create a separate treasury, would assume the responsibility for debts and other obligations pertaining to matters within the scope of self-government. When the colony achieved full independence, it became an entirely separate legal entity from the United Kingdom for all practical purposes, including the making of contracts, the holding of property and the capacity to sue and be sued. The divisibility of the Crown was explicitly recognized in the *Alberta Indians* case (1982),[3] when several associations of Canadian aboriginal peoples brought suit in the courts of the United Kingdom to enforce obligations to the aboriginal

2 See ch. 9, Responsible Government, above.

3 *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Assn. of Alta.* [1982] Q.B. 892 (C.A.).

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Wetzel v. R. | 2004 TCC 767, 2004 CCI 767, 2004 CarswellNat 4374, 2004 CarswellNat 7186, [2005] 3 C.T.C. 2874, 2005 D.T.C. 89 | (T.C.C. [Informal Procedure], Nov 29, 2004)

2002 SCC 54, 2002 CSC 54
Supreme Court of Canada

Ross River Dena Council v. Canada

2002 CarswellYukon 58, 2002 CarswellYukon 59, 2002 SCC 54, 2002 CSC 54, [2002] 2 S.C.R. 816, [2002] 3 C.N.L.R. 229, [2002] 9 W.W.R. 391, [2002] B.C.W.L.D. 705, [2002] S.C.J. No. 54, 114 A.C.W.S. (3d) 364, 168 B.C.A.C. 1, 2002 D.T.C. 7079 (En.), 2002 D.T.C. 7093 (Fr.), 213 D.L.R. (4th) 193, 275 W.A.C. 1, 289 N.R. 233, 3 B.C.L.R. (4th) 201, J.E. 2002-1160, REJB 2002-32124

Norman Sterriah, on behalf of all members of the Ross River Dena Council Band, and the Ross River Dena Development Corporation, Appellants v. Her Majesty The Queen in Right of Canada and the Government of Yukon, Respondents and The Attorney General of British Columbia and the Coalition of B.C. First Nations, Interveners

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: December 11, 2001
Judgment: June 20, 2002
Docket: 27762

Proceedings: affirming (1999), 182 D.L.R. (4th) 116, 1999 BCCA 750, 1999 CarswellYukon 83, 72 B.C.L.R. (3d) 292, [2000] 4 W.W.R. 390, [2000] 2 C.N.L.R. 293, 131 B.C.A.C. 219, 214 W.A.C. 219 (Y.T. C.A.); reversing [1998] 3 C.N.L.R. 284, 1998 CarswellYukon 23 (Y.T. S.C.)

Counsel: *Brian A. Crane, Q.C., Ritu Gambhir*, for Appellants
Brian R. Evernden, Jeffrey A. Hutchinson, for Respondent, Her Majesty the Queen in Right of Canada
Penelope Gaun, Lesley McCullough, for Respondent, Government of Yukon
Richard J.M. Fyfe, Paul E. Yearwood, Patrick G. Foy, Q.C., for Intervener, Attorney General of British Columbia
Leslie J. Pinder, for Intervener, Coalition of B.C. First Nations

Subject: Public; Provincial Tax; Property

Related Abridgment Classifications

Aboriginal and Indigenous law

II Land
II.2 "Reserve land"

Headnote

Native law --- Reserves and real property — "Reserve land"

Under Indian Act, setting apart of tract of land as reserve implied both action and intention — Crown had to do certain things to set apart land and must also have had intention of creating reserve — Royal **prerogative** in respect of creation of reserves within meaning of Indian Act was limited but not entirely ousted by statute — Definition of reserve in Indian Act limited effects of Crown's decision to set up reserve — Section 18(d) of the Territorial Lands Act placed limits on royal **prerogative** with respect to creation of reserves by establishing new and different source of authority whose exercise could trigger process of reserve creation — Territorial Lands Act, R.S.C. 1952, c. 263, s. 18(d) — Indian Act, R.S.C. 1985, c. I-5.

Droit autochtone --- Réserves et biens-fonds — « Terres de réserve »

En vertu de la Loi sur les Indiens, la mise de côté d'une parcelle de terrain à titre de réserve suppose à la fois une action et une intention — Couronne devait prendre

certaines mesures pour mettre de côté les terres et elle devait aussi avoir eu l'intention de créer une réserve — Loi sur les Indiens ne faisait que restreindre, et non écarter complètement, l'application de la **prérogative** royale en matière de création de réserves en vertu de la Loi — Définition de ce qu'est une réserve, qui est contenue dans la Loi sur les Indiens, limitait les effets de la décision de la Couronne de mettre une réserve sur pied — En établissant des pouvoirs de source nouvelle et différente dont l'exercice pouvait déclencher le processus de création de réserves, l'art. 18(d) de la Loi sur les terres territoriales limitait l'application de la **prérogative** royale en matière de la création de réserves — Loi sur les terres territoriales, L.R.C. 1952, c. 263, art. 18d) — Loi sur les Indiens, L.R.C. 1985, c. I-5.

In the 1950s, the members of an Indian band were allowed to settle on the site of their present-day village. During the 1950s, the agents of the Department of Indian Affairs and Northern Development knew that the band was living in the area. In 1953, the Superintendent of the Yukon Agency sought permission to establish an Indian reserve for the use of the band which was supported by the Indian Commissioner for British Columbia. In 1957 the federal government dismissed a recommendation to establish 10 reserves in the territories. The Superintendent of the Yukon Indian Agency applied in 1962 to have certain lands reserved for the creation of a band village site. In 1965, a government official advised the band that the lands in question had been reserved for the Indian Affairs Branch.

A store in the village was selling tobacco and the Government of Yukon imposed taxes under the *Tobacco Tax Act*. The band claimed an exemption and asked for a refund of taxes already paid on tobacco sold in the village. The band claimed that the government was taxing personal property of an Indian or band on a reserve which was exempt under the *Indian Act*. The government refused to refund the taxes on the basis that it did not recognize that the band occupied a reserve.

The band successfully applied for a declaration that the land in question was a reserve.

The Crown's appeal was allowed.

The band appealed.

Held: The appeal was dismissed

Per LeBel J. (Arbour, Binnie, Gonthier, Iacobucci, Major JJ. concurring): Under s. 2(1) of the *Indian Act*, the term "reserve" in the context of the *Indian Act* is defined as a tract of land, the legal title to which is vested in the Crown, that has been set apart by the Crown for the use and benefit of a band. Under the *Indian Act*, the setting apart of a tract of land as a reserve implied both an action and an intention. The Crown had to do certain things to set apart the land and must also have had an intention of creating a reserve.

The royal **prerogative** in respect of the creation of reserves within the meaning of the *Indian Act* was limited but not entirely ousted by statute. The definition of a reserve in the *Indian Act* limited the effects of the Crown's decision to set up a reserve. Section 18(d) of the *Territorial Lands Act* placed limits on the royal **prerogative** with respect to the creation of reserves by establishing a new and different source of authority whose exercise could trigger the process of reserve creation.

The registration in the Yukon Territory Land Registry of the setting aside of land for the Indian Affairs Branch was not sufficient to show intent to create a reserve. The Crown had to have an intention to create a reserve. The intention had to be possessed by Crown agents holding sufficient authority to bind the Crown. The intention could be evidenced either by an exercise of authority or on the basis of specific statutory provisions creating a particular reserve. Steps had to be taken to set apart the land and the setting apart had to occur for the benefit of Indians. The band concerned had to accept the setting apart and had to have started to make use of the lands set apart.

The band did not show that the Crown agents ever made representations to members of the band that the Crown had decided to create a reserve for them. The evidence presented related to recommendations made by Crown officials to other Crown officials which were generally ignored or rejected. No person having the

authority to bind the Crown ever agreed to the setting up of a reserve in the area. Every representation made by Crown officials in a position to set apart the lands was to the effect that no reserves existed in the territory and it was contrary to government policy to create reserves there. The Crown officials who advocated the creation of a reserve never had the authority to set apart the lands and create a reserve. What happened was the setting aside of lands for the use of the band. No reserve was legally created.

Per Bastarache J. (McLachlin C.J.C, L'Heureux-Dubé J. concurring): No reserve was created for the band. The evidence revealed that the Crown never intended to establish a reserve within the meaning of the *Indian Act*.

Section 2(1) of the *Indian Act* did not limit the Crown's ability to deal with lands for use of aboriginal people. Section 2(1) of the *Indian Act* merely defined with greater specificity which of the lands set apart for aboriginal people would be considered "reserves" for the purposes of the *Indian Act*. The Crown was still free to deal with its land in any manner it wished including the transfer of title to a first nation, although that land would not constitute a reserve under the *Indian Act*.

The royal **prerogative** to create a reserve was not limited by s. 18(d) of the *Territorial Lands Act*. Section 18 of the *Territorial Lands Act* permitted the Governor in Council to protect from disposition Crown lands for which other use was contemplated but was not directed at the creation of reserves per se. Any one of the historically used instruments could be sufficient to set apart lands as a reserve so long as intention on the part of the Crown to create a reserve was present. The mechanism provided by s. 18(d) of the *Territorial Lands Act* was not the only mechanism available to Crown to set apart lands for the creation of a reserve.

Durant les années cinquante, les membres d'une bande indienne ont obtenu la permission de s'établir à l'endroit où est actuellement situé leur village. Les fonctionnaires du ministère des Affaires indiennes et du Nord canadien savaient, dans les années cinquante, que la bande vivait dans la région. En 1953, le surintendant de l'Agence du Yukon a demandé la permission d'établir une réserve indienne à l'usage de la bande; cette demande était aussi appuyée par le commissaire aux Affaires indiennes pour la Colombie-Britannique. En 1957, le gouvernement fédéral a rejeté une recommandation visant l'établissement de dix réserves à l'intérieur des territoires. En 1962, le surintendant de l'Agence indienne du Yukon a demandé que certaines terres soient réservées pour la création du village de la bande. En 1965, un fonctionnaire du gouvernement a informé la bande du fait que les terres concernées avaient été réservées pour la Division des Affaires indiennes.

Le gouvernement du Yukon a imposé des taxes, en vertu de la *Loi de la taxe sur le tabac*, à un magasin du village qui vendait du tabac. La bande a revendiqué une exemption et a demandé le remboursement des taxes déjà payées sur le tabac vendu dans le village. La bande soutenait que le gouvernement taxait les biens personnels d'un Indien ou d'une bande dans une réserve, lesquels étaient exempts de taxe en vertu de la *Loi sur les Indiens*. Le gouvernement a refusé de rembourser les taxes au motif qu'il ne reconnaissait pas que la bande occupait une réserve.

La bande a demandé et obtenu une déclaration que les terres concernées constituaient une réserve.

Le pourvoi de la Couronne a été accueilli.

La bande a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (Gonthier, Iacobucci, Major, Binnie, Arbour, JJ., souscrivant): En vertu de l'art. 2(1) de la *Loi sur les Indiens*, le terme « réserve » est défini, aux fins de l'application de cette Loi, comme étant une parcelle de terrain, dont le titre est la propriété de la Couronne, et qui a été mis de côté par celle-ci à l'usage et au profit d'une bande. En vertu de la *Loi sur les Indiens*, la mise de côté d'une parcelle de terrain à titre de réserve suppose à la fois une action et une intention. La Couronne devait prendre certaines mesures pour mettre les terres de côté et avoir aussi l'intention de créer une réserve.

La *Loi sur les Indiens* ne faisait que restreindre, et non écarter complètement, l'application de la **prérogative** royale en matière de création de réserves en vertu de la Loi. La définition de la réserve contenue dans la *Loi sur les Indiens* limitait les effets de la décision prise par la Couronne de mettre sur pied une réserve. En établissant des pouvoirs d'une source nouvelle et différente dont l'exercice pouvait déclencher le processus de création d'une réserve, l'art. 18d) de la *Loi sur les terres territoriales* limitait l'application de la **prérogative** royale en matière de création de réserves.

L'enregistrement de la mise de côté des terres pour la Division des Affaires indiennes au bureau d'enregistrement des droits fonciers du Yukon n'était pas suffisant pour démontrer une intention de créer une réserve. La Couronne devait avoir eu l'intention de créer une réserve. Il faut que ce soit des représentants de la Couronne investis de l'autorité suffisante pour lier celle-ci qui aient eu cette intention. Cette intention pouvait être dégagée de l'exercice de pouvoirs ou des dispositions législatives particulières créant une réserve spécifique. Des mesures devaient être prises pour mettre les terres de côté, et cette mise de côté devait être faite au profit des Indiens. La bande concernée devait accepter la mise de côté et devait avoir commencé à utiliser ces terres.

La bande n'a pas réussi à démontrer que les représentants de la Couronne avaient jamais déclaré à ses membres qu'elle avait décidé de créer pour eux une réserve. La preuve présentée faisait état de recommandations faites par des fonctionnaires de la Couronne à d'autres fonctionnaires, lesquelles ont été en général ignorées ou rejetées. Aucune personne ayant le pouvoir de lier la Couronne n'a jamais accepté de mettre sur pied une réserve dans cette région. Chaque déclaration faite par les fonctionnaires qui pouvaient mettre de côté des terres précisait qu'il n'existait aucune réserve sur ce territoire et que la création de réserves à cet endroit était contraire aux politiques du gouvernement. Les fonctionnaires qui ont préconisé la création d'une réserve n'ont jamais eu le pouvoir de mettre de côté les terres et d'y créer une réserve. En définitive, des terres ont été mises de côté à l'usage de la bande, mais aucune réserve n'a été légalement créée.

Bastarache, J. (McLachlin, J.C.C., L'Heureux-Dubé, J., souscrivant): Aucune réserve n'a été créée pour la bande. La preuve révélait que la Couronne n'avait jamais eu l'intention d'établir une réserve au sens de la *Loi sur les Indiens*.

L'article 2(1) de la *Loi sur les Indiens* ne restreignait pas le pouvoir de la Couronne de déterminer quelles terres devaient être mises au profit des peuples autochtones. Cet article ne faisait que définir plus précisément quelles étaient les terres mises de côté pour les peuples autochtones qui pouvaient être considérées comme des « réserves » aux fins de la *Loi sur les Indiens*. La Couronne demeurait libre de faire ce qu'elle voulait de ses terres, y compris transférer le titre d'une terre à une première nation, même si cette terre ne constituerait pas une réserve en vertu de la *Loi sur les Indiens*.

L'article 18d) de la *Loi sur les terres territoriales* ne restreignait pas l'application de la **prérogative** royale en matière de création de réserves. Cet article permettait au gouverneur en conseil d'empêcher l'aliénation de terres pour lesquelles on envisageait un autre usage, mais il n'avait pas pour objet la création de réserves comme telles. N'importe lequel des instruments utilisés historiquement pouvait suffire à mettre de côté les terres à titre de réserve pour autant que la Couronne ait l'intention de créer une réserve. Le mécanisme prévu par l'art. 18d) n'était pas le seul dont pouvait disposer la Couronne pour mettre des terres de côté dans le but de créer une réserve.

Table of Authorities

Cases considered by *Bastarache J.*:

Attorney General v. De Keyser's Royal Hotel Ltd., [1920] A.C. 508 (U.K. H.L.) — considered

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Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 59 N.R. 1, 18 D.L.R. (4th) 481, 12 Admin. L.R. 16, 13 C.R.R. 287, 1985 CarswellNat 151, 1985 CarswellNat 664 (S.C.C.) — referred to

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Canadian Pacific Ltd. v. Paul, 1 R.P.R. (2d) 105, [1988] 2 S.C.R. 654, (sub nom. *Paul v. Canadian Pacific Ltd.*) 53 D.L.R. (4th) 487, 89 N.R. 325, 91 N.B.R. (2d) 43, [1989] 1 C.N.L.R. 47, 232 A.P.R. 43, 1988 CarswellNB 224, 1988 CarswellNB 70 (S.C.C.) — referred to

Hay River (Town) v. R. (1979), [1980] 1 F.C. 262, 101 D.L.R. (3d) 184, 1979 CarswellNat 108, [1979] 2 C.N.L.R. 101 (Fed. T.D.) — referred to

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Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127, 1990 CarswellQue 103, 1990 CarswellQue 103F (S.C.C.) — followed

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Statutes considered by *Bastarache J.*:

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s. 91 ¶ 24 — referred to

Dominion Lands Act, R.S.C. 1927, c. 113

Generally — considered

s. 74 — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — considered

s. 2(1) "reserve" — considered

Territorial Lands Act, R.S.C. 1952, c. 263

Generally — referred to

s. 18 — considered

s. 18(d) — considered

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s. 35 — referred to

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s. 3 — considered
s. 3(6) — considered
s. 6 — considered

Indian Act, R.S.C. 1952, c. 149
s. 21 — referred to

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Generally — considered
s. 2(1) "band" — considered
s. 2(1) "designated lands" — considered
s. 2(1) "reserve" — considered
s. 18(1) — referred to
s. 18(2) — referred to
ss. 20-25 — referred to
s. 21 — referred to
s. 28 — referred to
ss. 36-38 — referred to
s. 42 — referred to
s. 44 — referred to
s. 46 — referred to
ss. 48-51 — referred to
ss. 58-60 — referred to
s. 87 — referred to
s. 87(1) — referred to

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s. 26 — considered

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Generally — considered
s. 18 — referred to
s. 18(d) — considered

Territorial Lands Act, R.S.C. 1985, c. T-7
s. 23(d) — considered

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Generally — referred to

Treaties considered by *LeBel J.*:

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Generally — referred to

Treaty No. 10, 1906
Generally — referred to

Treaty No. 11, 1921
Generally — referred to

Words and phrases considered:

royal perogative

Per LeBel J. (Arbour, Binnie, Gonthier, Iacobucci, Major JJ. concurring): Generally speaking, in my view, the royal **prerogative** means "the powers and privileges accorded by the common law to the Crown" (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 1:14). The royal **prerogative** is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute [has] occupied the ground formerly occupied by the **prerogative**, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, *Crown Law* (1991), at pp. 66-67.)

Termes et locutions cités

prérogative royale

D'une manière générale, j'estime que la **prérogative** royale s'entend [traduction] « des pouvoirs et privilèges reconnus à la Couronne par la common law ». (voir P.W. Hogg, *Constitutional Law of Canada*, (éd. à feuilles mobiles, vol. 1, p. 1:14). La **prérogative** royale se limite aux pouvoirs exercés par l'exécutif, tant au niveau fédéral que provincial. Il est possible, au moyen d'une loi, d'abolir la **prérogative** ou de restreindre la portée de celle-ci : [traduction] « dès qu'une loi régit un domaine qui relevait jusque là d'une **prérogative**, l'État est tenu de se conformer à ses dispositions ». (Voir P. W. Hogg et P. J. Monahan, *Liability of the Crown* (3e éd., 2000), p. 17; voir aussi Hogg, *op. cit.*, p. 1:15-1:16; P. Lordon, *La Couronne en droit canadien* (1992), p. 75-76).

APPEAL by Indian band from judgment reported at 1999 BCCA 750, 1999 CarswellYukon 83, 182 D.L.R. (4th) 116, 72 B.C.L.R. (3d) 292, [2000] 4 W.W.R. 390, [2000] 2 C.N.L.R. 293, 131 B.C.A.C. 219, 214 W.A.C. 219 (Y.T. C.A.), allowing appeal from judgment declaring that the land was reserve.

POURVOI d'une bande indienne à l'encontre de l'arrêt publié à 1999 BCCA 750, 1999 CarswellYukon 83, 182 D.L.R. (4th) 116, 72 B.C.L.R. (3d) 292, [2000] 4 W.W.R. 390, [2000] 2 C.N.L.R. 293, 131 B.C.A.C. 219, 214 W.A.C. 219 (Y.T. C.A.), qui a accueilli le pourvoi à l'encontre du jugement ayant déclaré que les terres concernées constituaient une réserve.

***Bastarache J.*:**

1 I have had the opportunity to read the reasons of my colleague and I agree that no reserve was created in this case. As noted by my colleague, the essential conditions for the creation of a reserve within the meaning of s. 2 (1) of the *Indian Act*, R.S.C. 1985, c. I-5, include an act by the Crown to set aside Crown land for the use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown. The evidence in this case reveals that the Crown never intended to establish a reserve within the meaning of the Act.

2 Though I agree with the disposition, I respectfully disagree with my colleague's assertion that the royal **prerogative** to create reserves has been limited by s.18(*d*) of

the *Territorial Lands Act*, R.S.C. 1952, c. 263. In addition, I think it is important to state clearly the interaction between the Crown **prerogative** and s. 2(1) of the *Indian Act*. Section 2(1) does not constrain the Crown's **prerogative** to deal with lands for the use of Indians, but rather provides a definition of "reserve" for the purposes of the Act. Section 18(*d*) of the 1952 *Territorial Lands Act* gives the Governor in Council a discretionary power to protect Crown lands from disposal for a wide range of public purposes, including the welfare of Indians. In my view, neither provision, either expressly or by necessary implication, limits the scope of the Crown's **prerogative** to set aside or apart lands for Aboriginal peoples.

3 All of the parties agree that the power to create reserves was originally based on the royal **prerogative**. The power is thought to be part of the Crown's **prerogative** to administer and dispose of public property including Crown lands (see P. Lordon, Q.C., *Crown Law* (1991), at p. 96). The appellants nonetheless contend that this power has long been regulated by statute, including the successive Indian Acts which date back to Confederation as well as various statutes governing the disposition and management of Crown lands. They assert in particular that the right to establish reserves in the Yukon Territory is found in the *Indian Act* and the *Territorial Lands Act* which have replaced the **prerogative**. My colleague disagrees with the appellant that the **prerogative** has been displaced, but concedes that it has been limited.

4 There is no doubt that a royal **prerogative** can be abolished or limited by clear and express statutory provision: see *Operation Dismantle Inc. v. R.*, [1983] 1 F.C. 745 (Fed. C.A.), at p. 780, aff'd [1985] 1 S.C.R. 441 (S.C.C.), at p. 464. It is less certain whether in Canada the **prerogative** may be abolished or limited by necessary implication. Although this doctrine seems well established in the English courts (see *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (U.K. H.L.)), this Court has questioned its application as an exception to Crown immunity (see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (S.C.C.), at p. 558; *Sparling v. Caisse de dépôt & du placement*, [1988] 2 S.C.R. 1015 (S.C.C.), at pp. 1022-23). Assuming that **prerogative** powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:

> Where Parliament provides by statute for powers previously within the **Prerogative** being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. "Otherwise," says Swinfen-Eady M.R., "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on **Prerogative**?" [Emphasis added.]
>
> (H. V. Evatt, *The Royal **Prerogative*** (1987), at p. 44.)

5 In my view, s. 2(1) of the *Indian Act*, which sets out the definition of "reserve", does not in any way "provide by statute for powers previously within the **Prerogative** being exercised subject to conditions and limitations contained in the statute". It is well established that the *Indian Act* does not provide any formal mechanism for the creation of reserves. The Act is, and always has been, confined to the management and protection of existing reserves, many of which were established long before the federal government assumed jurisdiction over Indians pursuant to s. 91(24) of the *Constitution Act, 1867* (see R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada* (1990), at pp. 24-25).

6 In the past, the Crown exercised its **prerogative** to create reserves in a number of ways. Although some lands set apart for Indian bands constitute "reserves" within the meaning of the *Indian Act*, other lands have been set apart or aside for the use of Indian bands, yet are not recognized as "reserves" under the Act. For example, in this case, the Crown exercised its **prerogative** to "reserve" or set aside lands for the use of the Ross River Band, but did not manifest an intention to create a "reserve" within the meaning of s. 2(1) of the *Indian Act*. In my view, the definition of "reserve" in s. 2(1) serves to identify which lands have been set apart as "reserves" within the meaning of the Act; the definition does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. A "reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". The legislation does not indicate precisely when land will be considered to have been "set apart" for the use and benefit of a band, nor does it indicate the steps necessary for a "setting apart" of land to have occurred. This is, essentially, the issue that is before us here. As I stated earlier, we have determined that for land to have been "set apart" within the meaning of the Act, there must, at the very least, exist an act by the Crown to

set apart land for the use of the band combined with an intention to create a reserve on the part of persons having authority to bind the Crown.

7 My colleague asserts that the definition of "reserve" in s. 2(1) limits the royal **prerogative** to create reserves in that it precludes the possibility of transferring the title to the land from the Crown to the First Nation (since the definition provides that legal title is "vested in Her Majesty"). I agree with him that if a tract of land meets the definition of "reserve" under the *Indian Act*, the title must remain in the Crown and the land must be dealt with subject to the *Act*. However, I do not see how the definition otherwise limits the royal **prerogative** to set aside or apart land for Aboriginal peoples. In other words, it merely defines with greater specificity which of these lands will be considered "reserves" for the purposes of the Act. In my opinion, the Crown is still free to deal with its land in other any manner it wishes, including, as noted by my colleague, the transfer of title by sale, grant or gift to a First Nation or some of its members, though that land would not then constitute an *Indian Act* "reserve".

8 Nor do I agree that s. 18(*d*) of the 1952 *Territorial Lands Act* has placed limits on the Crown's **prerogative** with respect to the creation of reserves. Section 18 (the predecessor to the current s. 23(*d*)) finds its origin in the *Dominion Lands Act*, R.S.C. 1927, c. 113. That Act allowed for entry onto vacant Crown lands for agricultural purposes. Section 74 of the *Dominion Lands Act* authorized the Governor in Council to keep lands reserved for Indians outside of the scheme of the Act so that the lands would be protected from disposition. The provision also permitted the Governor in Council to protect lands from entry for various other public purposes, including "places of public worship, burial grounds, schools and benevolent institutions". Section 18 of the 1952 *Territorial Lands Act* consolidates and continues the *Dominion Lands Act* powers. Similar to the *Dominion Lands Act*, it authorizes the Governor in Council to set apart areas of land for the welfare of Indians, and also permits the Crown to protect Crown lands from disposal for a wide range of public purposes.

9 It seems clear from the above that s. 18 of the 1952 *Territorial Lands Act* is not directed at the creation of reserves *per se* but rather permits the Governor in Council to protect from disposition those Crown lands for which other use is contemplated. As my colleague points out, the setting apart of Crown lands which might otherwise be disposed of pursuant to s. 18 of the Act does not in and of itself imply that a "reserve" within the meaning of the *Indian Act* has been created since the Crown must also manifest an intent to make the land a reserve under the Act. Where, however, evidence of this intention is present, the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would certainly suffice as the formal act by which the Crown sets apart land for the use and benefit of an Indian band.

10 Though I agree that the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would be sufficient to establish an *Indian Act* reserve if the necessary intention on the part of the Crown to do so were present, I cannot see how s. 18(*d*) has placed any conditions or limitations on the Crown **prerogative** to create reserves. Historically, a wide array of formal and informal instruments has been used to set apart lands as *Indian Act* reserves. In my view, any one of these instruments may be sufficient to constitute the action by which the land is set apart so long as intention on the part of the Crown to create a reserve under the *Indian Act* is also present. I think that there is a danger in saying that s. 18(*d*) of the 1952 *Territorial Lands Act* has somehow limited the Crown's **prerogative** to create reserves since this implies that only an application under the Act will suffice as the formal action to set apart the lands as a reserve. While s. 18(*d*) provides one mechanism to set apart lands for the creation of a reserve, it is not the only mechanism available to the Crown for this purpose and I would not wish to imply this as a necessary condition for the creation of a reserve. If the setting apart of land under s. 18(*d*) is not a necessary condition for the creation of a reserve but merely one avenue to achieve this result, then I cannot see how the authority to set apart lands for a reserve under s. 18(*d*) limits the Crown's **prerogative** to create a reserve.

***LeBel J.*:**

I. Introduction

11 This appeal raises the issue of how *Indian Act* reserves were created in the Yukon Territory, in a non-treaty context. The appellants claim that the Government of Canada created a reserve by setting aside land for the Ross River Band. The federal government answers that, although land was set aside, no reserve was ever created; no intention to create it has been established on the evidence. For the reasons which follow, I conclude that no reserve was created and that the appeal should fail.

II. Background of the Litigation

12 This case arose out of a claim for a refund of tobacco tax from a store in a small village in the Yukon. According to the appellants, this village is a reserve; hence, an exemption was claimed. The respondents disputed this claim, saying that a reserve had never been created in this place. What began as a tax problem has become a question of aboriginal law which, in turn, requires a survey of the historical background to the procedure governing the creation of reserves in the Yukon Territory. The particular facts of the long history of the dealings of the Ross River Band with the Department of Indian Affairs must also be reviewed.

13 The Ross River Dena Council Band (the "Band") is recognized as a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is now located at Ross River, in the Yukon, on lands which it claims are a reserve. Norman Sterriah is the chief of the Band. In 1982, the Band incorporated the appellant, Ross River Dena Development Corporation. The Corporation was set up to provide services for the benefit of Band members and to carry on business as their agent. Despite the dispute about the legal status of the community, it is at least agreed that there is a village at Ross River and that Band members have been living there for a number of years.

14 After a long history of being shifted or pushed from place to place since the predecessors of the Department of Indian Affairs and Northern Development (DIAND) took them under its wing, in the 1950s, at long last, the members of the Ross River First Nation were allowed to settle down on the site of what is now their village, located at the junction of the Pelly and Ross Rivers. The lands in dispute in this case are not governed by treaty, as the Yukon Territory belongs to those regions of Canada where the treaty-making process with First Nations had very little practical impact, particularly in respect of the creation of reserves. (See *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2, *Restructuring the Relationship*, part 2, pp. 479-84.)

15 Despite the absence of a treaty, the agents of the Department in the 1950s knew that the Band was living on the shores of the Ross River. The acknowledgement of this fact triggered a process of administrative discussion and action which led or not to the creation of a reserve on this site. By letter dated October 21, 1953, the Superintendent of the Yukon Agency sought the permission of the Indian Commissioner for British Columbia to establish an Indian reserve for the use of the Ross River Indians. By letter dated November 10, 1953, the Indian Commissioner for British Columbia supported the recommendation. On April 1, 1954, the Superintendent of the Yukon Agency wrote to the Dominion Lands Agent in Whitehorse to advise that tentative arrangements had been made to apply for a tract of land for an Indian reserve at Ross River; Ottawa did not act on the request.

16 On May 4, 1955, the federal Cabinet issued a procedural directive entitled Circular No. 27 which set out an internal government procedure for reserving lands in the territories for the use of a government department or agency. In 1957, the federal government decided to dismiss the recommendation to establish 10 reserves. On November 27, 1962, the Superintendent of the Yukon Agency applied to the Indian Affairs Branch (then in the Department of Citizenship and Immigration) to reserve approximately 66 acres of land under s. 18 of the *Territorial Lands Act*, R.S.C. 1952, c. 263, to be used for the Ross River Indian Band Village site. Correspondence was then exchanged over the following three years with respect to the proposed size and location of the site. On January 26, 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch that the site had been reserved for the Indian Affairs Branch. The letter was entered in the Reserve Land Register pursuant to s. 21 of the *Indian Act*, R.S.C. 1952, c. 149. It was also recorded in the Yukon Territory Land Registry of the Lands Division of the former Department of Northern Affairs and National Resources.

17 The Band takes the view that this administrative process, combined with the actual setting aside of land for its benefit, created a reserve within the meaning of the *Indian Act*. It appears that this opinion was not shared either by the Yukon territorial government or the Indian Affairs Branch. The dispute may have remained dormant for a while. It broke into the open and reached the courts on the occasion of a problem concerning the applicability of tobacco taxes.

18 The respondent Government of Yukon had imposed taxes on the Band under the *Tobacco Tax Act*, R.S.Y. 1986, c. 170. The Band claimed an exemption and asked for a refund of taxes already paid on tobacco sold in the village. It asserted that the Government of Yukon was taxing personal property of an Indian or of a band on a reserve, which was exempt pursuant to s. 87(1) of the *Indian Act*. The Government of Yukon refused to make the refund because it did not recognize that the Band occupied a reserve. According to the Yukon government, the Band was merely located on lands

which had been "set aside" for its benefit by the Crown in right of Canada. The federal government gave full support to this position and subsequently fought the claim of the appellants as to the existence of a reserve.

19 In the meantime, negotiations were taking place in the Yukon with respect to the land claims and rights of First Nations. An agreement known as the "Umbrella Final Agreement" was entered into by the Council for Yukon Indians, the Government of Yukon and the Government of Canada in 1993. It is a framework agreement which provides for its terms to be incorporated into subsequent agreements with individual First Nations. According to the Yukon government, seven of these agreements are now in force, dealing, among other topics, with land "set aside" and not part of a reserve. The Band chose to remain outside this process of treaty negotiation pending a decision from the courts regarding whether a reserve was created pursuant to the *Indian Act*.

III. Judicial History

***A. Yukon Territory Supreme Court*, [1998] 3 C.N.L.R. 284 (Y.T. S.C.)**

20 The appellants filed a motion in the Yukon Territory Supreme Court asking for a declaration that the lands the Band occupied at the Ross River site constitute a reserve within the meaning of the *Indian Act*. The federal government replied that the land had only been set aside for the Indian Affairs Branch on behalf of the Band. There had been no intent to create a reserve. Moreover, the creation of a reserve in the Yukon required an Order-in-Council, under the royal **prerogative**. This step had never been taken in the case of the Ross River Band.

21 Maddison J. declared the tract of land in question "to be an Indian Reserve within the meaning of the *Indian Act*". Maddison J. held that the definition of "reserve" in s. 2 of the *Indian Act* does not require any particular form of proclamation, conveyance, notification, transfer, order or grant; rather, the statutory definition emphasizes the act of "setting apart". He recognized that there was no Order-in-Council or other such official instrument creating or recognizing the Ross River lands as an Indian reserve, but he found that such formal recognition was not necessary to bring the lands within the definition of "reserve" in the *Indian Act*. Maddison J. found, at para. 29, that:

> The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve". The active words of the document reserving the land are as close to the wording of the statute as all but one of the four admitted Yukon Reserves for which the Court has been provided the wording. The public servants who put the setting-aside in process were Her Majesty's agents.

***B. Yukon Territory Court of Appeal* (1999), 182 D.L.R. (4th) 116 (Y.T. C.A.)**

22 The respondents then appealed to the Yukon Territory Court of Appeal. A majority of the court allowed the appeal, with Finch J.A. in dissent.

(1) Richard J.A.

23 Richard J.A., for the majority, held that the decision of the Yukon Territory Supreme Court should be overturned. He found that the lands occupied by the Band and its members were "lands set aside" but not a "reserve" under the *Indian Act*. He noted that the distinction between "lands set aside" and "reserves" was well established in the history of the Yukon, although the terminology may have varied over time.

24 Richard J.A. found that it was the **prerogative** of the Crown to establish a reserve which was usually formally evidenced by an Order-in-Council. He found that there was no evidence that in 1965 the Crown ever intended to create a reserve for the Band, either directly or by express or implied delegation. He held that there was in fact a deliberate decision not to create a reserve. He added that there was also no evidence that the Head of the Resources Division had authority to create a reserve and the letter did not purport to be an act of the Governor in Council or an exercise of the royal **prerogative**. A generous or liberal reading of the definition of "reserve" in the *Indian Act* would not have provided any assistance, because the land was not set apart for the use and benefit of a "band". Richard J.A. commented that the question at issue was whether a reserve had in fact been created and not whether a reserve should have been created.

(2) Hudson J.A. (concurring)

25 Hudson J.A. held that the chambers judge's suggestion that some Crown officers had conspired to impose the policy of integrating Aboriginal peoples into the dominant society was not supported by the evidence. He stated that the evidence indicated that the public servants complained about the policy adopted by the government and, in fact, expressly favoured the goal of cultural preservation through the reservation of land for the benefit of Aboriginal peoples.

(3) Finch J.A. (dissenting)

26 Finch J.A. noted that neither the *Indian Act* nor the *Territorial Lands Act* provided any formal mechanism for the creation of an "Indian Reserve" as defined in the *Indian Act*. He determined that the definition of a reserve must be read against the background of the Crown's relationship with Aboriginal peoples to whom the Crown owed a fiduciary duty.

27 Finch J.A. found that the correspondence and conduct of officials from the federal government responsible for Indian Affairs created a reserve in 1965, despite the absence of any Order-in-Council or other official instrument reflecting an exercise of the Crown's **prerogative**. In his opinion, the statutory powers conferred in the *Territorial Lands Act* displaced the Crown's **prerogative** and allowed the Department of Northern Affairs and National Resources to create reserves in the course of exercising statutory powers delegated to them by the Governor in Council. Finch J.A. further found that the Cabinet directive contained in Circular No. 27 was a delegation of statutory authority sufficient to authorize public officials to create a "reserve" as defined in the *Indian Act*.

28 Finch J.A. found that the definition of "reserve" in the *Indian Act* required only an intention to allocate an area of Crown land for the use and benefit of a band, and an act by a public official with the authority to give effect to that intent. Finch J.A. decided that the appropriate government official had set apart certain land intending it to be reserved for the use and benefit of the band. To hold otherwise would be inconsistent with the Crown's fiduciary obligations.

IV. Relevant Statutory Provisions

29 *Indian Act*, 1876, S.C. 1876, c.18

> **3.** The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context: —
>
> **6.**The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

Indian Act, R.S.C. 1985, c. I-5

> **2.**(1) In this Act,
>
> "band" means a body of Indians
>
> > (*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
> >
> > (*b*) for whose use and benefit in common, moneys are held by Her Majesty, or
> >
> > (*c*) declared by the Governor in Council to be a band for the purpose of this Act;
>
> "reserve"
>
> > (*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
> >
> > (*b*) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60 and the regulations made under any of those provisions, includes designated lands;
>
> (2) The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

18.(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

87.(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Territorial Lands Act, R.S.C. 1952, c. 263

18. The Governor in Council may

(*d*) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians;

Territorial Lands Act, R.S.C. 1985, c. T-7

23. The Governor in Council may

(*d*) set apart and appropriate such areas or lands as may be necessary

(i) to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for that purpose;

(ii) for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians;

V. Analysis

A. The Issues

30 This appeal raises two well-defined issues about the creation of reserves. The first one is the nature of the legal requirements which must be met for the establishment of a reserve as defined in the *Indian Act*. The second issue concerns whether, given these requirements, the lands set aside for the Ross River Band have the status of a reserve.

B. The Position of the Parties

(1) Appellants

31 The appellants submit that reserves have been created in a number of ways. In their view, while the power to create reserves may originally have been exercised under the royal **prerogative**, this was displaced beginning in 1868 with the passage of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42. The royal **prerogative** has been further displaced by the combination of the definition of "reserve" in s. 2(1) of the *Indian Act* and s. 18(*d*) of the 1952 *Territorial Lands Act* (now s. 23(*d*)). The exercise of this statutory authority thus requires no formal instrument signifying the exercise of the royal **prerogative** such as an Order-in-Council or letters patent.

32 The appellants submit that reserves can be created by treaty or otherwise, including by being set aside by survey. The lack of an Order-in-Council setting lands aside has not been determinative of the creation of a reserve. Indeed, the courts should continue to take a flexible approach to the Crown's actions in its relations with First Nations. The appellants adopt the view of Finch J.A. that two conditions are required to create a reserve: 1) an intention to create a *de facto* reserve, and 2) an act by a public official with authority to give effect to the intention. The appellants have also stated the criteria for creating a reserve as follows: 1) the Crown, as a matter of fact, has set apart a

specific tract of land; 2) the specific tract has been set apart for the permanent use and benefit of a band of Indians; and 3) the underlying title to these lands remains in the Crown.

33 The appellants submit that the village site inhabited by the Band meets the test for the creation of a reserve. They claim that a specific tract of land was set apart for their use in 1965. The lands have been used by the Band ever since. Government officials as early as 1953 expressed an intention to create a reserve for the Band, and continued to take this view in spite of Ottawa's intransigence. However, since the lands were set aside under the *Territorial Lands Act* according to appellants, a reserve was created. The Crown had a clear purpose in setting aside the lands: to establish a settled community where the Band would be able to live in permanent dwellings. Further, DIAND adopted a policy in 1971 which recognized the Band's beneficial interest in the land and required the Department to consult and compensate the Band if a right-of-way should be needed over its lands.

(2) Respondents

(i) Government of Canada

34 The Government of Canada submits that the power to create reserves in the Yukon Territory continues to be an exercise of the royal **prerogative**. The Crown in this case never intended to create a reserve, and never by a duly authorized official or body exercised the royal **prerogative** to do so. Intention to create a reserve is key, and the evidence accepted in the courts below was that no such intention ever existed. The Government of Canada submits that, as the Band is not the signatory of any treaty, reserve-creation principles based on treaty-created reserves are inapplicable. Further, the *Territorial Lands Act* does not grant authority to create reserves; even if it did, the authority to do so would reside in the Governor in Council who has not exercised that power to create a reserve for the Band.

35 The Government of Canada submits that the power to create reserves is part of the royal **prerogative** because of the special nature of the relationship of First Nations to the Crown. By convention and long-standing practice, only the Governor in Council is able to exercise this power; its exercise cannot be delegated to ministers of the Crown or other delegates. The exercise of the royal **prerogative** requires an outward public manifestation through an Order-in-Council; warrants, commissions or orders under the sign manual; or proclamations, writs, letters patent, letters close, charters, grants and other documents under the Great Seal. In most cases, reserves have been created by means of Orders-in-Council, although there have been exceptions. In the view of the Government of Canada, these exceptions do not prove that the creation of reserves is no longer a **prerogative** power. In this case, there is no treaty manifesting an intention to create a reserve, nor any other concrete evidence of it. While some Crown servants may have favoured the creation of a reserve, their views were never adopted by the Crown which had a stated policy against the creation of reserves in the Yukon Territory.

36 The royal **prerogative** can only be limited by means of express language in statute. Neither the *Indian Act* nor the *Territorial Lands Act* supplant the **prerogative** by means of explicit language with respect to reserve creation. The Government of Canada rejects the trial judge's application of the definition of the word "reserve" in the *Indian Act* as inconsistent with the purposive, contextual approach to interpretation advocated by this Court. The Government of Canada adds that the context of the *Indian Act* makes it clear that not all lands occupied by Indians under the Act are reserve lands; First Nations may also reside on Crown lands that have not been set apart as reserves. Moreover, in many cases, powers in relation to reserves under the Act must be exercised by the Governor in Council. Finally, because the creation of a reserve has effects upon the general population as well as the specific band, it is critical that the process of establishing a reserve be appropriately public to ensure clarity, certainty and public notice.

(ii) Government of Yukon

37 The Government of Yukon has taken no position on the questions in this appeal. However, the Government of Yukon stated its concern about the impact of any decision in this case on the Umbrella Final Agreement, which sets the pattern for land settlement agreements between it and the First Nations of the Yukon Territory. The Umbrella Final Agreement treats reserves and lands set aside, or settlement land, differently. Lands set aside must become settlement land, outside of the *Indian Act*, under the Umbrella Final Agreement; on the other hand, reserves are to be retained or converted to settlement land. Different tax regimes affect each type of land, with reserves entitled to the exemption under s. 87 of the *Indian Act*, whereas lands set aside have been granted a

moratorium on the collection of certain types of tax. Further, federal grants in lieu of taxes are paid to the Government of Yukon on lands set aside, but not on reserve lands. A judgment of this Court finding that the Ross River lands are a reserve would impact on other First Nations in the Yukon Territory and could disrupt the current land agreement.

(3) Interveners

38 Two interveners, the Attorney General of British Columbia and the Coalition of B.C. First Nations (the "Coalition") made sharply conflicting submissions on the key issues raised in this appeal. In support of the Government of Canada, the Attorney General of British Columbia submitted that the creation of reserves remains essentially a matter of royal **prerogative**. The *Indian Act* is concerned with the management of reserves but does not provide for their creation. Moreover, a finding that an *Indian Act* reserve has been established requires evidence of an outward manifestation of intent to bring a tract of land under the management and protection scheme of the Act.

39 The Coalition submitted broad arguments on the nature of the relationship between the Crown and First Nations. It views reserve creation as an exercise of the royal **prerogative**, constrained by the Crown's legal and equitable obligations to First Nations, as well as by statute. In this context, it submits that reserves may come into existence by various means like the treaty process, unilateral government action, or even *de facto* through the historical development of a particular native community which gives the reserve definite boundaries over time.

40 Given the position of the parties and the issues they raise, I will review the legal process of reserve creation in the Yukon Territory, after a few comments about the history of the process in Canada. I will then turn to the evidence in order to determine whether it establishes that a reserve was created at Ross River.

C. The Creation of Reserves

41 A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.

42 The key issue in this case remains whether the lands set aside nearly half a century ago for the Ross River Band have the status of a reserve as defined in the *Indian Act*. Was the process purely an exercise of the **prerogative** power? Did statute law displace this power completely or in part? These questions must be answered in order to determine whether a reserve now exists at the junction of the Ross and Pelly Rivers.

43 Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country.

44 In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time. It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada. Nevertheless, its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research. For example, in the course of the execution of its broad mandate on the problems of the First Nations in Canada, the Royal Commission on Aboriginal Peoples reviewed the process in its report ("*RCAP Report*") (see *Looking Forward, Looking Back*, vol. 1, at pp. 142-45; *Restructuring the Relationship*, vol. 2, *supra*, at pp. 464-85). The report gives a good overview of the creation of reserves, emphasizing its very diversity. A more detailed study of the topic may also be found in R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland: A Study in Law and History* (1990); see also J. Woodward, *Native Law* (loose-leaf ed.), at pp. 247-48.

Northern Canada

45 In this appeal, more detailed attention must be given to a review of the process of reserve creation in Northern Canada. Treaties 8, 10 and 11 provided for the creation of reserves in Northern Canada (consisting in part of the northern Prairie provinces and the western portions of the Northwest Territories, southeastern Yukon Territory, and northeastern British Columbia). These have been characterized as "resource development" agreements in the sense that there was no desire to turn the Aboriginal peoples of these areas into farmers as had been the case in the South. Moreover, First Nations were told generally that they would not be forced to live on the reserve allotments nor would their traditional economic life be disrupted. However, as in the more southerly numbered treaties, the federal government was often slow to meet its obligation to create reserves, leaving many First Nations to continue the struggle to settle land claims into very recent times (see *RCAP Report*, vol. 2, *supra*, at pp. 479-84). In a number of cases, some First Nations never acceded to treaties purporting to cover their lands. In other cases, no treaties were ever signed, as is the case in most of the Yukon Territory. However, in the last two decades there has been some movement to formulate land settlement claims with the Inuit (which led to the creation of Nunavut), the Dene and Yukon First Nations. These agreements generally provide for some form of Aboriginal self-government, but do not necessarily provide for the creation of reserves (as in the Umbrella Final Agreement in the present case).

46 The legal methods used to give a form of legal existence to these reserves have varied. Each of them must be reviewed in its own context. I will hence focus now more narrowly on the legal nature of the process which prevailed in the Yukon and on its application to the facts in this case.

D. Reserve Creation in the Yukon

47 Three different sources for the authority to create reserves have been identified by the parties. The appellants essentially submit that the authority to create a reserve is statute based. In their view, statute law has displaced the royal **prerogative** as the primary source of authority. As mentioned above, the federal government answers that the reserve-creation power in the Yukon Territory continues to flow from the royal **prerogative**. One of the interveners, the Coalition, advances the submission that the authority to create reserves derives from the combined application of **prerogative** powers and statute.

(1) Statute

48 In order to determine whether statutory authority exists, it is necessary to turn first to the provisions of the *Indian Act*. Under s. 2(1) of the *Indian Act*, the term "reserve" in the context of the Act is defined as follows: "[A] tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". In certain sections of the *Indian Act* (namely, ss. 18(2), 20-25, 28, 36-38, 42, 44, 46, 48-51, 58 and 60 and the regulations made under those sections), the definition of "reserve" is extended to include "designated lands", which s. 2(1) defines to mean "a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition". This latter expansion of the definition is not of relevance in the instant case, so my analysis will focus on the definition proper.

49 The definition in s. 2(1) of "reserve" exists primarily to identify what lands are subject to the terms of the Act. The Act outlines property rights of Indians on reserves, establishes band governments and outlines their powers, identifies how Indians are or are not subject to taxation, and provides for a variety of other matters.

50 Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, the signing of a treaty or the issuing of an Order-in-Council are of such an authoritative nature that the mental requirement or intention would be implicit or presumptive.

51 While s. 2(1) of the *Indian Act* defines "reserve" for the purposes of the Act as land set apart by the Crown for the use and benefit of Indians, nothing in the Act bestows upon the Governor in Council, the Minister of DIAND, or any other statutory delegate, the authority to perform the actions necessary to create a reserve. Nor does the Act

explain what must be done to set apart lands for the purpose of creating a reserve: the Act neither sets out the material element nor the intentional element required for the setting apart of land to take place. One must look elsewhere for sources of any such statutory authority.

52 The appellants concede that the royal **prerogative** was the original source of the Crown's authority to create a reserve. In such instruments as the Mi'kmaq treaties in the early 1760s discussed in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), the Crown interacted directly with the First Nations without the interposition of any statutory authority. Such a situation is a pure act of **prerogative** authority. Only since the latter part of the eighteenth century has legislation been enacted which could eliminate or reduce the scope of the royal **prerogative** with respect to reserve creation.

53 The appellants submit that, while the royal **prerogative** may have once been the source of authority for creating reserves, it has been superseded by statute. The question, then, which must first be answered is whether and to what degree the royal **prerogative** has been limited in the scope of its application to reserve creation. This analysis necessarily implies determining how the royal **prerogative** is limited.

*(2) Royal **Prerogative***

54 Generally speaking, in my view, the royal **prerogative** means "the powers and privileges accorded by the common law to the Crown" (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 1:14). The royal **prerogative** is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute [has] occupied the ground formerly occupied by the **prerogative**, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, *Crown Law* (1991), at pp. 66-67.) In *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (U.K. H.L.), Lord Dunedin described the interplay of royal **prerogative** and statute, at p. 526:

> Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the **prerogative**, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the **prerogative** being curtailed.

Lord Parmoor added, at p. 568: "The Royal **Prerogative** has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion". In summary, then, as statute law expands and encroaches upon the purview of the royal **prerogative**, to that extent the royal **prerogative** contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Hogg and Monahan, *Liability of the Crown*, *supra*, at p. 17; Lordon, *Crown Law*, *supra*, at p. 66.

55 The appellants submit that statute has long since displaced the royal **prerogative** in the area of reserve creation. The first post-Confederation statute which dealt with Indians, *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, gave the Secretary of State authority to control and manage the lands and property of Indians and, in s. 3(6) of the *Indian Act, 1876*, defined a reserve to include any land "set apart by treaty or otherwise", implying that there were several ways by which a reserve could be created. The essential element then, and which continues today, is that the lands be set apart.

56 Further, s. 18(*d*) of the 1952 *Territorial Lands Act*, the successor to the *Dominion Lands Act*, R.S.C. 1927, c. 113, repealed S.C. 1950, c. 22, s. 26, states that the Governor in Council may "set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians". The appellants submit that this provision, in combination with the provisions discussed above in the *Indian Act*, has supplanted the royal **prerogative**.

57 The respondents counter that s. 18(*d*) provides for the creation of a land bank from which the Crown may create reserves, but that it does not provide for the actual creation of reserves themselves. The respondents rely upon *Hay River (Town) v. R.* (1979), [1980] 1 F.C. 262 (Fed. T.D.), in which Mahoney J. stated in *obiter*, at p. 265, that "the

authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal **Prerogative**, not subject to any statutory limitation".

58 In my view, the statutory framework described by the appellants has limited to some degree but not entirely ousted, the royal **prerogative** in respect of the creation of reserves within the meaning of the *Indian Act* in the Yukon. Whenever the Crown decides to set up a reserve under the *Indian Act*, at a minimum, s. 2(1) puts limits on the effects of the decision of the Crown in the sense that the definition of a "reserve" in the *Act* means 1) that the title to reserve lands remains with the Crown, and 2) that the reserve must consist of lands "set apart" for the use and benefit of a band of Indians. If the royal **prerogative** were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members. However, in the Yukon, so long as the Crown intends to create a reserve as defined by the *Indian Act*, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). If the Crown intended to transfer land to a First Nation outside the scope of the *Indian Act*, the role and effects of the **prerogative** would not be constrained by this *Act* and would have to be examined in a different legal environment.

59 Section 18(*d*) of the 1952 *Territorial Lands Act* has similarly placed limits on the royal **prerogative** with respect to the creation of reserves by establishing a new and different source of authority whose exercise may trigger the process of reserve creation. It indicates that at least some of the lands used to fulfill treaty requirements, which include the creation of reserves for signatory First Nations, are to be drawn from lands set apart and appropriated for that purpose by the Governor in Council under the terms of the 1952 *Territorial Lands Act*.

60 That said, it would not be accurate to state that the royal **prerogative** has been completely ousted from the field by the 1952 *Territorial Lands Act*. Section 18(*d*) does, on its face, seem to bestow a power on the Governor in Council to set apart lands for the creation of reserves. However, as the respondent Government of Canada points out, this does not necessarily mean that this section grants authority to actually create the reserve and that the **prerogative** no longer plays any part in the process. The setting apart and appropriating of land is not the entire matter; the Crown must also manifest an intent to make the land so set apart a reserve. The use of the words "as may be necessary" implies a separation in time between the appropriation of the lands and the fulfilment of the treaty obligations. In other words, once the land is appropriated, it does not yet have the legal status of a reserve; something more is required to accomplish that end. This requirement reflects the nature of a process which is political, at least in part. Given the consequences of the creation of a reserve for government authorities, for the bands concerned and for other non-native communities, the process will often call for some political assessment of the effect, circumstances and opportunity of setting up a reserve, as defined in the *Indian Act*, in a particular location or territory.

61 The appellants have not pointed to any other statutory provision which identifies the process by which the Crown takes lands set apart and appropriated under s. 18(*d*) and turns them into a reserve. Indeed, the Act remains entirely silent in this respect. Rather, the appellants seem to rely on a logical leap from the fact of setting apart and appropriating the land to the creation of a reserve. As I have said, the language of s. 18 (*d*) does not make that leap. If Parliament had meant in s. 18(*d*) to grant the Governor in Council the power to both appropriate lands for the purpose of meeting treaty obligations to create reserves and to create the reserves from the lands appropriated, it would have used more specific language to effect such a grant of authority.

62 Even if I were to find that s. 18(*d*) has occupied the field with respect to the creation of Indian reserves, it is nevertheless clear from the language of the section that the Governor in Council has been given the power to create reserves from lands set apart. The Governor in Council is given discretion (indicated by the use of the word "may") to decide whether to set apart lands and whether to designate said lands as the reserve of any particular First Nation. Further, the Governor in Council is under no obligation to set apart particular lands for the use and benefit of a band, unless that has been provided for under treaty or some other land settlement agreement. Otherwise, the Governor in Council is free to designate any Crown land the Crown chooses as a reserve for a particular band. Although this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*.

63 It is worth noting that, in either situation, it is the Governor in Council who exercises the authority granted. The royal **prerogative** in Canada is exercised by the Governor General under the letters patent granted by His Majesty King George VI in 1947 (see *Letters Patent constituting the office of Governor General of Canada* (1947), in *Canada Gazette*, Part I, Vol. 81, p. 301 (reproduced in R.S.C. 1985, App. 2, No. 31)). In the usual course of things, the Governor General exercises these powers for the Queen in right of Canada, acting on the advice of a Committee of the Privy Council (which consists of the Prime Minister and Cabinet of the government of the day). Thus, if the power to create reserves is derived from the royal **prerogative**, the Governor General, or Governor in Council, would normally exercise that power. On the other hand, s. 18(*d*) of the 1952 *Territorial Lands Act* specifically designates the Governor in Council as the holder of the power to set apart and appropriate lands for the fulfilment of treaty obligations. In effect, the holder of the power is the same person in both cases.

64 The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. As the intervener Coalition of B.C. First Nations submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve. In my view, the correct test of this is to be found in this Court's judgment in *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), at p. 1040.

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

65 While these words were said in the context of treaty creation, they seem relevant in principle to the creation of a reserve. In both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.

66 However, from the passage from *Quebec (Attorney General)*, it is also clear that not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other, in a process which involves significant political considerations or concerns about the Crown's duties and obligations towards First Nations. The Crown agent must "have represented [the Crown] in very important, authoritative functions" (*Quebec (Attorney General)*, *supra*, at p. 1040). Similarly, where reserves have been created by means of an Order-in-Council, there is no question that it is the Governor in Council who is making the representations and who is exercising the power to create the reserve. On the other hand, in the circumstances of this case, the registration in the Yukon Territory Land Registry of the setting aside of land for the Indian Affairs Branch is not sufficient to show intent to create a reserve given the widely varying types of interests in land recorded in that Register.

E. Summary of Principles Governing the Creation of Reserves Applicable to this Case

67 Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.), at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order in Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have

started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

68 It should be noted that the parties did not raise, in the course of this appeal, the impact of the fiduciary obligations of the Crown. It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights: see the comments of Lamer C.J. in *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 (S.C.C.), at paras. 14-16.

F. The Evidence Relating to the Creation of a Reserve at Ross River

69 To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land, nor with respect to the absence of an Order-in-Council, which latter issue, in my view, is not determinative of the issue. The key question remains whether there was an intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.

70 The appellants pointed to parts of the evidence which, in their opinion, indicated that such an intention had existed and had led to the setting apart of the lands where the Band had been living for many years. The appellants point to a number of individuals involved in the management of native affairs in the Yukon who recommended to the Minister of Citizenship and Immigration, Indian Affairs Branch, and/or the Supervisor of Lands and Mining, Department of Northern Affairs and National Resources, that a reserve be created for the Band. They placed strong emphasis on their recommendations as well as on the fact that a village was established at Ross River, as had also been recommended.

71 In my view, the critical flaw in the appellants' reliance on the authority of these Crown officials to bind the Crown appears when one asks whether these agents either 1) made representations to the Ross River Band that they had authority to create reserves; or 2) both made the representations and set apart the lands by legal act. On this appeal, the appellants have made no attempt to show that in fact these Crown agents ever made representations to the members of the Ross River Band that the Crown had decided to create a reserve for them. Nowhere in the appellants' lengthy review of the facts is there any reference to such evidence. Nor did Maddison J., in his reasons for judgment at trial, make any such reference. The evidence presented by the appellants all relates to recommendations made by Crown officials to other Crown officials, which recommendations were generally ignored or rejected. There appears to have been a long-lasting and deep-seated tension, even disagreement, as to the opportunity of creating new reserves between the civil servants working directly with native groups in the Yukon and their superiors in Ottawa. The evidence shows that no person having the authority to bind the Crown ever agreed to the setting up of a reserve at Ross River. Every representation made by those Crown officials actually in a position to set apart the lands was to the effect that no reserves existed in the Yukon Territory and that it was contrary to government policy to create reserves there. There is simply no evidence provided by the appellants which suggests that any Crown agents with the authority to set apart lands went to the members of the Band and in effect said: "The Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act". Conversely, those Crown officials who did advocate the creation of a reserve, whether or not they made representations to the Band, never had the authority to set apart the lands and create a reserve.

72 Some specific facts are particularly telling in this respect. They confirm that the appellants failed to demonstrate the existence of the intentional component of the reserve-creation process. At most, as indicated above, they proved that there had been a long-standing disagreement between the local agents of DIAND and its predecessors and its central administration in Ottawa. This conflict originated in the 1950s. For example, the Indian Commissioner for British Columbia, who was also in charge of native affairs in the Yukon, recommended that a number of new reserves, including one at Ross River, be created in the territory. The Deputy Minister of the Department of Citizenship and Immigration, Indian Affairs Branch, advised the Acting Minister against such a move and no action was taken.

73 A few years later, in 1957, the Deputy Minister recommended against the creation of new reserves. As a result, the Government of Canada decided not to implement a recommendation to set up 10 new reserves including one at Ross River. In 1958, the Deputy Minister received new recommendations against the creation of reserves.

74 In 1962, the Yukon Agency of the Indian Affairs Branch of the Department of Citizenship and Immigration applied to the Department of Northern Affairs and National Resources and asked that land be set aside for the Ross River Indian Village site, presumably pursuant to the *Territorial Lands Act*. After a series of correspondence about the location and size of the site, the Department of Northern Affairs and National Resources informed the Indian Affairs Branch that land had been set aside "for the Indian Affairs Branch", but not specifically for the Ross River Band.

75 After the village was established and the land was set aside, the Department constantly maintained the position that it had not intended to create a reserve. In 1972, a published list of reserves restated the official position that no reserve had been created in the Yukon, within the meaning of the *Indian Act*. In 1973, the Department reversed in part its previous stance. It acknowledged that six reserves had been created by Orders-in-Council, between 1900 and 1941. The Ross River site was not among them.

76 After 1965, the reality of these set-asides which do not constitute reserves seems to have been well established. There was an early illustration of this fact. In 1966, the Government of Yukon took back control of a lot on the site of the Ross River Indian Village and leased it to a private citizen. There was consultation with the Band, but no authorization or consent was requested from it. No suggestion was made at the time that the Band's consent would be required. Finally, as we shall see, the existence of these lands set aside, while not having the status of reserves, was recognized during the negotiations leading to the conclusion of the Umbrella Final Agreement.

G. The Effect of the Setting Aside

77 As argued by the respondent, the Government of Canada, what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created. This procedure may raise concerns because it may amount to a bureaucratic attempt to sidestep the process of reserve creation and establish communities which remain in legal limbo. The use of this procedure may leave considerable uncertainty as to the rights of the Band and its members in relation to the lands they are allowed to use in such a manner. Nevertheless, it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century.

78 The Umbrella Final Agreement acknowledges that these set asides were common practice in the Yukon. Indeed, as pointed out in the factum of the Government of Yukon, the Umbrella Final Agreement provides for rules and procedures designed to deal with the status of lands set aside, which set-aside lands are clearly distinguished from *Indian Act* reserves. Under this agreement, lands set aside must become settlement land under a Yukon First Nation Final Agreement. Such settlement land is specifically identified as not being reserve land. Thus, it may well be thought that the alleged claim of the appellants should have been pursued through the negotiation process, given the absence of intention to create a reserve on the part of the Crown.

VI. Conclusion

79 For these reasons, the appeal should be dismissed, with no order as to costs.

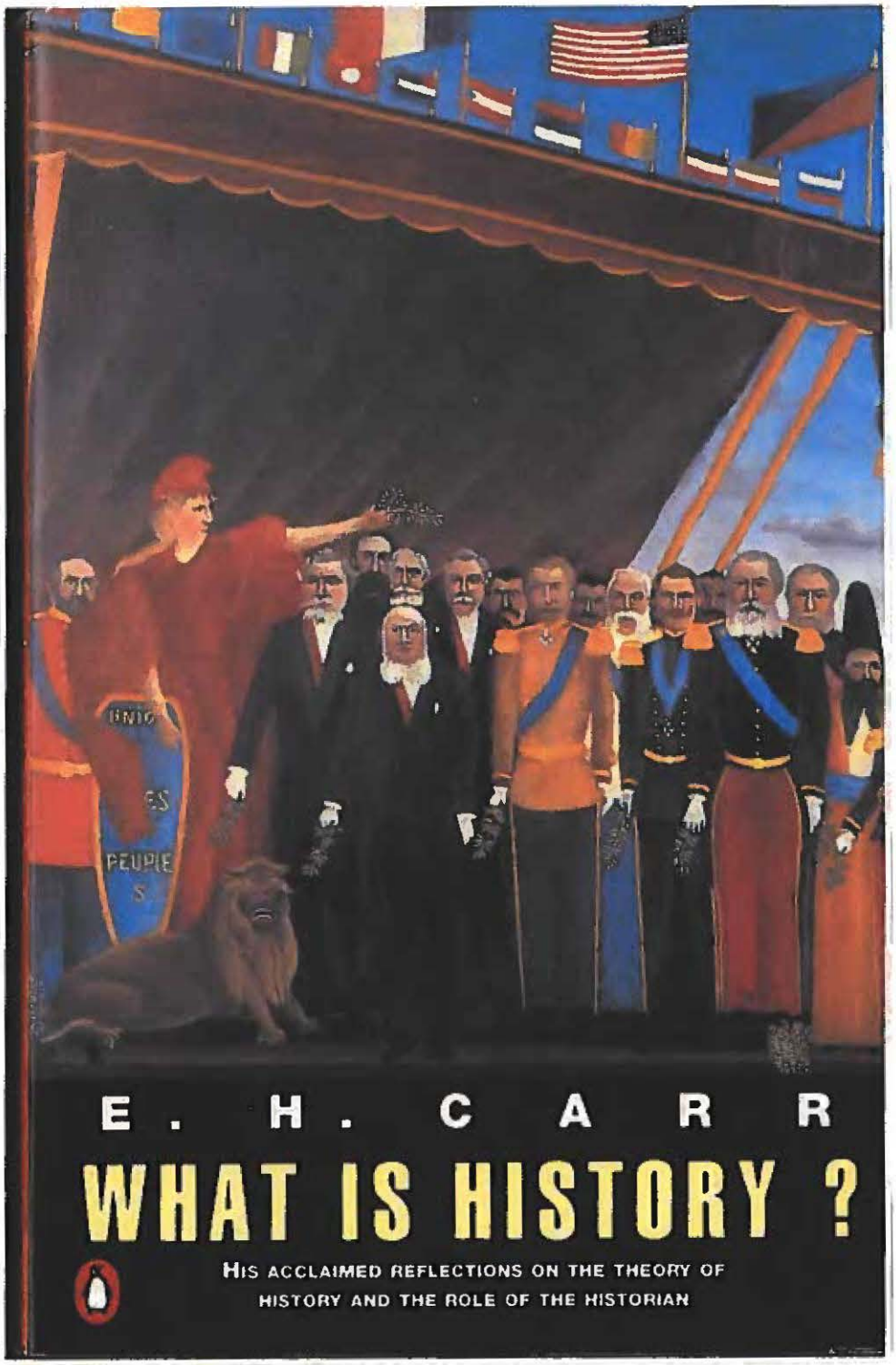
Appeal dismissed.

Pourvoi rejeté.

Footnotes

* Corrigenda issued by the court on July 25, 2002 have been incorporated herein.

TAB 7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WHAT IS HISTORY?

Edward Hallett Carr was born in 1892 and educated at the Merchant Taylors' School, London, and Trinity College, Cambridge, where he was Craven scholar and took a double first in classics. He joined the Foreign Office in 1916 and after numerous jobs in and connected with the F.O. at home and abroad he resigned in 1936 and became Wilson Professor of International Politics at the University College of Wales, Aberystwyth. He was Assistant Editor of *The Times* from 1941 to 1946, Tutor in Politics at Balliol College, Oxford, from 1953 to 1955, and became a Fellow of Trinity College, Cambridge, in 1955 and an Honorary Fellow of Balliol College, Oxford, in 1966. He received the CBE in 1920.

As a historian he is best known for his monumental *History of Soviet Russia*, which the *Guardian* referred to as 'among the most important works by a British historian this century' and *The Times* called 'an outstanding historical achievement'. He began his *History* in 1945 and worked at it for nearly thirty years. It occupies fourteen volumes plus a summary, *The Russian Revolution: Lenin to Stalin*. Several parts of the *History* have been published by Penguin: *The Bolshevik Revolution, 1917–1923* (in three volumes); *The Interregnum, 1923–1924*; *Socialism in One Country, 1924–1926* (in three volumes); and *Foundations of a Planned Economy 1926–1929* (in two volumes, volume one co-authored by R. W. Davies). His other publications include *The Romantic Exiles* (1933), *The Twenty Years' Crisis, 1919–1939* (1939), *Conditions of Peace* (1942), *The Soviet Impact on the Western World* (1946), *The New Society* (1951) and *From Napoleon to Stalin and other essays* (1980). E. H. Carr died in 1982 and in his obituary *The Times* wrote, 'His writings were for the most part as incisive as his manner. With the unimpassioned skill of a surgeon, he laid bare the anatomy of the recent past . . . beyond doubt he left a strong mark on successive generations of historians and social thinkers.'