OSGOODE HALL LAW SCHOOL | YORK UNIVERSITÉ UNIVERSITY

Osgoode Hall Law Journal

Volume 12, Number 1 (May 1974) Article 4

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Robert D. Howe

THE APPLICABILITY OF THE RULES OF NATURAL JUSTICE TO INVESTIGATORY AND RECOMMENDATORY FUNCTIONS

By ROBERT D. HOWE*

Administrative law has traditionally distinguished the recommendatory function which a tribunal performs when it merely investigates and reports, and the determinative functions it performs in rendering a binding decision. The classification of the function often carries with it serious consequences affecting the rights of individuals coming into contact with the tribunal. The classification of a function as primarily of a decision making or judicial character brings into operation the rules of natural justice and the procedural safeguards embodied in the Statutory Powers Procedure Act, 1971.[1] However, persons finding themselves the objects of an inquiry before an investigatory tribunal often have need for the aforementioned safeguards.[2] It has been suggested that the question of what circumstances require compliance with the rules of natural justice be observed by persons entrusted with the conduct of an investigation but (having no power to give a binding decision), represents "one of the most troublesome problems in the whole of administrative law"[3] a review of the Canadian authorities on the topic would seem to be appropriate.

An early Ontario case, *Re Godson and The Corporation of the City of Toronto*,[4] provides a classic example of the divergent judicial views which permeate this area. The City of Toronto, having discovered that a municipal employee had been guilty of breach of trust in his position as inspector of materials furnished for work done for the city by contractors, passed a resolution[5] directing a County Court Judge to inquire into dealings between the city and persons who had been contractors for civic workers. He was also directed to ascertain, *inter alia*, whether contractors or others had wrongfully obtained payment of moneys from the city by unlawful means. When the plaintiff contractor was notified that certain contracts in which he had been

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* Mr. Howe is an Assistant Professor, Faculty of Law, University of Windsor.

[1] S.O. 1971, Vol. 2, c. 47.

[2] The decision in *Re Thompson and Lampton County Board of Education*, [1972] 3 O.R. 889; 32 D.L.R. (3d) 339 clearly illustrates that the Statutory Powers Procedure Act, 1971 has perpetuated the distinction between investigatory and decision making functions.

[3] S.A. De Smith, *Judicial Review of Administrative Action* (2d ed. London: Stevens, 1968) at 217.

[4] (1888), 16 O.R. 275 (Ch.D.); reversed (1889), 16 O.A.R. 452; aff'd (1890), 18 S.C.R. 36.

[5] The resolution was passed under the provisions of The Municipal Corporation Act, R.S.O. 1887, c. 184, s. 477. See The Municipal Act, R.S.O. 1970, c. 284, s. 240(1) for the analogous provision now in force.

interested were to be investigated, he and his counsel attended the inquiry and claimed that specific charges of misconduct should be formulated. When the County Court Judge refused to direct the formulation of specific charges, the plaintiff applied for a writ of prohibition. The motion came before Robertson J.[6] who granted prohibition on the ground that the resolution was too general; he concluded that "charges must be specified and the parties who are alleged to be implicated must be named and charged."[7]

This decision was reversed by the Ontario Court of Appeal,[8] which held that prohibition would not lie because the County Court Judge performed only investigatory and reporting functions. Hagarty C.J.O. observed that in performing these functions, he "neither can nor does impose any legal obligations on any individual."[9] On further appeal to the Supreme Court of Canada, the decision of the Ontario Court of Appeal was affirmed.[10] Ritchie C.J., who delivered the opinion of the majority,[11] expressed the following view:

> The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially; he was in no sense a court; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual.[12]

In his dissent Gwynne J. opined that the report of the county court judge, if unfavourable to the person under investigation, would invariably "be attended with consequences injurious to [the investigated person's] character and to his business interests and pecuniary interests."[13] Having stated that the city council could give effect to the judge's report by disqualifying the person from entering into future contracts with the city, he concluded that the rules of natural justice were applicable[14] since a person "who may be so injuriously affected in his pecuniary interests, his reputation and business prospects by the judgment formed by a 'judge' upon such inquiry had before him must be entitled to have the inquiry conducted in a judicial manner, and 'the judge' presiding and making the inquiry and required to report his conclusions or

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[6] (1888), 16 O.R. 275 (Ch.D.).

[7] *Id.* at 283.

[8] (1889), 16 O.A.R. 452.

[9] *Id.* at 458. Burton and Osler JJ.A. delivered separate concurring opinions. Maclennan J.A. concurred.

[10] (1890), 18 S.C.R. 36.

[11] Fournier and Taschereau JJ. concurred in the opinion of the Chief Justice. Patterson J. concurred in the views expressed by the members of the Ontario Court of Appeal.

[12] (1890), 18 S.C.R. 40.

[13] *Id.* at 49.

[14] *Id.* at 53.

opinion or judgment . . . to the council who have power to act upon it must . . . be considered to be acting in a judicial capacity."[15]

The majority and the minority opinions in the preceding case may be viewed as archetypical. The schism between the disparate judicial views reflects the inherent conflict in administrative law between the desire to bestow upon each administrative tribunal the widest discretionary latitude to exercise its particular expertise in the interest of governmental efficiency, and the competing desire to safeguard the rights of individuals by imposing curial standards of justice upon the administrators. In his dissent Gwynne J. penetrates the form of the proceedings to discover the substance of the function performed by the investigator. He is thus led to the conclusion that the function could, and in all probability would, adversely affect the interests of individuals.

The approach adopted by the majority in the Supreme Court of Canada in *Re Godson* has been followed in a number of succeeding cases. In *St. John* v. *Fraser*,[16] the underwriter of a major stock issue of a gold mining company claimed a right to cross-examine witnesses who had given evidence before the respondent investigator who was conducting an investigation into the affairs of the gold mining company pursuant to instructions of the Attorney-General of British Columbia under the Securities Frauds Prevention Act.[17] Counsel for the appellant stressed that the rules of natural justice should apply because its status and reputation might be adversely affected as a direct result of the investigator's report. The Attorney-General contended that "if during the investigation every witness called was entitled to have his counsel cross-examine all other witnesses, the enquiry would become utterly ineffective, prolonged in duration and costly in administration."[18] In rejecting the argument for an implied right of cross-examination, Crocket J. observed that the investigator, who was not authorized to make any final adjudication, was merely empowered to forward his opinion as to whether a fradulent act had been committed to the Attorney-General who could accept it and act upon it or entirely reject it in his absolute discretion.[19] The fact that disclosure of the evidence or the name of any witness without the authorization of the Attorney-General constituted an offence fortified his conclusion that the proceedings were to be conducted by the investigator in private and that "no person or company should have the right of cross-examination of any witness or witnesses brought before the investigator whether the evidence

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[15] *Id.* at 49.

[16] [1935] S.C.R. 441 (S.C.C.). This case is hereinafter referred to as the *Fraser* case.

[17] S.B.C. 1930, c. 64, s. 10 See The Securities Act, R.S.B.C. 1970, c. 348, s. 14(1) for the analogous provision now in force.

[18] *St. John* v. *Fraser*, [1935] S.C.R. 441 at 452.

[19] *Id.* at 446. Cannon and Lamont JJ. concurred. Davis J. wrote a separate concurring opinion. Bysart J. agreed in the result.

of such witness or witnesses should affect the status or reputation of such person or company or not."[20]

An overwhelming majority in the Supreme Court of Canada in *Guay* v. *Lafleur*[21] verified that the rationale of the *Fraser* case remains good law in Canada notwithstanding the enactment of the Canadian Bill of Rights.[22] Respondent taxpayer, whose financial affairs were being investigated at an inquiry conducted by the appellant inquiry officer, claimed to be entitled to be present and to be represented by counsel at the inquiry. At trial Brossard J. enjoined the appellant from continuing the inquiry until such time as respondent was permitted to be present and represented by counsel.[23] A majority of the Quebec Court of Queen's Bench affirmed that decision.[24] However, Abbott J., speaking for the majority[25] in the Supreme Court, held the Canadian Bill of Rights to be inapplicable because "no rights and obligations are determined by the person appointed to conduct the investigation"[26] since the taxpayer's rights remain unaffected until an actual assessment has been made.

In his compelling dissent, Hall J. ignored the form in his quest for the substance of the matter. He found it to be implicit that some judgment on the facts and information obtained would be made by the appellant in-

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[20] *Id.* at 447.

Similarly, a commissioner under the Combines Investigation Act (*O'Connor* v. *Waldron*, [1935] A.C. 76, 82 (P.C.); *Re the Imperial Tobacco Company Limited et al. and MacGregor*, [1973] O.R. 627, 644 (*Ont. C.A.*)), the Restrictive Trade Practices Commission (*British Columbia Packers Ltd. et al.* v. *Smith, MacDonald and Attorney-General of Canada*, [1961] O.R. 596, 601 (H.C.)), the Board of Broadcast Governors (*R.* v. *Board of Broadcast Governors and the Minister of Transport, Ex parte Swift Current Telecasting Co. Ltd.* (1962), 33 D.L.R. (2d) 449 (Ont. C.A.). [See especially at page 461, where Laidlaw J.A. suggests that even where the statute expressly requires that a public hearing be held before the Board submits its recommendations, the fact that the Board does not determine the rights of any person qualifies the hearing requirement so as to leave the Board "free to prescribe its own course of procedure"]), a conciliation board (*Ayriss* v. *Board of Industrial Relations of Alberta* (1960), 23 D.L.R. (2d) 585, 586 (Alta. S.C.)); the Ontario Labour Relations Board when answering a question referred to it by the Minister of Labour concerning his authority to appoint a conciliation officer (*R.* v. *Ontario Labour Relations Board, Ex parte Kitchener Food Market Limited* (1966), 57 D.L.R. (2d) 521 (Ont. C.A.)); a preliminary inquiry committee while investigating allegations of improper or unprofessional conduct on the part of a physician (*R.* v. *Saskatchewan College of Physicians and Surgeons et al., Ex parte Samuels* (1966), 58 D.L.R. (2d) 622, 640 (Sask. Q.B.)); a coroner conducting an inquest (*Wolfe* v. *Robinson*, [1962] O.R. 132 (Ont. C.A.)); a County Court Judge conducting a hearing under the Extradition Act (*Re State of Wisconsin and Armstrong* (1973), 32 D.L.R. (3d) 265 (F.C.A.)), and an inquiry officer authorized by the Minister of National Revenue to investigate the affairs of a taxpayer under the Income Tax Act (*Guay* v. *Lafleur*, [1965] S.C.R. 12) have all been found to exercise investigatory functions without power to render binding decisions.

[21] [1965] S.C.R. 12.

[22] R.S.C. 1970, Appendix III, as amended by S.C. 1970-71, c. 38, s. 29.

[23] *Guay* v. *Lafleur*, [1965] S.C.R. 12 at 14.

[24] [1963] Que. Q.B. 623; 63 D.T.C. 1098.

[25] Abbott J. delivered the judgment of Taschereau C.J., Fauteux, Abbott, Martland, Judson, and Ritchie JJ.; Cartwright J. wrote a separate concurring opinion.

[26] *Guay* v. *Lafleur*, [1965] S.C.R. 12 at 16.

vestigator in his report to the Deputy Minister. Viewed in the context of the cases cited above, Hall J. assumed the role of a voice crying in the wilderness when he declared: "One cannot ignore the reality of the situation that in such cases the decision is made by the subordinate but put out in the name of the Deputy Minister."[27] As suggested by Professor Walter Tarnopolsky, this is indeed a difficult assertion to refute[28] unless one is prepared to ignore the reality of the situation by focusing with myopic satisfaction upon the lack of customary adjudicative processes at the inquiry stage of the process.

In a subsequent decision, it was held at trial that since no rights are affected by the inquiry, the Court could not prohibit the Minister of National Revenue from using the inquiry for the purpose of obtaining discovery with respect to an appeal pending before the Tax Appeal Board.[29] An appeal from this decision was dismissed[30] on the ground that prohibition was not the appropriate remedy even on the assumption that the Minister had abused his powers under the Act by launching the inquiry in an effort to obtain discovery to assist him in the pending appeal. In light of the facts of this case, the assertion that inquiries do not affect rights[31] seems to ignore reality.

Should not the "degree of proximity between the investigation in question and an act or decision directly adverse to the interests of the person"[32] seeking prohibition or claiming entitlement to be heard be taken into consideration even if the proceeding is not "a required first step leading to adverse action against the parties"?[33] Should not the *audi alteram partem* rule apply equally to cases where one official hears and reports to a second official who then decides on the basis of the report, as to cases where one official both hears and decides?[34] A recent amendment to the Income Tax Act would seem to indicate that Parliament is gradually becoming aware of the unsatisfactory state of the authorities in this area.[35] Other statutory changes (to be discussed below) also reflect the gradual awakening of legislators to the reality of the grave impact which tribunals which investigate and report may exert upon an individual.

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[27] *Id.* at 20.

[28] W. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell Co., 1966) at 205.

[29] In *Re Steven Low*, 66 D.T.C. 5198, 5200 (O.H.C.).

[30] 67 D.T.C. 5060, 5061 (Ont. C.A.).

[31] *Guay* v. *Lafleur*, [1965] S.C.R. 12 at 16.

[32] See, *supra*, note 3 at 218.

[33] *R.* v. *Ontario Labour Relations Board, Ex Parte Kitchener Food Market Limited* (1966), 57 D.L.R. (2d) 521 at 530 (per Laskin J.A. [as he then was]).

[34] See, *supra*, note 28 at 206.

[35] Section 231(15) of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended has modified the law as set out in *Guay* v. *Lafleur*. This provision, which was added with the 1971 tax reform measures, provides that any person whose affairs are investigated in the course of an inquiry authorized by the Minister [under s. 231(7)] is entitled to be present and to be represented by counsel throughout the inquiry unless the hearing officer, on application by the Minister or a person giving evidence, orders otherwise on the ground that the presence of the person and his counsel or either of them, would be prejudicial to the effective conduct of the inquiry.

The mere appellation of an individual as an "inquiry officer" does not conclude the matter, nor does a statutory direction that such individual conduct an "inquiry".[36] If the enactment which employs this terminology contemplates not only an investigation of facts but also a "decision",[37] the inquiry officer may be found to be performing a quasi-judicial function with respect to which *certiorari* will lie. Moreover, it has been suggested that the rules of natural justice will apply to an investigation which forms an "integral and necessary part of a process which may terminate in an action adverse to the interests" of the person claiming the right to be heard.[38] Thus, the rules of natural justice must be observed by a Provincial Court Judge in the conduct of a preliminary inquiry.[39]

An interesting triumvirate of decisions by the Ontario Court of Appeal appears to reflect the realistic approach suggested in the dissenting opinions in *Re Godson*[40] and *Guay* v. *Lafleur*.[41] In the earliest of the three, *Re Children's Aid Society of the County of York*,[42] a commissioner had been appointed pursuant to the provisions of the Public Inquiries Act[43] to inquire into the conduct, management, and administration of the York Children's Aid Society as a result of a petition complaining that the Society had discharged its functions in a negligent and incompetent manner. The Act contained a provision which read:

> Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.[44]

On a stated case by the Commissioner, the Court held that counsel for the petitioners was entitled to call witnesses and examine them in chief and was

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[36] *Ex parte Hirsch*, [1960] O.R. 159 (H.C.).

[37] In *Ex parte Hirsch, supra*, the "decision" to be made by the Special Inquiry Officer was whether to permit the immigrant to come into Canada or to make a deportation order against him; see the Immigration Act, R.S.C. 1970, c. I-2, ss. 22, 23, and 26.

[38] See, *supra*, note 3 at 218-219.

[39] *R.* v. *Botting* (1966), 56 D.L.R. (2d) 25 (Ont. C.A.). At page 37, Laskin J.A. (as he then was) indicated that *certiorari* would lie to quash a committal for trial where a breach of the rules of natural justice had occurred during the preliminary inquiry because "a committal for trial is an integral part of a process which may terminate in an action prejudicial to the accused". See also the opinion of Evans J.A. (with whom Porter C.J.O. concurred) at page 28: "A tribunal either has or has not jurisdiction; it either did or did not exceed that jurisdiction which has been conferred on it and in my opinion the finality or otherwise of the adjudication is immaterial". See also *R.* v. *Dick*, [1968] 2 O.R. 351 (H.C.).

[40] 18 S.C.R. 36 at 49.

[41] [1965] S.C.R. 12 at 20.

[42] [1934] O.W.N. 418 (C.A.).

[43] R.S.O. 1927, c. 20. This statute, which appears as R.S.O. 1970, c. 379, in the most recent consolidation, has been repealed and superseded by The Public Inquiries Act, 1971, S.O. 1971, Vol. 2, c. 49.

[44] R.S.O. 1927, c. 20, s. 5(1). [See S.O. 1971, Vol. 2, c. 49, s. 6 for the appeal provision now in force, which section superseded R.S.O. 1970, c. 379, s. 5(1).]

also entitled to cross-examine witnesses called by counsel for the commission or by others. Middleton J.A. stressed that "the fullest right of cross-examination should be permitted"[45] in order to maximize the disclosure of the truth.

The majority judgment in *Re Ontario Crime Commission, Ex Parte Feeley and McDermott*[46] confirmed that the supervisory jurisdiction vested in the Court by virtue of the provision quoted above comprehended judicial review of the procedure adopted by the Commissioner in addition to review of his authority to conduct the inquiry.[47] In this case, the appointment of the Royal Commission had been precipitated by a speech delivered in the legislature by the Leader of the Opposition Party in which he had charged that organized crime was flourishing in the Province and that Feeley and McDermott as masterminds behind organized gambling had attempted to corrupt law enforcement officials. Since much of the evidence adduced before the Commission cast grave imputations upon both individuals, their counsel requested that he be allowed to represent them at the hearing, to call and examine witnesses on their behalf, and to examine or cross-examine witnesses called by counsel for the Commission or by any other person. When the Commissioner denied these requests, counsel obtained an order for a case to be stated to the Ontario Court of Appeal.

In his dissent, Laidlaw J.A. stated that since the Commissioner's report would have "no legal consequence",[48] the Court should be governed by the views expressed in the *Fraser* case which conflicted with the views expressed in *Re Children's Aid Society of the County of York*.[49] It is clear from the following passage from his dissenting opinion that investigatory celerity is the value which he sought to advance:

> [The inquiry] was intended to be an effective, efficient and practical means of obtaining all available information from the public touching the matters under investigation. If every person affected by some or all of the evidence given by the witnesses had a right to be represented by counsel, to call witnesses, and to examine and cross-examine witnesses, called at the hearing or if every such person were granted such a privilege in the exercise of the discretion of the Commissioner then it appears to me plainly that the inquiry would in most, if not all cases, be rendered less productive, wasteful and inoperative and the purpose and intention of the Legislature thereby defeated. Persons represented by counsel and given the privilege of calling witnesses and of examining and cross-examining witnesses would in effect become parties in the proceedings and the inquiry would become a litigious contest contrary to the intention of the legislation.[50]

The majority held that the Commissioner should comply with the petitioners' procedural requests. While acknowledging that the Commissioner was

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[45] [1934] O.W.N. 418 at 421.

[46] [1962] O.R. 872 (C.A.).

[47] *Id.* at 894, where Schroeder J.A., with whom Aylesworth J.A., concurred, stated that "validity" as used in the Act was intended to denote "solidity in the grounds upon which [the decision concerning a procedural issue] is based" rather than the narrower concept of "strict legal efficacy".

[48] *Id.* at 876.

[49] [1934] O.W.N. 418 (C.A.).

[50] [1962] O.R. 872 at 883.

not conducting a trial, they recognized that the reputation of the petitioners could be severely impaired by the inquiry:

> In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover, it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.[51]

Re Godson, Fraser, and other cases of this genre were distinguished on their facts and on the basis that an express statutory authority for judicial review of the validity of the investigator's decisions, orders, and directions had not been available in those cases. Therefore, it would seem that the unique statutory authorization of judicial review may have been essential to the majority decision in this case. Accordingly, the enlightened view expressed by the majority is unlikely to be extended by the courts to other investigatory functions.

In *Re Public Inquiries Act and Shulman,*[52] the Ontario Court of Appeal extended the foregoing rationale. The individual who had voiced the allegations which had prompted the inquiry was accorded the privilege of having his evidence in chief educed by his own counsel rather than by counsel for the Commission. The Court found the alleger (Dr. Shulman) to be a "person affected" by the inquiry since he was "liable to be discredited in the eyes of the public if [the substantial allegations which he had made against certain persons in public office] upon proper inquiry should prove to be unfounded".[53] Aylesworth J.A. seemed to indicate that counsel for the alleger would also be entitled to cross-examine any persons affected by the allegations who gave evidence tending to refute the allegations.[54] In reaching this decision, the Court distinguished the type of inquiry in question from an inquiry directed merely to the gathering of information for the purpose of preparing a report to a Government department as to the desirability or undesirability of enacting legislation in relation to a given subject.

Although these three decisions can be readily distinguished from other investigatory situations on the basis of the unique statutory provision involved, they provide a viable alternative to the rigid view which has permeated this area under which an investigator, in the interest of expediency and efficiency, is not obliged to comply with the rules of natural justice because of the non-judicial character of the investigatory function.

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[51] *Id.* at 896.

[52] [1967] 2 O.R. 375 (C.A.).

[53] *Id.* at 377.

[54] *Id.* at 378. Aylesworth J.A. delivered the judgment of the Court which also consisted of Schroeder and McLennan JJ.A.

This preferable alternative approach has also been tentatively adopted in the Trial Division of the Federal Court. In *Re Lingley and Hickman*[55] the plaintiff was being detained in a Provincial Hospital since he had been found not guilty by reason of insanity on a charge of murder. After a Board of Review appointed by the Lieutenant-Governor (pursuant to the provisions of the Criminal Code[56]) had delivered a unanimous opinion that there had been no change in the plaintiff's status and that he had not "recovered" within the meaning of s. 547(5)(d) of the Code, plaintiff sought to challenge the review *via* Federal Court action in which he sought a declaratory judgment to guide the Board with respect to the proper construction to be placed upon the word "recovered" in this statutory context.

On a motion brought by the defendant for an order dismissing the action, one of the grounds of attack upon the Court's jurisdiction was that the functions of the Board of Review were informative and investigatory only and that the Board had no authority to affect plaintiff's rights because the decision to release or retain plaintiff in custody would be made by the Lieutenant-Governor of New Brunswick, who would merely have the Board's report before him as material to assist him in making his decision. Heald J., after considering the nature of the Board of Review and the historical position prior to the enactment of the Criminal Code provision in question, rejected this argument. He noted that the Board, which was required by statute to include in its membership at least two duly qualified psychiatrists and one member of the provincial bar, was obviously established to assist the Lieutenant-Governor in coming to a proper decision. The following passage captures the essence of his reasoning:

> The statute requires that at least two members of the Board must be duly qualified psychiatrists and at least one member of the Board must be a duly qualified solicitor. In my view, one is entitled to assume that the Lieutenant-Governor acting prudently and judiciously would give much weight to the considered opinion of a Board like this — heavily weighted as it is with personnel equipped with expertise so relevant to the issues in cases of this kind. If my assumptions are correct, then the deliberations and conclusions of such a board become important indeed to the individual concerned whose liberty may be at stake. Surely, in these circumstances, it is vital that the principles of natural justice be observed by a board such as this.
>
> If the principles of natural justice are not followed by such a board, if such a board, acting on improper principles, makes an improper report to the Lieutenant-Governor, can such an injustice ever be corrected at a later date? I think not, as the critical point in the total proceedings might well be at the Board of Review stage.

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[55] (1972), 10 C.C.C. (2d) 362; 33 D.L.R. (3d) 593. In his reasons for judgment Heald J. declined to grant a declaration that in deciding "recovery" the board should restrict itself to the legal definition of "insanity" contained in s. 16(2) of the Criminal Code. This relief was denied because the Court concluded, after a careful consideration of the relevant Criminal Code provisions, that the Board "is entitled to interpret 'recovery' as full recovery and to find that if an accused can no longer be said to be legally insane as defined in section 16, he is, nevertheless, 'not recovered' in a case . . . where there is strong evidence of continuing psychopathic disorders which would render the accused 'dangerous' to members of the public were he to be released". See (1973) 13 C.C.C. (2d) Part 6, 303 at 308.

[56] R.S.C. 1970, c. C-34, s. 547.

> There might be little point in the Court exercising its supervisory jurisdiction over subsequent proceedings leading to a decision if a wrong report based on wrong principles is permitted to strongly influence the decision-making body.
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> Put another way, the report and recommendations of the Board of Review to the Lieutenant-Governor sets in motion a chain of events leading to a determination of rights affecting the liberty of the individual in question.[57]

This view represents a daring and, it is submitted, a desirable departure from the traditional Canadian judicial approach in this area. Moreover, it embodies substantial considerations which weigh against the adoption in this context of the principle that any absence of natural justice in an inferior tribunal may be cured by the compliance with the rules of natural justice by an appellate tribunal.[58] Hopefully, future judgments will adopt analogous reasoning with a view of bringing this area of the law into greater accord with the realities of modern governmental decision-making.

Legislative reform has also remedied some of the deficiencies of the traditional common law approach in certain restricted areas. Recognizing that the wide publicity often given to statements made during investigations may, in the absence of rights of challenge or cross-examination, do irreparable damage to individuals even though the statements might ultimately be determined to be unfounded, the McRuer Commission made a number of recommendations[59] which culminated in the enactment of s. 5 of the Public Inquiries Act, 1971:[60]

> (1) A commission shall accord to any person who satisfies it that he has a substantial and direct interest in the subject matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his counsel on evidence revelant to his interest.
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> (2) No finding of misconduct on the part of any person shall be made against him in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the misconduct alleged against him and was allowed full opportunity during the inquiry to be heard in person or by counsel.

This provision may be contrasted with the provisions of the (Federal) Inquiries Act[61] which require the commissioners to allow any person against which a charge is made in the course of the investigation to be represented by counsel.[62] Where no charge is made, the language of the statute is permissive rather than mandatory: "The Commissioners may allow any person whose conduct is being investigated . . . to be represented by counsel."[63] Section 13 of the Act provides that no report shall be made against any person until he has been given reasonable notice of the charge of misconduct alleged against him and has been allowed full opportunity to be heard in person or by counsel. However, the Act gives no right of cross-examination

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[57] (1972), 10 C.C.C. (2d) 362 at 367-8; 33 D.L.R. (3d) 593 at 598-9.

[58] *King* v. *University of Saskatchewan* (1969), D.L.R. (3d) 120, 130 (S.C.C.).

[59] *Ontario. First Report of the Royal Commission Inquiry into Civil Rights,* (Toronto; Queen's Printer, 1969) at 451-452-McRuer Report.

[60] S.O. 1971, Vol. 2, c. 49.

[61] R.S.C. 1970, c. I-13.

[62] *Id.*, s. 12.

[63] *Id.*

even to persons whose conduct is being investigated; persons with merely an interest in the subject matter, albeit a substantial and direct interest, have no statutory right to cross-examine witnesses. Nevertheless, these statutory provisions effect a desirable modification of the common law position.

As mentioned above, it has been held that the maxim *audi alteram partem* does not apply to a coroner's inquest.[64] In the words of Schroeder J.A., "the verdict of the jury at a coroner's inquisition does not bind any person whose acts or omissions may be involved in the jury's finding, and it is not an adjudication of rights affecting either person or property."[65] The Supreme Court held in *Batary* v. *Attorney-General for Saskatchewan et al.*[66] that a person charged with murder and awaiting trial cannot be compelled to testify at a coroner's inquest into the death of the deceased with whose murder he is charged. Although it has been suggested that this decision implicitly refuted the assertion that a coroner's court is a court of inquiry (rather than one of accusation) where there is no accused and no *lis inter partes*,[67] subsequent cases in the lower courts have not acceded to this view. Thus, where the driver of a vehicle which had collided with another vehicle was called upon to testify at the coroner's inquest into the death of the driver of the latter vehicle, the Court recited the view that there is no accused at an inquest which is merely an investigation to ascertain whether a crime had been committed.[68] The *Batary* case was distinquished on the ground that in that case a charge had been laid against the person who was found not to be a compellable witness at the inquest, whereas in the case before the Court, the driver had not been charged with any offence. Thus, the Court found no merit in counsel's contention that the police had decided not to charge his client until after the inquest so as to obtain assistance in their investigation *via* the inquest. His further contention that his client should not be exposed to an examination which might lead to a charge being laid against him was rejected as "not sound in law".[69]

The British Columbia Court of Appeal applied similar reasoning in *Re Wilson Inquest*[70] to overrule a decision of Munroe J.[71] in which he had held that where the evidence given at an inquest indicates to one having knowledge of the law that a person may reasonably be charged with an offence arising out of the death in question, such person cannot be compelled to testify at an inquest into the death. The appellate Court held that the non-compellability of a witness not charged with any offence did not follow from

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[64] *Wolfe* v. *Robinson*, [1962] O.R. 132 (C.A.).

[65] *Id.* at 136.

[66] [1965] S.C.R. 465; 51 W.W.R. (N.S.) 449. This case is hereinafter referred to as the *Batary* case.

[67] *Supra*, note 28, at 186.

[68] *Wyshynski* v. *Schwartz* (1965), 53 W.W.R. 422 (Sask. Q.B.).

[69] *Id.* at 425 (per Sirois J.).

[70] (1968), 66 W.W.R. 522.

[71] (1968), 63 W.W.R. 108. See also *R.* v. *Coroner of Municipality of Langley, Ex parte Whitelaw* (1968), 67 D.L.R. (2d) 541 (B.C.S.C.).

what was decided in the *Batary* case, and declined to extend the principles enunciated therein to encompass a person merely suspected of having committed a crime.

Although the authorities militate solidly against the proposition that the rules of natural justice should apply to a coroner's inquest, a new provision in The (Ontario) Coroners Act, 1972,[72] permits any person to apply to the coroner for designation as a person with standing at the inquest. This provision requires the coroner to designate the applicant "if he finds that the person is substantially and directly interested in the inquest".

Section 33(2) lists the rights which a duly designated peron may exercise:

> A person designated as a person with standing at an inquest may,
> (a) be represented by counsel or an agent;
> (b) call and examine witnesses and present his arguments and submissions;
> (c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible.[73]

Thus, The Coroners Act, 1972, represents another desirable alternative to the common law position.

Conclusion:

The following passage from the McRuer Report accurately summarizes the law in this area: "The great weight of authority is that, apart from statute, persons affected by investigations . . . have no absolute procedural rights which must be recognized by persons conducting the inquiry".[74] However, significant statutory innovations and the occasional modern decision are beginning to jettison the traditional common law position in favour of an approach which recognizes and safeguards the significant individual interests that can be seriously impaired by tribunals performing investigatory and recommendatory functions. Nevertheless, the distinction between the recommendatory function which a tribunal performs by merely investigating and reporting, and the determinative function which a tribunal performs in rendering a binding decision, retains crucial significance in contemporary administrative law.

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[72] S.O. 1972, c. 98, s. 33. (This Act, which was given Royal Assent on June 30, 1972, came into force on May 31, 1973.).

[73] *Id.* See also s. 42(2) which empowers a coroner to "reasonably limit further cross-examination of a witness where he is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he had given evidence". See also s. 22(1) which codifies the *Batary* rationale.

[74] *Supra*, note 59, at 447.