

“*Ultra Vires and Void:*”¹ An Executive Inquiry Takes on Manitoba’s Legislative Building Crisis (And Wins)

T O M M I T C H E L L *

I. INTRODUCTION

In March 1915, claims made in the Manitoba legislature of corruption in the construction of a new legislative building for the province blossomed within weeks into a crisis for the Conservative government of Sir Rodmond Roblin. Events moved precipitously: on April 20, 1915, a commission of inquiry under Judge Thomas Mathers was appointed; on May 12, 1915, Roblin, Premier since 1900 and victorious in four consecutive provincial elections, resigned.² Finally, on August 31, 1915, only days after the release and publication of the commission of inquiry report, Roblin and three of his ministers were charged with conspiracy to defraud the province of some \$800,000. They were released on bail: \$50,000 for each man.³ Trials would follow. The legislative building scandal has long been viewed as a seminal event in Manitoba politics: the Conservative Party fell from power and would remain in the political wilderness for 42 years until 1958 when Duff Roblin (Sir Rodmond’s

* Tom Mitchell is (since 2012) University Archivist Emeritus at Brandon University. In the fall of 2021, his account of the provenance of Canada’s original inquiries act appeared in the *Journal of Canadian Studies*. The author would like to thank Bill Morrison and Ken Osborne for their substantive and editorial suggestions on this paper.

¹ “Inquiry Is Off for Week: Will Be A Sensation”, *Manitoba Free Press* (10 May 1915) at 5.

² On Mathers see Dale Brawn, *The Court of Queen’s Bench of Manitoba, 1870-1950: A Biographical History* (Toronto: University of Toronto Press, 2006) at 185-97.

³ “Charge Preferred is Conspiracy to Defraud”, *Brandon Daily Sun* (1 September 1915) at 2.

grandson) returned it to respectability and power. Manitoba politics aside, the place of these developments in the history of executive appointed commissions of inquiry in Canada appointed through enabling legislation—*Inquiries Acts*—remains unexplored.⁴

Canada's original *Inquiries Act*, an *Act to empower Commissions for inquiring into matters connected with the public business, to take evidence on oath*,⁵ approved by the legislature of the Province of Canada in 1846 to address a crisis that threatened the legitimacy of the fledgling Canadian state,⁶ stands as the progenitor of contemporary executive inquiries, both federal and provincial.⁷ The state spoken of here embraces the Gramscian notion of the state as an apparatus of rule and a form of symbolic capital of which civil society is an integral part.⁸ Since Confederation, executive inquiries deployed through inquiries acts have served the Canadian liberal state as an important instrument in what (to borrow Ian McKay's phrase) could be termed "a political project of rule in North America."⁹ Such inquiries have (to name the most obvious) made policy issues legible, shored up the legitimacy of the state, promulgated new languages of rule, and legitimated state action.¹⁰ While non-coercive policy inquiries such as the Royal

⁴ I have borrowed the use of "executive" driven inquiries from W Harrison Moore, "Executive Commissions of Inquiry" (1913) 13:6 *Colum L Rev* at 500–23.

⁵ *Act to empower Commissioners for inquiring into matters connected with the public business, to take evidence on oath*, S Prov C 1846, c 39.

⁶ Tom Mitchell, "1846: Canada's First Inquiries Act" (2021) 55:3 *J Can Studies* 564.

⁷ All, with the exception of the Manitoba legislation termed the *Manitoba Evidence Act* (Part IV), are titled *Inquiries* or *Public Inquiries Acts*. See Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 19–20.

⁸ On this account of the state see Ian McKay, "Canada as a Long Liberal Revolution: On Writing the History of Actually Existing Canadian Liberalism, 1840s–1940s," in Jean-Francois Constant & Michel Ducharme, eds, *Liberalism and Hegemony: Debating the Canadian Liberal Revolution* (Toronto: University of Toronto Press, 2009) 347 at 368.

⁹ *Ibid* at 353.

¹⁰ See e.g. James Douglas Maxwell, "Royal Commissions and Social Change in Canada, 1867–1966" (PhD Thesis, Cornell University, 1969) [unpublished]. For an early account of the purposes of Canadian executive inquiries rooted in legitimation theory see Peta E Sheriff, "State Theory, Social Science, and Governmental Commissions" (1983) 26:5 *Am Behav Scientist* 669 at 671–72. Recent accounts stress the utility of inquiries in nation building. See Neil Bradford, "Writing Public Philosophy: Canada's Royal Commissions on Everything" (2000) 34:4 *J Can Studies* 136; Eve Haque, *Multiculturalism Within a Bilingual Framework: Language, Race, and Belonging in Canada*

Commission on the Status of Women have been mostly praised for their contribution to state and society, investigations in the Canadian coercive tradition—those that have made extensive use of coercive instruments of investigation to take testimony on oath and to subpoena witnesses and documentary records—have come to be associated with the abrogation of basic principles of natural justice.¹¹

In Canada, legislatures have always had the power to confer coercive powers of investigation through statute, but, as in Britain, conferral of such powers was beyond the scope of the Crown acting independently. Beginning in 1846, the grant of power to the Canadian Crown to deploy executive investigations with coercive powers marked a fundamental shift of authority from the legislature to the executive contra the British Bill of Rights (1689) that had outlawed Crown-appointed coercive commissions of inquiry as “illegal and pernicious.”¹² Following 1846, Canadian legislatures and courts extended and affirmed these new inquisitorial powers of the executive, though not without criticism from some that such power was “inconsistent with the whole spirit of the British Constitution and the administration of justice.”¹³ The resistance of those subject to executive inquiries helped to construct Canadian inquiries as formalized judicial proceedings in which structures akin to legal proceedings provided the foundation for truth-seeking.

This paper examines a chapter in the development of coercive inquiries in Canada, one written in the spring and summer of 1915, when charges of corruption against the Premier of Manitoba, his cabinet, and the

(Toronto: University of Toronto Press, 2012). On the diverse utility of commissions of inquiry elsewhere Matthew R Keller, “When is the State’s Gaze Focused? British Royal Commissions and the Bureaucratization of Conflict” (2014) 27: 2 *J Historical Sociology* at 206–07.

¹¹ See C Granger, “Crime Inquiries and Coroners Inquests: Individual Protection in Inquisitorial Proceedings” (1977) 9:3 *Ottawa L Rev* at 441–73; Gordon F Henderson, “Abuse of Power by Royal Commissions” *Law Society of Upper Canada Special Lecture Series* 1979 (Toronto: Law Society of Upper Canada, 1979); David C Scott, “The Rights and Obligations of Those Subject to Inquiry and of Witnesses” (1989) 12:3 *Dal LJ* 133 at 133–49; Bryan Schwartz, “Public Inquiries” (1998) 40:1 *Can Pub Admin* 72 at 72–85.

¹² Moore, *supra* note 4 at 518.

¹³ “Investigations Under Oath Bill, Mr. Anglin”, *House of Commons Debates*, 4-2 (3 May 1880) at 1935.

Conservative-dominated public accounts committee, pushed the political institutions of the province into crisis.¹⁴ The crisis brought down the Roblin government, led to the arrest and subsequent criminal prosecution of the Premier and several cabinet colleagues, and destroyed the electoral prospects of the Conservative Party for more than a generation. An executive inquiry led by Justice Thomas Mathers, appointed (ironically) by the Conservative government, proved to be the fulcrum for the restoration of credibility to Manitoba's liberal state. The decisive rejection by Manitoba's Court of Appeal of the claims that the Mathers inquiry was unconstitutional, and its actions illegal, marked an important milestone in the development of executive inquiries.

II. AN INDICTMENT OF "GROSS AND CULPABLE NEGLIGENCE"

In March 1915, the Liberal members of a Conservative-dominated Manitoba Public Accounts Committee pointed to irregularities in the financial arrangements made by the Roblin government for the construction of the province's new legislative building. They also charged that the Conservative majority on the Committee was obstructing a legitimate investigation to get to the bottom of possible illegality.¹⁵ Brushing Liberal protests aside, on March 30, 1915, the Conservatives sought approval of a report in which changes in the plans and methods of constructing the legislative building were deemed necessary, and the terms of new contracts given in connection with these changes were endorsed as

¹⁴ The most frequently cited historical accounts of Canadian commissions of inquiry are dated. See Watson Sellar, "A Century of Royal Commissions" (1949) 25:1 Can Bar Rev 1 at 1-28; Thomas J Lockwood, "A History of Royal Commissions" (1967) 5:2 Osgoode Hall LJ 172 at 172-209; and JE Hodgetts, "Royal Commissions of Inquiry in Canada" (1949) 9:1 Pub Admin Rev 22 at 22-29. Since the 1980s these accounts are typically cited as the basis of brief narrative accounts of the history of commissions of inquiry linked to legislative enactments, analysis of types or typologies of inquiries, and detailed accounts of law and practice related to the operation of inquiry commissions. See for example Ronda Bessner & Susan Lightstone, *Public Inquiries in Canada: Law and Practice* (Toronto: Thomson Reuters, 2017) at 4-5; Stephen Goudge & Heather MacIvor, *Commissions of Inquiry* (Toronto: LexisNexis Canada Inc, 2019) at 41.

¹⁵ "Manitoba Defrauded of \$800,000: Liberals Demand Royal Commission", *Manitoba Free Press* (31 March 1915) at 1.

fair and reasonable.¹⁶ When the report was presented to the legislature for approval, Liberal A.B. Hudson (a future member of the Supreme Court of Canada) moved an amendment that amounted to an indictment of gross incompetence, if not criminality, on the part of Conservative members of the Public Accounts Committee.¹⁷

The amendment set out a series of stark charges of “gross and culpable negligence on the part of the Government,” including the assertion of “systematic violation of contracts,” and claims that the province had been “defrauded of sums exceeding \$800,000.” And Hudson made a thinly veiled charge that a cover-up of illegality was afoot: material evidence had been excluded from the committee’s inquiry, witnesses employed by the province had disappeared, and original records had been mutilated.¹⁸ The amendment concluded with a demand for a commission of inquiry to investigate Hudson’s charges. As the fierce debate on Hudson’s call for an inquiry played out in the legislature (the Legislative Assembly adjourned at 1:30 A.M.), it seemed that the Conservative strategy of stonewalling would prevail. Twenty-eight of the 49 members elected to the legislature in the July 1914 election were Conservatives (against twenty Liberals and one independent): on that score the denouement of this high political drama would be the defeat of the Hudson amendment and the prorogation of the legislature.

It was not to be. As the rancor continued in the legislature on the evening of March 31, 1915, Liberal leader T.C. Norris presented Sir Douglas Cameron, Lieutenant Governor of Manitoba, with a petition on behalf of the Liberal members of the Legislature.¹⁹ The petition set out the allegations contained in the Hudson’s amendment, and charged that, unless a commission of inquiry was established to investigate, the province would

¹⁶ For the motion, the amendment that followed, and the announcement of the inquiry, see *Journals of the Legislative Assembly of Manitoba*, Second Session, Fourteenth legislature (1915) at 180-92.

¹⁷ On Albert Blellock Hudson see “Mr. Justice Hudson” (1936) 14:5 Can Bar Rev 418.

¹⁸ “Manitoba Defrauded of \$800,000: Liberals Demand Royal Commission”, *supra* note 15.

¹⁹ Sir Douglas Cameron, the 61-year-old President of the Rat Portage Lumber Company and former Liberal member of the Ontario legislature, had been appointed Lieutenant Governor in 1911 by Sir Wilfred Laurier, “Sir Douglas Cameron Passes at Toronto”, *Manitoba Free Press* (28 November 1921) at 1-2.

“suffer grave loss and injury....”²⁰ Cameron was urged not to prorogue the legislature until a commission of inquiry had been created to investigate Liberal allegations.²¹ What was Cameron to do? Under parliamentary convention, prorogation and/or the creation of such an inquiry did not lie in the hands of the Lieutenant Governor. Or did they?

Though Norris had provided Cameron with only allegations, the Lieutenant Governor had reasons to credit the claims set out in the petition. The disappearance of critical witnesses, missing records, and general stonewalling by the Conservative majority in the Public Accounts Committee had been well-reported in the, albeit partisan, press. In determining a course of action as Lieutenant Governor, Cameron sought legal advice from Manitoba’s Chief Justice, H. M. Howell.²² A Liberal in politics, Howell had been Chief Justice of the Manitoba since 1909. He was a seasoned veteran of politics and the courts, and highly regarded by both Conservatives and Liberals.²³

The next day, during a meeting with Roblin at Government House, Cameron presented the Premier with a Morton’s Fork: Roblin could have a commission of inquiry or an election – it was his choice.²⁴ Roblin, in power since 1900, won the 1914 election. But the campaign featured a rising tide of reform sentiment, and the Roblin Conservative Party was increasingly viewed as corrupt.²⁵ In 1915, an election with government

²⁰ “Opposition Members Present Memorial to Lieut. – Governor”, *Manitoba Free Press* (1 April 1915) at 1.

²¹ *Ibid.*

²² Cameron had no confidence in Conservative Attorney General, JH Howden. See Howell’s testimony Manitoba, Legislative Assembly, “Royal Commission Appointed to Investigate the Charges in the Statement of C.P. Fullerton, K.C.” Sessional Papers, No 18 (1916) at 667–68.

²³ Howell was appointed Chief Justice of the Court of Appeal in 1906 and became Chief Justice of Manitoba in November 1909. “Chief Justice Howell Dies After Protracted Illness”, *Manitoba Free Press* (8 April 1918) at 1, 3.

²⁴ For accounts of these events with slight variations see *Manitoba Free Press*, 2 April 1915, at 1, 5; J Castell Hopkins, *The Canadian Annual Review of Public Affairs 1915* (Toronto: The Annual Review Publishing Co. Ltd., 1916) at 622; John T Saywell, *The Office of Lieutenant-Governor* (Toronto: University of Toronto Press, 1957) at 50; MS Donnelly, *The Government of Manitoba* (Toronto: University of Toronto Press, 1963) at 118.

²⁵ Jim Blanchard, “Roblin, Sir Rodmond Palen” (2016), online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/roblin_rodmond_palen_16E.html>

scandal as the center piece spelled almost certain defeat, and a Liberal government appointed commission of inquiry would certainly follow. Roblin must have calculated that if he (not Norris) appointed the inquiry, perhaps he could shape the terms of reference and membership to his advantage. When Roblin appeared at the legislature on the afternoon of April 1, 1915, the gallery was full, and expectations were high. When a chastened Premier announced that the charges placed before the legislature by the Liberal opposition were sufficiently serious to require the appointment of inquiry, few seemed surprised by this turn of events.

Roblin's capitulation was not unprecedented. Other Canadian and Manitoban political leaders, confronted with an existential political crisis, had resorted, sometimes unwillingly, to a commission of inquiry. Facing a corruption scandal rooted in illicit election financing in 1873, Prime Minister John A. Macdonald sought to subdue the "Pacific Scandal" first with a Parliamentary select committee, but (unable to give it the authority to take testimony on oath) later had recourse to the federal *Act respecting inquiries concerning Public Matters*.²⁶ For both Roblin and Macdonald, the appointment of a commission of inquiry was a high-stakes move. Neither had much choice. The departure of loose fish (among others) was rapidly turning Macdonald's parliamentary majority into a minority; in Roblin's case, Lieutenant Governor Cameron had invited Roblin to choose one of two evils. Ironically, Roblin's public account of the need for an inquiry (charges warranted investigation) recalled the reasons given for the appointment on inquiries by two former Manitoba Premiers. However, these inquiries were appointed to rebuff politically inspired (probably false) claims of corruption.

In 1886, then Premier John Norquay, used Manitoba's *Inquiries Act* to appoint an inquiry to investigate financial dealings between the province and the Saskatchewan Coal Mining and Transportation Company of which Norquay was President.²⁷ The Commission, headed by Manitoba Chief Justice Wallbridge, took sworn testimony, issued subpoenas, and cross-

[perma.cc/EL4K-FNKS].

²⁶ *Act respecting inquiries concerning Public Matters*, SC 1868, c 38; D Girouard, "The Bill of Oaths, the Prorogation, and the Royal Commission" (1873) 3:2 RCLJ at 178-202.

²⁷ *An Act to make provision for Inquiries concerning Public Matters*, SM 1873, c 21.

examined witnesses.²⁸ Wallbridge concluded that the charges against Norquay were unfounded.²⁹

In 1889, an internecine struggle within the Liberal Party over railway construction led to the appointment of an inquiry by Premier Thomas Greenway to investigate himself and his Attorney General Joe Martin. It had been alleged in the *Manitoba Free Press* and the *Winnipeg Morning Call* that Greenway and Martin had taken a bribe of \$12,500 from the operators of the Manitoba Central railway company in return for favorable legislation.³⁰ Greenway's detractors objected to the inquiry terms of reference and failed to appear at the inquiry. No surprise, the Commissioner, Judge Killam of the Court of Queen's Bench, dismissed the charges as unfounded.³¹

For both Norquay and Greenway, an executive inquiry proved a valuable instrument to shore up the legitimacy of the state undermined by charges of corruption. While the government of the day was the target of criticism, the redemption of the liberal order (and what Ian McKay has termed "the party of the liberal order" here composed of the members of both the Liberal and Conservative parties)³² was the real burden of both inquiries, as it would be for the Legislative building inquiry in 1915.

No one viewed Roblin's appointment of a commission of inquiry as calling anyone's bluff, never mind a good faith step to get at the truth of Liberal charges. Norris offered a collective pat on the back to his Liberal colleagues: Roblin's announcement was "right in line with our view of what

²⁸ "Royal Commission", *Manitoba Daily Free Press* (29 March 1886) at 4.

²⁹ GA Friesen, "John Norquay" in Barry Ferguson & Robert Wardhaugh, eds, *Manitoba Premiers of the 19th and 20th Centuries* (Regina: University of Regina Press, 2010) at 47-69.

³⁰ John A Hiltz, "The Political Career of Thomas Greenway" (PhD Dissertation, University of Manitoba, 1974) at 144-50.

³¹ For his report see Sessional Paper 3, Report of the Commissioner appointed on the tenth day of November, 1888, under authority of a Resolution passed by the Legislative Assembly on November 8, 1888, and of Sections 84 and 85 of Chapter 7 of the *Consolidated Statutes of Manitoba*, to examine into, and report upon the charges made against the First Minister and the Attorney General, and against the government generally. Legislative Assembly of Manitoba, Second Session, Seventh Legislature, Sessional Papers, Volume XXI, 1888-889.

³² McKay, *supra* note 8 at 368.

is necessary.”³³ The next day, the *Free Press* tossed salt in Roblin’s wounds with a front page report that he had been forced to “surrender” to the Liberals.³⁴ And Roblin apologists confirmed the *Free Press* account, lobbing charges that the inquiry was a partisan political “conspiracy,” an “iniquitous plot,” in which the “Lieutenant Governor had converted his office into a cogwheel of a political party machine.”³⁵

In the wake of Roblin’s announcement, the epicenter of the crisis swirled around a tug of war (Roblin v. Cameron) over the membership and terms of reference of the inquiry. While this played out, Conservative partisans travelled to Government House to confront the Lieutenant Governor. Long-time Tory wire-puller Robert Rogers (the preeminent Conservative in western Canada) came to explore Cameron’s susceptibility to a bribe or the threat of dismissal. Rumours had it that Cameron (identified as one of Winnipeg’s millionaires in 1910) was broke.³⁶ During his interview, Sir James Aikins (who would succeed Roblin as Conservative leader in 1915, and Cameron as Lieutenant Governor in 1916) told Cameron that he had no right to insist upon the appointment of a commission of inquiry against the desires of Roblin and his cabinet.³⁷ Cameron was unmoved.³⁸

Three weeks after Roblin’s announcement the terms of reference and commissioners for the inquiry were announced. Cameron had insisted on broad terms of reference for the inquiry. It would “investigate and inquire into all matters pertaining to the new Parliament Buildings and the expenditure of money therefore.”³⁹ This bald language posed a legally-

³³ “Premier Roblin Forced To Grant Fullest Inquiry”, *Manitoba Free Press* (2 April 1915) at 3.

³⁴ *Ibid.*

³⁵ “Things in General”, *The Winnipeg Saturday Post* (24 April 1915) at 1.

³⁶ “Winnipeg’s Ever Widening Circle of Millionaires”, *Winnipeg Telegram* (19 January 1910) at 10.

³⁷ Alexander I Inglis, “Some Political Factors in the Demise of the Roblin Government 1915” (MA Thesis, University of Manitoba, 1968) at 36 [unpublished].

³⁸ “Indefensible Were Acts of Sir Rodmond”, *Manitoba Free Press* (21 July 1915) at 9.

³⁹ Archives of Manitoba, EC 0003A, G879, Order in Council 24019, 1915. See also Manitoba, Legislative Assembly, “Report of the Royal Commission Appointed to Inquire into Certain Matters Relating to the New Parliament Buildings” Sessional Papers, No 17 (1916) at 868 [“New Parliament Buildings”].

charged question: had Roblin and members of his government engaged in a criminal conspiracy to defraud the public treasury of hundreds of thousands of dollars? Three commissioners would undertake the investigation: Thomas Mathers, Chief Justice of the Court of King's Bench, (*primus inter pares*) was joined by Justice D. A. Macdonald, also of the Court of King's Bench (both suggested by Cameron), and (a concession to Roblin) former Conservative leader and Premier now Police magistrate, Sir Hugh John Macdonald.⁴⁰

III. THE INQUIRY

The Mathers inquiry carried forward a tradition of coercive inquiries initiated by Canada's inaugural *Inquiries Act* of 1846.⁴¹ This legislation opened a path of historical development in which Canadian legislatures and courts extended and affirmed the inquisitional powers—to summon witnesses, to require testimony under oath, to demand the production of documents—of coercive inquiries as an instrument of rule of the post-1867 Canadian state. By the mid-1940s this distinct pattern of state formation in Canada, born of a temporary statute hardly more than a page in length, culminated in the creation of an instrument of state power that was authoritatively described as having “a formal equality with the other institutions of the State such as the Courts, Houses of Parliament and Privy Council.”⁴²

⁴⁰ Hal J Guest, “Macdonald, Sir Hugh John” (2005), online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/macdonald_hugh_john_15E.html> [perma.cc/RR2W-GWM5].

Justice DA Macdonald, appointed to the Court of King's Bench in 1906 by the Laurier government, would succeed Mathers as Chief Justice of King's Bench in 1928. On Macdonald see Gordon Goldsborough, “Memorable Manitobans: Daniel Alexander Macdonald (1858-1937)” (15 December 2020), online: *Manitoba Historical Society* <www.mhs.mb.ca/docs/people/macdonald_da.shtml> [perma.cc/G2P2-KLXC].

⁴¹ The Australian colony of Victoria (1854) and New Zealand (*Commissioners' Power Act 1867*) later passed similar legislation. In 1902, the new Commonwealth of Australia (established 1901) adopted a *Royal Commissions Act*. See Goudge & MacIvor, *supra* note 14 at 41.

⁴² *Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (Ottawa: King's Printer, 1947) at 683

Following Confederation, section 129 of the *British North America Act* carried the 1846 Act forward (“subject nevertheless to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province”⁴³) into the new Confederation on a path dependent trajectory.⁴⁴ Macdonald—his own Minister of Justice and Attorney General and a protégé of W.H. Draper, the author of Canada’s first *Inquiries Act*—chose to renew the statute with one amendment required by the new constitutional structure. In May 1868, Ottawa approved *An Act respecting inquiries concerning Public Matters* to replace the 1846 Act deleting only the reference to “the administration of justice,” now a provincial responsibility under the federal state.⁴⁵ In 1873, Manitoba followed in Ottawa’s footsteps and approved the *Public Inquiries Aid Act* that gave commissioners the power “to enforce attendance of such party or witnesses and to compel them to give evidence, as is vested in any court of law in civil cases.” Replicating the 1846 statute, it also contained the common-law provision against self-incrimination contained in the original *Inquiries Act*: no “witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution.”⁴⁶ Almost immediately, the expedient value of the statute was evident when it was invoked to create inquiries into corrupt electoral practices,⁴⁷ and, later, allegations against a stipendiary magistrate.⁴⁸

On April 22, 1915, the Mathers inquiry opened in a courtroom in the new Law Courts Building on Broadway, just north of the Legislative Building under construction and now under investigation. From the outset,

[*Agents of a Foreign Power*].

⁴³ *British North America Act*, 1867 (UK), 30 & 31 Vict, c 3, s 129.

⁴⁴ Luc-André Couture, “Introduction to Canadian Federal Administrative Law” (1972) 22:1 UTLJ 47 at 49. On path dependency see James Mahoney, “Path Dependence in Historical Sociology” (2000) 29:4 Theory & Soc 507.

⁴⁵ *An Act respecting Inquiries concerning Public Matters* (UK), 1868, 31 Vict, c 38.

⁴⁶ *An Act to make provision for Inquiries concerning Public Matters*, SM 1873, c 21.

⁴⁷ “Manitoba Parliament”, *Manitoba Free Press* (12 May 1875) at 3. In the case of the inquiry regarding the Kildonan Election, the Assembly asked the Lieutenant Governor to appoint a commission under the *Act to make provision for enquiries into public matters*, SM 1873, c 21. Stuart Hay, Reference Librarian, Legislative Library of Manitoba, e-mail 26 June 2020.

⁴⁸ “City and Provincial”, *Manitoba Free Press* (12 May 1880) at 1.

the participants in the inquiry—lawyers in charge of the Liberal Party case and those representing Roblin and his associates—including Chief Justice Mathers, referred to the inquiry as “the court.”⁴⁹ The dominant role of judges and lawyers in the proceedings of Canadian coercive inquiries eventually led one commentator to speak of their “judicialized” character.⁵⁰ Though, in 1915, Manitoba law remained silent on the participation of legal counsel in inquiries, *de facto* participation of lawyers in Manitoba inquiries dated from at least the 1880s.⁵¹

The Roblin government was eager to provide the Mathers inquiry with legal counsel. Conservative loyalist Edward Anderson appeared at the first session and announced that he had been “appointed by the Government as counsel for the commission.”⁵² Told several times by Mathers that his services were not required, Anderson eventually left the Law Courts, but not before issuing a caution that “in matters of this kind it has been the practice for counsel to represent the commission.” Anderson thought that the question “should receive further consideration by the commission.”⁵³

Anderson may well have envisioned a leading role for himself in selecting, summoning, and questioning of witnesses, but Mathers had decided that counsel representing the Liberal Party would be charged with

⁴⁹ For examples of the inquiry referred to as “the court” see “Counsel For Kelly Now Contends Contract Called for Lump Sum for Caissons”, *Manitoba Free Press* (8 May 1915) at 4.

⁵⁰ JE Hodgetts, “Should Canada be De-Commissioned? A Commoner’s View of Royal Commissions” (1964) 70:4 *Queen’s Q* 457 at 477–8.

⁵¹ *An Act respecting Commissioners to make Inquiries Concerning Public Matters*, RSM 1913, c 34. For counsel present for the Norquay inquiry see Royal Commission, *supra* note 28. The *de jure* participation of lawyers in federal inquiries dates from 1912 when amendments to the federal *Inquiries Act* (section 12) authorized commissioners to engage counsel (and other experts as required) and stipulated that commissioners may allow legal counsel for any person whose conduct was being investigated. This provision graduated to shall allow for any person “against whom any charge is made in the course of such investigation, to be represented by counsel.” See *An Act to Amend the Inquiries Act*, SC 1912, c 28.

⁵² On Anderson see Gordon Goldsborough, “Memorable Manitobans: Edward Anderson (1867-1955)” (7 June 2019), online: *Manitoba Historical Society* <www.mhs.mb.ca/docs/people/anderson_e.shtml> [perma.cc/5NGD-PRZT].

⁵³ Archives of Manitoba, Royal Commission to Inquire into Certain matters relating to the New Parliament Buildings, Evidence, Part 1, 1915, A0063, GR 13694, G 3175, at 9 [A0063].

making the case in support of their corruption charges. C.P. Wilson, a veteran court room litigator and “prosecuting counsel”⁵⁴—“one of the ablest and best equipped lawyers of western Canada”⁵⁵—supported by Liberal insiders J. B. Coyne K.C.⁵⁶ and Herbert Symington K.C., would do the heavy lifting for the inquiry.⁵⁷ Led by Wilson, the investigation took on the appearance of a criminal law process with Wilson pushing the inquiry forward with demands for testimony and documentation and close questioning of witnesses,⁵⁸ while opposing counsel did their best to safeguard the interest of their clients before the inquiry.⁵⁹

The Mathers inquiry may have looked like a court in session, but stark differences in procedure left few legal bulwarks for defence counsel (in juridical terms, no one could stand before an inquiry as a defendant) on which to rely. Statute granted executive inquiries a formidable arsenal of investigative powers, and tradition bequeathed an almost unlimited procedural discretion: procedure depended on the commissioners’ view of necessity. Commissioners decided whether an inquiry would be public or in camera, whether and what coercive powers would be put to use, who would question witnesses, what they would be asked, and what documents they would be told to produce. And conventional rules of evidence did not apply. When A. J. Andrews—counsel for the Roblin government—asked if the inquiry would accept hearsay evidence (a witness had testified that he heard that a government employee had been directed to alter records related to the construction of the legislature), Mathers said yes: “The commission was largely a law unto itself..., not bound by the ordinary rules of

⁵⁴ *Ibid.*

⁵⁵ “C.P. Wilson K.C. Dies in General Hospital”, *Manitoba Free Press* (12 September 1931) at 18.

⁵⁶ On Coyne see JE Rea, *TA Crerar: A Political Life* (Montreal & Kingston: McGill-Queen’s University Press, 1997) at 32.

⁵⁷ *Ibid.* Herbert J Symington KC and JB Coyne KC had exemplary Liberal credentials. Both were members of the facetiously named “Sanhedrin” along with JW Dafoe and Hudson.

⁵⁸ “Commissions Will Sit in Big Room of Assize Courts”, *Winnipeg Telegram* (21 April 1915) at 1.

⁵⁹ “Technicalities Will Not Hold In Royal Commission”, *Manitoba Free Press* (3 May 1915) at 7.

evidence.”⁶⁰ Such independence—a cousin of the judicial independence of the courts—was deemed essential to the deliberations of an inquiry.

The inquiry began as a cycle of conflict triggered by inquiry demands for testimony, backed up with threats of subpoena and bench warrants. A roughly \$800,000 question stood at the center of the process: had Thomas Kelly and Sons—the contractor—been overpaid as part of a fraudulent scheme to personally benefit members of the Conservative government, or alternatively, as an election fund kickback scheme? When C. P. Wilson demanded contractor Kelly’s financial records, F. H. Phippen—Kelly’s counsel—declined: He required these for his own preparation for the inquiry, and—foreshadowing Phippen’s later assault on the legality of the inquiry—the production of such documentation, in his view, would carry the inquiry beyond its proper scope.⁶¹

For Phippen, a former Manitoba Court of Appeal judge, now a resident of Toronto,⁶² the drive to end the inquiry was given urgency by the disclosure on 7 May of a letter from contractor Thomas Kelly to Provincial Architect Victor Horwood concerning payments for concrete.⁶³ The letter had passed from Horwood (concerned that he was being set up to take the blame for Roblin corruption), to Horwood’s counsel W. H. Whitla, to A.J. Andrews, who turned it over to the inquiry. Andrews’ terse account of the letter’s provenance belied its explosive revelations. He had been in possession of the letter for a day but had forgotten about it.⁶⁴ In the letter (dated 20 September 1913) Kelly proposed that he be paid a lump sum of \$844,437.00 for caisson work on the new legislature.⁶⁵ No indication of the

⁶⁰ “Whitla Says Evidence of Salt Improper”, *Winnipeg Tribune* (1 May 1915) at 10.

⁶¹ “Lawyers Have Sharp Clash at Capitol Inquiry”, *Manitoba Free Press* (30 April 1915) at 13.

⁶² Appointed Judge of the Manitoba Court of Appeal in 1906, Phippen left Winnipeg in 1909 to become General Counsel for the Canadian Northern Railway in Toronto. B.M. Greene, ed, *Who’s Who in Canada* (Toronto: International Press Ltd, 1929) at 2104.

⁶³ Randy R Rostecki, “Horwood, Victor William” (2015), online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/horwood_victor_william_16E.html> [perma.cc/RJA2-UZKD].

⁶⁴ “Counsel For Kelly Now Contends Contract Called for Lump Sum for Caissons”, *supra* note 49.

⁶⁵ “Caissons Paid For By a Lump Sum, Says Kelly” *Winnipeg Evening Tribune* (7 May 1915) at 5. See also Archives of Manitoba, “New Parliament Buildings”, *supra* note 39 at 887–88.

amount of cement to be poured was provided. Because it contradicted vital testimony given before the Public Accounts committee, the letter ignited the inquiry. During Public Accounts Committee hearings, the lump sum cited in the Horwood-Kelly correspondence was accounted for in a different manner. There, the cost for the cement in the caissons—\$844,037—was based on Kelly's bill to the province for 35,933 yards of cement at \$28.00 a cubic yard. A Roblin appointed official—W. A. Elliott, the province's chief inspector of building projects—sanctioned these payments on the basis of reports from his subordinate William Salt. Horwood told the Public Accounts Committee that a verbal agreement was arrived at that Kelly would receive a flat rate of \$25.83 per cubic yard of concrete. Kelly offered a revision: the base rate was \$23, but something higher could be charged.⁶⁶ The explanation offered to the inquiry by Phippen (on behalf of Kelly) and Andrews (on behalf of the Roblin government) only deepened the mystery of the \$844,037.

Phippen: the letter was a formal agreement—what he considered a contract with the government—that had been arrived at after it became clear that pilings for the new structure had to be replaced with cement caissons. Kelly had made an offer to the government for their construction on the basis of an estimate of cement required for the caissons, added twenty per cent to that, and settled on the sum of \$844,437.00 for the work. On behalf of the government, Horwood agreed to Kelly's proposal and directed him to proceed with the work. The only legal question that might be raised, Phippen observed, concerned the legality of the agreement (the validity of the letter) as a contract.

Andrews: the Roblin government was an innocent bystander, a victim of a (perhaps nefarious) deal made by Horwood and Kelly. Nor was the government culpable for the false statements made by government officials before the Public Accounts Committee. Why would the government question accounts presented and certified by officials that purported to record the exact yardage and materials which had been used in the construction of the caissons? Only after the proroguing of the legislature, had it become aware of some financial irregularities, and the government was intent on retrieving any overpayments from Kelly & Sons.

⁶⁶ "Counsel For Kelly Now Contends Contract Called for Lump Sum for Caissons", *supra* note 49.

These self-serving accounts galvanized the Liberal prosecutors. C.P. Wilson pointed to Phippen's statement as a key to the conspiracy: it disclosed that

the payments made to Kelly & Sons for the caissons, according to the evidence before the public accounts committee, were not for 35,000 yards of concrete. The inspector certified that 35,000 yards of concrete were used, and cheques were issued upon that basis. But the whole of the 35,000 yards was not put in and that was by arrangement with Horwood.⁶⁷

In actuality, the official certification of cement used in the caissons was simply a cover for the payment of the \$844,437.00 referenced in the Horwood-Kelly letter. The exposure of this fraudulent scheme provided a guide to other features of the overall conspiracy.

By the end of the inquiry, it was apparent that the caissons arrangement—payments based on grossly inflated cost projections and/or fraudulent documentation—was repeated in work involving several parts of the new building. Changes to the structure, made after Kelly had the contract, served as the basis to issue contracts to Kelly containing grossly overstated costs. From these proceeds, Kelly was obliged to kick-back funds to the Conservative Party for an election fund. The caisson construction netted \$680,704.50 for the fund; grossly overstated costs for steel in the north wing of the structure generated \$102,692.36; fraudulently claimed payments for construction of the south wing and grillage netted \$68,997.71; over charges for brick for rubble produced \$17,968.73; and claims for three feet of excavation (never done), added \$21,734.80.⁶⁸ In total, \$892,098.10 was assembled in this manner.⁶⁹ As matters stood on 7 May 1915, aside from the simmering controversy associated with cement in the caissons, no pattern of fraud had been disclosed, and Frank Phippen intended to do everything he could to keep it that way.

IV. PHIPPEN'S INDICTMENT

When the appearance of the Horwood-Kelly letter 7 May 1915 triggered demands for Kelly's bank book, construction records, and related

⁶⁷ *Ibid.*

⁶⁸ "There Was a Conspiracy To Rob Province", *Manitoba Free Press* (26 August 1915) at 1.

⁶⁹ For a detailed summary see Archives of Manitoba, "New Parliament Buildings", *supra* note 36 at 880-912.

documents, Phippen decided it was time to put the inquiry on hold and on trial. Evidently, he had been preparing for this moment. In retrospect, it seems clear that mitigating the impact of evidence damaging to his client had always been secondary to Phippen's search for a way to subvert the inquiry process. Frustrating the inquiry's demands for documents was now joined by a frontal assault on its legality.

In 1915, the unexplored legal and constitutional foundation of Manitoba executive inquiries (and the indulgence of inquiry commissioners) allowed Phippen to develop an indictment of Manitoba's inquiries legislation and the Mathers inquiry as "ultra vires and void."⁷⁰ He began his (ninety minute) dissertation with the claim that no valid legal foundation—common law or statutory—existed for the Mathers inquiry.⁷¹ "This Commission is not issued by virtue of any statutory power but issued under [sic] Common law prerogative of the Crown..." he announced. It had to be so because no statute existed in Manitoba to authorize "the issuing of a Commission of the character of the one under which your Lordships are acting."⁷² Manitoba's *Inquiries Act* only "authorized the Lieutenant-Governor in Council, when a Commission has been issued, to empower the Commissioners to summon witnesses, and compel them to give evidence, and to order the production of documents." It did not provide for the creation of an inquiry. Ontario originally had an Act with a similar deficiency, Phippen observed, but had "amended that Act by making specific statutory provision for the issuing of commissions of this character."⁷³

If no statutory power existed to create the inquiry, Phippen concluded, it had to be the product of prerogative authority. However, this was impossible because, he argued, Manitoba's Lieutenant Governor—unlike those in other provinces—had no prerogative powers of any kind to exercise.⁷⁴ The governors of provinces that had originated as formal colonies had received prerogative powers from the British Crown; because Manitoba

⁷⁰ "Kelly & Sons Seek Injunction Restraining Royal Commission From Proceeding With Inquiry", *Manitoba Free Press* (10 May 1915) at 5.

⁷¹ "Kelly Counsel Attacks Legality of Royal Commission", *Winnipeg Evening Tribune* (7 May 1915) at 1.

⁷² A0063, *supra* note 53 at 251.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

had never been a formal colony, prerogative powers could come to Manitoba's Lieutenant Governor only through a dispensation from Canada in 1870, but this was not possible because prerogative powers were nowhere addressed in the *British North America Act*. The powers of the Lieutenant Governor of Manitoba were limited to those spelled out in the *Manitoba Act*; these did not include the authority to create an inquiry. It followed that the creation through Crown prerogative of an executive inquiry in Manitoba was unconstitutional.

Phippen also contended that the commissioners had no powers to inquire: the commissioners' authority to demand the production of documents was meaningless because their commission failed to "authorize your Lordships to require any witness to give evidence."⁷⁵ The *Inquiries Act* stated that the Lieutenant Governor may confer on the Commissioners "the power of summoning before them parties or witnesses, and requiring them to give evidence,"⁷⁶ but he had failed to do so. The actual commission directed the commissioners only to "to enquire into all matters pertaining to the new parliament buildings and the expenditure of money therefore... and for that purpose to summon witnesses to take evidence on oath orally or in writing." Nowhere was the commission given power to require the attendance and testimony of witnesses.⁷⁷ Phippen quoted Lord Haldane's words from a recent decision of the Judicial Committee of the Privy Council (*A.G. for Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237) in which Haldane observed that "the power to compel answers from witnesses is not incident [sic] to the execution of the commission."⁷⁸

With no authority to require the attendance of witnesses or their testimony, the commissioners could hardly claim authority "in a case of disobedience by any party or witness... to punish that party for disobedience."⁷⁹ Indeed, the act was specific, only after the Lieutenant Governor had conferred "power of summoning before them any party or witness, and of requiring them to give evidence on oath orally or in writing" would the commissioners have "the same powers to enforce the attendance

⁷⁵ *Ibid* at 253.

⁷⁶ *Ibid* at 255.

⁷⁷ *Ibid* at 255-56.

⁷⁸ *Ibid* at 253.

⁷⁹ *Ibid* at 252.

of such party or witnesses and compel them to give evidence.”⁸⁰ Even had the Lieutenant Governor conferred the power to require attendance and testimony, Manitoba’s legislation did not contemplate any specific form of punishment for those who ignored the demands of the inquiry. Section 2 of the *Commissioners Act* (the original *Inquiries Act* had been renamed in 1902) referred to punishments available to “any court of law in civil cases,”⁸¹ but this was irrelevant because, Phippen concluded, “you have not the power.”⁸²

For these reasons, Phippen refused to submit to the demands of the inquiry for the financial records of Thomas Kelly and invited the commissioners to have the constitutionality and powers of the inquiry adjudicated by the courts. If Phippen expected that his indictment of the inquiry’s legal status and authority would derail the inquiry, he must have been disappointed in the response he received from Mathers. The Commissioners were not competent to decide whether the Lieutenant Governor in Council had the authority to issue the commission in question, but they would “assume that he had the power to do so,” Mathers observed. Business as usual it was, unless Phippen turned his objections into an injunction to halt the inquiry.⁸³

Veteran lawyer that he was, Phippen had been planning for this eventuality. His May 7th jeremiad against the inquiry was a by-product of his work with Toronto colleague W. M. Tilley to develop just such an application.⁸⁴ Dated May 8, 1915, the application took aim at the prerogative powers of Manitoba’s Lieutenant Governor, the order in-council that created the inquiry, and Manitoba’s inquiries legislation. It asked that both the legislation and the inquiry be declared “ultra vires and void,” and that the investigation be stopped “by order and injunction... from proceeding further under and by virtue of the said commission.”⁸⁵

⁸⁰ *Ibid* at 257.

⁸¹ See *An Act respecting Commissioners to make Inquiries Concerning Public Matters*, RSM 1913, c 34, s 2.

⁸² A0063, *supra* note 53 at 257.

⁸³ *Ibid* at 276.

⁸⁴ “Roblin Denies Anything Wrong in Negotiations”, *Manitoba Free Press* (3 July 1915) at 4.

⁸⁵ “Kelly & Sons Seek Injunction Restraining Royal Commission From Proceeding With Inquiry”, *supra* note 70 at 1, 5.

Traditionally, injunctions were not available against the Crown because of the inability of the courts (the Queen's courts) to issue an order against the Crown. However, under Manitoba's *Petition of Right Act*, approved 1875, an application for an injunction against the Crown could proceed with the permission of the Attorney General.⁸⁶ "Throughout the Roblin regime such permission was consistently refused until Kelly desired it," reported the *Manitoba Free Press*. Then, for the first time, Conservative Attorney General J. H. Howden, soon to be implicated in the legislative building scandal, issued a fiat permitting suit to be entered against the province.⁸⁷

Phippen's public campaign against the inquiry—process and legal objections graduating to the threat of a court injunction—played out in the public sphere while, privately, Phippen initiated negotiations with Liberal intermediary A. B. Hudson to achieve the same end behind closed doors. Beginning May 7—coincident with the Kelly-Horwood bombshell landing in front of the Mathers inquiry—Phippen and Hudson (acting for the Liberal Party/prosecution) hammered out a plan to end the inquiry. The Roblin government would resign and in his resignation letter (with wording provided by Phippen and approved by Hudson), the Premier would acknowledge that opposition claims against the government were substantially correct. Once in power, the Liberals would replace the Mathers inquiry with a departmental or public accounts investigation,⁸⁸ and a civil suit would be launched to recover over-payments from Thomas Kelly and Sons. The agreement of the Lieutenant Governor, Mathers, and his fellow commissioners was required to seal the plan.⁸⁹

On Saturday May 8, 1915, Phippen and Hudson met with Chief Justice Howell to lobby for his support and participation in the plan to shut the inquiry down. Howell was assured that the proposed arrangement did not

⁸⁶ See *An Act to make further provision for the institution of suits against the Crown by Petition of Right*, SM 1876, c 27. On the Petition of Right in Canada see Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Scarborough, ON: Carswell, 2000) at 4-8.

⁸⁷ "Will Thomas Kelly Remain in Exile?", *Manitoba Free Press* (11 August 1915) at 34.

⁸⁸ Fullerton, *supra* note 22 at 114.

⁸⁹ *Manitoba Free Press* (1 July 1915) at 5. For an account of these developments see Fullerton, *supra* note 22 at 966-69. On the autonomy of executive inquiries see Tamar Witelson, "Declaration of Independence: Examining the Independence of Federal Public Inquiries" in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 301.

include immunity for anyone from civil or criminal proceedings.⁹⁰ Because he was troubled by the prospect of a continuation of the Mathers inquiry parallel to civil or criminal proceedings against Kelly, Howell concluded that the proposal had merit.⁹¹ He subsequently sought and received agreement to the plan from the Lieutenant Governor and Mathers (tracked down on a golf course),⁹² though the latter stipulated that the inquiry would be terminated only if the Norris government, once in power, requested that the commissioners return their commission.⁹³

The plan went nowhere, subverted, in large part, by Sir Rodman Roblin.⁹⁴ On the morning of May 12th, he resigned without—from the Liberal point of view—adequately acknowledging the justice of Liberal charges of corruption against his government.⁹⁵ Later in the day, T.C. Norris was invited to form a government and A.D. Hudson was appointed Attorney General and put in charge of the legislative building file. As evidence of the scope of corruption was disclosed and (false) rumours began to circulate that the Liberals had gained power as part of a nefarious arrangement involving financial considerations amounting to \$50,000,⁹⁶ Hudson slammed the door shut on the idea that the Norris government would ask Mathers and company to disappear.⁹⁷

⁹⁰ “Chief Justice Howell Gives Evidence Before Commission”, *The Globe and Mail* (8 July 1915) at 5.

⁹¹ “Three Ministers Exonerated by C.P. Fullerton”, *Manitoba Free Press* (1 July 1915) at 5.

⁹² *Ibid*; “Chief Justice Howell Gives Evidence Before Commission”, *supra* note 90 at 5.

⁹³ Later, Mathers repeated this statement of his position to the Lieutenant Governor. Inglis, *supra* note 37 at 172–73.

⁹⁴ “Roblin Monday Again; Johnson Will Be Next”, *Winnipeg Evening Tribune* (3 July 1915) at 5.

⁹⁵ “Three Ministers Exonerated by C.P. Fullerton”, *supra* note 91 at 5; “Roblin Monday Again; Johnson Will Be Next”, *Winnipeg Evening Tribune* (3 July 1915) at 5.

⁹⁶ “Three Ministers Exonerated by C.P. Fullerton”, *supra* note 91 at 5.

⁹⁷ *Ibid*; Fullerton, *supra* note 22 at 962–64. Later, the arrangement became the subject of an executive inquiry after Winnipeg lawyer and former Conservative candidate C.P. Fullerton K.C. appeared before the Mathers inquiry on 21 June 1915 with allegations that the Norris government gained power via a corrupt agreement between the former Conservative government and the Liberal Party. Mathers and his fellow commissioners concluded that Fullerton’s charges were beyond their terms of reference. An executive inquiry appointed by the Norris government concluded that Fullerton’s claims were “without foundation” (*ibid* at 5).

At the same time, the new Liberal government complicated the work of the inquiry when the new Premier opined that anyone found guilty of a crime would be prosecuted, and that civil action would be initiated against Kelly & Sons to recover monies improperly paid to them.⁹⁸ No immediate action followed. Later A. B. Hudson explained that it was concluded that immediate action would be “unfair to Kelly, and would give him stronger grounds for an injunction.”⁹⁹ Unfair because, as Hudson was aware, Kelly could not refuse to give testimony (perhaps incriminating) before the Mathers inquiry that might be relevant to a civil or criminal proceeding.

In 1889, the traditional common-law protection (no “witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution”) contained in the original Manitoba *Inquiries Act* was nullified when Ottawa made all witnesses before a commission of inquiry—federal or provincial—compellable. This initiative was prompted by a request made in December 1888 to John Thompson, federal Minister of Justice, for a pre-emptive general pardon for witnesses before a Quebec commission of inquiry—the *Boodle Commission*—dealing with civic corruption in that city. The pardon was required to secure the testimony of witnesses who refused to testify on the grounds that their testimony might be self-incriminating. Thompson refused and the investigation was adjourned *sine die*, but the matter did not end there.¹⁰⁰ A disciple of Jeremy Bentham, Thompson thought all witnesses should be compellable.¹⁰¹ With the Quebec City Boodle Affair as impetus, Thompson took a step in that direction through *An Act to make further provision respecting inquiries concerning Public Matters* (1889).¹⁰² With its passage, no witness examined by commissioners appointed through the federal *Inquiries Act* or “commissioners appointed by the Lieutenant Governor in Council of any province to conduct any inquiry into and concerning the good government

⁹⁸ “Strict Adherence To Well Defined Liberal Platform”, *Manitoba Free Press* (14 May 1915) at 1.

⁹⁹ “Three Ministers Exonerated by C.P. Fullerton”, *supra* note 91 at 5.

¹⁰⁰ “Quebec Boodle Investigation”, *The Globe* (11 December 1888) at 1.

¹⁰¹ Thompson figures in an ongoing Benthamite inspired campaign to make all witnesses competent and compellable. See Desmond Brown, “Be Sworn and Give Evidence: The Evolution of the Competent Witness in the Context of the Canadian Evidence Act” (1994) 22 *Man LJ* at 390.

¹⁰² *An Act to make further provision respecting inquiries concerning Public Matters*, SC 1889, c 33.

of such province and or the conduct of any part of the public business thereof” could refuse to answer questions put to her because the answer might be incriminating with the provision that evidence so taken would not be admissible in a criminal proceeding except in the case of a witness charged with giving false evidence.¹⁰³

Conditions on this defence were introduced in 1893 with the passage of Thompson’s *Canada Evidence Act* through which Thompson sought to make all witnesses both competent and compellable in criminal or civil proceedings, and all other proceedings under federal jurisdiction – including commissions of inquiry. Through section 5 of this legislation Thompson made all witnesses (with the exception that husband or wife of an accused in a criminal trial were competent, but not a compellable) including the accused, both competent and compellable.¹⁰⁴ It read:

No person shall be excused from answering questions upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.¹⁰⁵

Did a witness have to object to answering a question to secure this protection? Discord in the courts on this question resulted in an amendment in 1898. Under *An Act to Amend the Canada Evidence Act* (1893), the original section 5 was revised to require a witness—including those before a commission of inquiry—to register an objection to answering an incriminating question in order to secure the safeguard against self-incrimination.¹⁰⁶ The revised Section 5 now stipulated that:

¹⁰³ For Thompson’s explanation of the need for the legislation see Thompson, *House of Commons Debates* 6th – 3rd, Vol 1 (7 March 1889) at 504. For the debate in the Senate see *Senate Debates* 6-3, Vol 1 (20 Feb 20 1889) at 40.

¹⁰⁴ For a summary of the debate in Commons and Senate see Ronald D Noble, “The Struggle to Make the Accused Competent in England and Canada” (1970) 8:2 *Osgoode Hall LJ* 249 at 270–72.

¹⁰⁵ *An Act Respecting Witnesses and Evidence*, RSC 1893, c 31.

¹⁰⁶ *An Act to Amend the Canada Evidence Act 1893*, SC 1898, c 53.

if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, ... the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.¹⁰⁷

In 1894 Manitoba followed Ottawa's legislative initiative with its own *Act Respecting Witnesses and Evidence*. Under the Act, witnesses before provincial proceedings were compellable but protected against the use of evidence given thereafter in any civil proceeding "at the instance of the Crown or of any other Person."¹⁰⁸

Though Kelly, in strict legal terms, had protection against the use of testimony given before Mathers inquiry in a subsequent civil or criminal proceeding, he refused to come before the inquiry. On 20 May when it resumed following the collapse of the Roblin government and the failed scheme to end the inquiry, Kelly's status as a compellable witness facing almost certain civil or criminal proceedings dominated the proceedings of the Mathers inquiry. Phippen asserted that the civil action against Kelly announced by the new Liberal government covered the same ground as the Mathers inquiry. He offered to produce Kelly for discovery in the civil case; this, he said, "would avoid any of the doubts thrown on the jurisdiction of this commission."¹⁰⁹ Mathers was unmoved: the course of other investigations had no relevance to his, and until "we're stopped by those who appointed us, or unless those prosecuting the charges decide to withdraw," the inquiry would continue.¹¹⁰ Phippen was similarly unequivocal. He announced the formal withdrawal of Thomas Kelly from

¹⁰⁷ *Ibid.* A further clarifying amendment in 1901 extended the protection against self-incrimination provided in the amended Section 5 to testimony given before any proceeding under provincial jurisdiction. *An Act to further to amend the Canada Evidence Act, 1893*, SC 1901, c 36.

¹⁰⁸ *An Act respecting Witnesses and Evidence*, SM 1894, c 11. It took the province until 1902 to remove the protection against self-incrimination contained in its original provincial inquiries act; *An Act Respecting Commissioners to Make Inquiries into Public Matters*, SM 1902, c 26 brought it into conformity with the 1894 *Manitoba Witnesses and Evidence Act*. Personal e-mail from Stuart Hay, Reference Librarian, Manitoba Legislative Library, February 28, 2020.

¹⁰⁹ "Kelly Leaves Court Because of Turn Down", *Winnipeg Evening Tribune* (20 May 1915) at 5.

¹¹⁰ *Ibid.*

the inquiry “on the grounds that the commission has no authority to compel the attendance of witnesses or the production of documents.”¹¹¹

Over the course of May, and into early June 1915, the inquiry continued. The testimony of Victor Horwood, taken in Minneapolis in early June, was vital to the conclusions arrived at by the inquiry.¹¹² Mathers noted in his Diary, that the story Horwood told was a “sordid one implicating Roblin, Montague, Coldwell, Howden, Kelly, and Dr. Simpson in a conspiracy to defraud the province of a large sum of money.”¹¹³ An unwilling participant in the conspiracy, Horwood was judged a willing and truthful witness.¹¹⁴ The testimony of government inspector William Salt, the focus of bribes to leave Winnipeg and stay in the United States beyond the power of a subpoena (because he was unwilling to perjure himself before the Public Accounts Committee or the Mathers inquiry)¹¹⁵ also challenged claims of innocence by members of the Roblin government.¹¹⁶ Roblin and several cabinet colleagues at the center of the conspiracy also testified. Mathers concluded that all were “equally reticent about revealing information that would be helpful to our investigation.”¹¹⁷

In early June, C.P. Wilson urged a reckoning with the juridical claims made against the inquiry by Frank Phippen.¹¹⁸ In Wilson’s estimate, a supplemental commission was required.¹¹⁹ Mathers agreed, and, following a request for action by the Norris cabinet, a supplementary commission (drafted by A.B. Hudson) was issued that “empowered” commissioners to “summon before them any party or witnesses and to require them to give

¹¹¹ “Kelly Withdrew But Commission Will Go Ahead”, *Manitoba Free Press* (21 May 21) at 2.

¹¹² “Kelly Gave \$100,000 to Campaign Fund Out of Caissons at Simpson’s Demand”, *Manitoba Free Press* (12 June 1915) at 1.

¹¹³ Inglis, *supra* note 37 at 112.

¹¹⁴ “New Parliament Buildings”, *supra* 39 at 931.

¹¹⁵ *Ibid* at 914–26.

¹¹⁶ The headline in the admittedly partisan *Manitoba Free Press* read “ASTOUNDING REVELATIONS BY SALT AND HORWOOD IMPLICATE EX-MINISTERS”, *Manitoba Free Press* (11 June 1915) at 1.

¹¹⁷ “New Parliament Buildings”, *supra* note 39 at 932.

¹¹⁸ “Commission Will Be Given Greater Scope in Inquiry”, *Manitoba Free Press* (4 June 1915) at 9.

¹¹⁹ “New Parliament Buildings”, *supra* note 39 at 868–69.

evidence on oath, orally or in writing and to produce documents....” It also “further empowered” the commissioners to “make from time to time interim reports on any matter which in their view is the proper subject of such a report,” and directed the commissioners “when reporting the evidence” disclosed in their inquiry to also to “report their findings on such evidence.”¹²⁰ In late June 1915, with its authority affirmed and ratified by an order-in-council,¹²¹ Mathers was ready to order subpoenas served on Thomas Kelly and several other witnesses deemed essential to the work of the inquiry.¹²²

The apprehension that the newly empowered inquiry would move to subpoena Thomas Kelly prompted Edward Anderson (appearing “locum tenens” for Phippen) to restate objections to the inquiry. In an appearance before the inquiry on June 25th, Anderson argued that the new order-in-council may have given the inquiry power to subpoena Kelly to appear and to produce documents, but the commissioners could not send a man to jail for contempt: “no commission could be appointed with such extensive authority.” A.B. Hudson had told Anderson that “if the government believed the evidence justified it, it would prosecute Mr. Kelly.” Given this situation, examination before the commission was equivalent to an examination for discovery. Such a process offended the basic principle in “British law [that] no man could be compelled to give evidence against himself.” Anderson conceded that there “had been some statutory modifications of that, but the principle still held good:” to demand Kelly’s testimony was to put him “on trial” before the commission and deny him his rights under a normal judicial process.¹²³ Mathers offered assurances that any evidence Kelly gave the commission would not be used against him; Anderson contended that any appearance before the inquiry would amount to an examination for discovery. Mathers invited Anderson to have the question “tested in the courts,”¹²⁴ and offered to hold off on a subpoena until the courts had ruled.

¹²⁰ Archives of Manitoba, EC 0003A, G880, Order in Council 24263, 1915 at 2.

¹²¹ *Ibid.* See also “New Parliament Buildings”, *supra* note 39 at 868.

¹²² “Commission To Force Kelly To Attend Sessions”, *Manitoba Free Press* (25 June 1915) at 1.

¹²³ “To Ask Simpson To Refund Cash Is Later Move”, *Winnipeg Evening Tribune* (25 June 1915) at 15.

¹²⁴ “Commission To Force Kelly To Attend Sessions”, *supra* note 122 at 1.

There matters stood until July when the subject of how far and how hard to pursue Thomas Kelly became central to the inquiry. Events quickly placed the constitutionality of the inquiry before the courts. On July 7th, C.P Wilson pressed the commissioners “to decide whether or not they think the evidence already brought out warrants a criminal charge being laid against Kelly.”¹²⁵ There was not much point in pursuing Kelly “if, upon the evidence already in, the commission would make an interim report suggesting that a criminal charge might be laid against him.”¹²⁶ A final invitation was extended to Kelly to appear before the inquiry.

On July 14th, Edward Anderson showed up on Kelly’s behalf. It was a fundamental principle of law, Anderson declared, that no man could be forced to give evidence which tended to criminate him. As his client stood in such a position, it was improper for the commission to compel his attendance.¹²⁷ He dismissed C. P. Wilson’s claim that the *Canada Evidence Act* protected Kelly against testimony given before the inquiry being used against him later as evidence.¹²⁸ The commissioners were unmoved. After paying a visit to Thomas Kelly sojourned beyond the reach of a subpoena at his summer retreat two hundred and fifty miles south of Winnipeg at Detroit Lakes, Minnesota, Anderson returned to Winnipeg and filed an application for an injunction with the Court of King’s Bench to restrain the Mathers commission from compelling Kelly to produce documents or give evidence before it or to make report on its findings.¹²⁹

V. JUDICIAL REVIEW

The court proceedings launched by Anderson were not unprecedented in Canadian legal history. In 1863, the first legal challenge to the subject matter and the procedures (in this case, the reception of hearsay evidence) by a commission of inquiry authorized under the original *Inquiries Act* was adjudicated in a Montreal courtroom.¹³⁰ The inquiry concerned charges of

¹²⁵ “Kelly Will Be subpoenaed By the Commission”, *Manitoba Free Press* (7 July 1915) at 1.

¹²⁶ *Ibid.*

¹²⁷ “Anderson Says Federal Probe Would Be Legal”, *Winnipeg Evening Tribune* (14 July 1915) at 13.

¹²⁸ *Ibid.*

¹²⁹ “Kelly Will Stay Away For Present”, *Manitoba Free Press* (13 July 1915) at 4.

¹³⁰ “Law Intelligence”, *Montreal Herald and Commercial Gazette* (20 August 1863) at 2.

“malversation of office” made against two government bureaucrats in Montreal. The terms of reference for the inquiry read like a criminal indictment and the proceedings took on the character of a preliminary hearing into criminal charges.¹³¹ The inquiry centered on the allegation that the individuals under investigation had “had embezzled ... Government monies,” and “committed perjury.”¹³² Charles Schiller retained legal counsel and challenged the proceedings in a court action.¹³³ His counsel argued that the commission had “invaded the precincts of criminal jurisdiction,... [that] the proceedings ...were in the highest degree illegal, and subversive of the liberty of the subject” and that the commission had received hearsay evidence that in “an ordinary trial, the accused could attack...”¹³⁴

The case was argued before Judge Monk¹³⁵ of the Superior Court of Lower Canada. Monk conceded that “it seemed strange that charges of so heinous a nature should not have been investigated in the usual way. The parties should have been arrested the moment the charges were made.”¹³⁶ In his decision, however, Monk concluded in a sparse judgment that the charges contained in the commission’s term of reference formed a “proper subject matter” of investigation for a commission of inquiry, that the Commissioners did not “usurp the powers of any Criminal Court of Criminal Jurisdiction whatever,” and, finally, in the course of the proceedings of the inquiry the commission had “acted legally.”¹³⁷ Monk,

Schiller’s counsel, Montreal lawyer, William W. H. Kerr observed that this case was “the first instance in which a writ of Quo Warranto had issued for the purpose of testing the power of Commissioners appointed by the Crown” *Montreal Herald and Commercial Gazette* (20 August 1863) at 2.

¹³¹ Thomas Kennedy Ramsay, *Government Commissions of Inquiry* (Montreal: John Lovell, St Nicholas Street, 1763) at 3–6.

¹³² Girouard, *supra* note 26 at 195–96.

¹³³ On Schiller see George Maclean Rose, ed, *A Cyclopaedia of Canadian Biography being Chiefly Men of the Time* (Toronto: Rose Publishing Company, 1888) at 677.

¹³⁴ “Law Intelligence”, *Montreal Herald and Commercial Gazette* (19 August 1863) at 2.

¹³⁵ On the Hon. Samuel Cornwallis Monk see Rose, *supra* note 133 at 537.

¹³⁶ Law Intelligence, *supra* note 134 at 2.

¹³⁷ “Midnight Despatches”, *Montreal Herald and Commercial Gazette* (31 August 1863) at 2.

without explicitly saying so, affirmed the view that the inquiry was something other than judicial in nature.¹³⁸

In 1890, a second appeal against an inquiry, while still focused on jurisdictional matters, broadened the focus of judicial review to include the application of rules of natural justice in tribunal proceedings. In *Arthur W. Godson and The Corporation of the City of Toronto*, a case arising from the use of the inquiry provisions of the *Ontario Municipal Act*, a County Court judge was asked to investigate whether contractors had obtained payments from the city unlawfully. A contractor, Arthur Godson, not named in the inquiry terms of reference, objected to the general nature of the inquiry (his reputation and standing in the business community might be impaired). An injunction against the inquiry proceeding was secured, only to be removed by the Ontario Court of Appeal.

The majority members of that court restricted their review to the jurisdictional question and concluded that neither the terms of reference or conduct of the inquiry were judicial in character, and that the inquiry had engaged only in investigative and reporting functions. The Appeal Court decision was sustained by the majority of the Supreme Court of Canada. Ritchie C.J., speaking for the majority of the court, concluded that the inquiry had been created “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...take action.” The commissioner, a “county judge was not acting judicially in holding this inquiry; ... he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person....”¹³⁹

In a dissenting opinion, Gwynne J. moved beyond jurisdictional proprieties to the broader question of the application of rules of natural justice.¹⁴⁰ He believed that inquiries legislation was “so open to abuse” that

¹³⁸ His decision prompted the publication of a dissenting critical commentary—*Government Commissions of Inquiry*—by Montreal lawyer T.K. Ramsay who dismissed Monk’s judgment as an assault on the common law principle that only the courts might undertake the adjudication of criminal charges leveled by the state against a citizen. Ramsay, *supra* note 131 at 3–6.

¹³⁹ *Godson v Toronto (City)*, (1890) 18 SCR 36 at 53 [*Godson*].

¹⁴⁰ Paul Romney, “Gwynne, John Wellington” (1994), online: *Dictionary of Canadian* <www.biographi.ca/en/bio/gwynne_john_wellington_13E.html> [perma.cc/YBK2-

it should be “so construed as to confine the powers proposed to be conferred by the act within the strictest construction of its letter.”¹⁴¹ He objected to the fact that even though Godson had not been named in the inquiry terms of reference, he was a subject of investigation: to inquire, to take evidence against someone without notice “of the charge or complaint against him, and which he has to meet and of the time and place of the taking of the evidence against him,” contended Justice Gwynne, offended the principles of natural justice.¹⁴² He believed that the application of such principles were applicable because anyone “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 ...must be entitled to have the inquiry conducted in a judicial manner...”¹⁴³

Decades later, in the 1970s, Robert Howe observed that the contending judgments in the *Godson* case “may be viewed as archetypical” reflecting “the inherent conflict in administrative law between the desire to bestow upon each administrative tribunal the widest discretionary latitude ..., and the competing desire to safeguard the rights of individuals...”¹⁴⁴ Still, Justice Gwynne was a voice in the wilderness. Just how and when (or if) rules of natural justice were to be applied in Canadian public inquiries remained “one of the most troublesome problems in the whole of administrative law.”¹⁴⁵ Howe’s assessment remains valid, the development of a mature body of Canadian administrative law, and the existence of the *Canadian Charter of Rights and Freedoms* notwithstanding.¹⁴⁶

In July 1915, the scant juridical record of injunctive claims against commissions of inquiry invited a Toronto editorial writer to comment in relation to Anderson’s application for an injunction that

the power to enjoin a Commission constituted by Royal authority is a matter of uncertainty. Anglo-Saxon complacency under any system that gives no trouble has

EASC].

¹⁴¹ *Godson*, *supra* note 139 at 41.

¹⁴² *Ibid* at 44.

¹⁴³ Robert D Howe, “The Applicability of the Rules of Natural Justice to Investigatory and Recommendatory Functions” (1974) 12:1 *Osgoode Hall LJ* at 180.

¹⁴⁴ *Ibid* at 181.

¹⁴⁵ *Ibid* at 179.

¹⁴⁶ See also Goudge & MacIvor, *supra* note 14 at 76–78.

prevented attempts at defining the respective authorities of Royal Commissions and judicial injunctions. Perhaps Manitoba's Royal Commission will render a valuable service in defining the extent of its authority.¹⁴⁷

The occupants of the Attorney General of Manitoba's office were also "anxious for a ruling from the higher court [that]... will settle the powers and the limitations of future royal commissions..."¹⁴⁸

As Anderson prepared to appear before the Court of King's Bench, reports surfaced that Norris and Hudson had seen enough evidence in the inquiry to begin preparations for criminal prosecutions of leading Conservatives. The charges contemplated centered on conspiracy to defraud. A list of prosecutorial targets was being prepared by lawyers retained to conduct the prosecutions. They were being given a daily transcript of the evidence before the commission and were developing an interim list of those to be prosecuted with a final list to be submitted upon the conclusion of the inquiry.¹⁴⁹ Detectives had been assigned to monitor the movements of former ministers.¹⁵⁰ The Conservative *Winnipeg Telegram* linked the inquiry, and criminal prosecutions, to the anticipated election: criminal prosecutions, observed the *Telegram*, would provide the electorate with "evidence of the Norris government's ultra purity."¹⁵¹

On July 14th, before Justice Prendergast¹⁵² of Manitoba's Court of King's Bench, Edward Anderson advanced a scatter-gun series of claims (mostly a reiteration Phippen's arguments) against the inquiry.¹⁵³ He assailed the power of the Lieutenant Governor to appoint an inquiry. The prerogative powers of Manitoba's Lieutenant Governor were not equal to those of the King of Great Britain, the Governor General, or Lieutenant Governors in provinces that had been granted colonial governments. Nor did the *British North America Act* or the *Manitoba Act* confer prerogative rights on Manitoba's Lieutenant Governor. And there was nothing in the

¹⁴⁷ "Commissions and Courts", *The Globe and Mail* (24 May 1915) at 6.

¹⁴⁸ "Kelly Loses in The First Stage", *Manitoba Free Press* (16 July 1915) at 8.

¹⁴⁹ "Immunity for Horwood, Hook Et Al Is Plan of Norris Crowd", *Winnipeg Evening Tribune* (13 July 1915) at 3.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* at 1.

¹⁵² On Prendergast see Brawn, *supra* note 2 at 223-31.

¹⁵³ "Kelly Injunction In Appeal Court", *Manitoba Free Press* (28 July 1915) at 8.

Inquiries Act that provided authority to the Lieutenant Governor to appoint a commission of inquiry.

Moreover, he contended that Manitoba's inquiries legislation was unconstitutional, an invasion of federal jurisdiction because the "field was covered by Dominion legislation and ...the province had no right to enter...."¹⁵⁴ He invoked the Judicial Committee decision in *A.-G. for Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237 that had denied the right of Australia's federal government to undertake an inquiry on matters conferred by the Australian constitution exclusively on Australian states. Likewise, Manitoba, by creating the *Inquiries Act*, had assumed federal powers that it did not have.¹⁵⁵

Even if Manitoba's inquiries statute was constitutional, the Mathers Commission had exercised powers unavailable under any inquiries act: no commission could assume the prosecutorial role of the courts, Anderson contended. He was alarmed by the use of the inquiry to proceed like a court in the investigation of a crime, and by the inquiry's use of coercion to require a witness to give evidence which might be self-incriminating. It was a method that had "star chamber" features; moreover, such a proceeding was unfair and "un-British." It constituted an "inquisition... conducted with a view to getting prosecutions against individuals, including the plaintiffs."¹⁵⁶ And neither the *Canada Evidence Act* nor the *Manitoba Evidence Act* provided adequate protection to individuals appearing before the Mathers inquiry.¹⁵⁷

Inquiries were not intended to engage in "'discovery' with a view to civil or criminal suit,"¹⁵⁸ Anderson explained, but it was clear that the Mathers commission was conducted to secure criminal prosecutions against Kelly and others.¹⁵⁹ Inquiries legislation was designed simply to authorize the appointments of commissions to take evidence on which to base

¹⁵⁴ "Decide Today on Kelly Injunction", *Manitoba Free Press* (15 July 1915) at 5.

¹⁵⁵ "Kelly Injunction In Appeal Court", *supra* note 153 at 8.

¹⁵⁶ "Decide Today on Kelly Injunction", *supra* note 154 at 5.

¹⁵⁷ "Verdict in Kelly Case Tomorrow", *Winnipeg Telegram* (14 July 1915) at 13.

¹⁵⁸ "Howell Says Charge of Fraud Not Crime", *Winnipeg Evening Tribune* (27 July 1915) at 2.

¹⁵⁹ "Kelly Injunction in Appeal Court", *supra* note 153.

legislation.¹⁶⁰ For this reason, Anderson asserted, the Manitoba's inquiries legislation was never intended to grant the Lieutenant-Governor-in-Council the power to direct a commission of inquiry to make or report a finding at the conclusion of its inquiry.

Justice Prendergast made short work of most of Anderson's claims. He believed that prerogative powers were implied in the *British North America Act*, the *Manitoba Act*, and the *Manitoba Inquiries Act*. And Prendergast J was satisfied that the *Inquiries Act* was within the powers of the Manitoba legislature to approve.¹⁶¹ However, he had "very serious doubts" that the act gave commissioners the power "as is vested in a court of the power to commit to enforce the attendance of witnesses." Nevertheless, Justice Prendergast, in a quick decision delivered July 15th, 1915, within a day of his court hearing (it was "urgent, being on the eve of a long vacation, for the purpose of facilitating an appeal, that I should reach a decision at once..."), rejected the application.¹⁶²

Manitoba's courts were now enveloped in the deepening crisis triggered by the legislative building scandal that continued to unsettle the state. The day following Prendergast's ruling, the Norris government prorogued the legislature and directed the Lieutenant Governor to set a provincial election for August 6th.¹⁶³ On July 17th, Justice Mathers announced that, if Thomas Kelly failed to appear to give testimony on Monday, July 19th, the public hearings of his inquiry would end and the inquiry would hear submissions from opposing legal counsel prior to undertaking the preparation of a report.¹⁶⁴ Monday arrived (Kelly didn't) and in the manner of a police court judge presiding over a preliminary hearing, Mathers J. invited contending legal counsel to argue their cases. From Monday into Tuesday afternoon, July 20th, C. P. Wilson, J.C. Coyne and H.J. Symington advanced a damning review of the evidence against Roblin and others. Symington concluded the submission (with a lash of sarcasm) urging commissioners to find that "the

¹⁶⁰ *Ibid.*

¹⁶¹ "Kelly Defeated on Application For Injunction", *Winnipeg Evening Tribune* (15 July 1915) at 12.

¹⁶² "Kelly Loses In The First Stage", *supra* note 148 at 8.

¹⁶³ "Fullerton Finds It Difficult to Keep In Bounds", *Manitoba Free Press* (17 July 1915) at 8.

¹⁶⁴ "Commission on Capitol Scandal Nearing Finish", *Manitoba Free Press* (17 July 1915) at 1.

Roblin cabinet [had] engaged in a gigantic conspiracy to defraud, or return a verdict that the individual members of the former government were totally ignorant and incompetent, and were in their dotage.”¹⁶⁵ In a brief reply to the “prosecution,” A. J. Andrews asserted that his clients were blameless, but if there had been wrong-doing “Horwood... was the guilty man, and could not expect to be believed if he said he had committed his crimes for the benefit of others.”¹⁶⁶

Next day, Attorney General Hudson, wielding a thirty-one-page statement of claim, launched a civil proceeding to reclaim approximately \$1,000,000 from Thomas Kelly. The statement of claim alleged that the \$1,000,000 had been gained through various acts of fraud.¹⁶⁷ “Collusion and conspiracy between His Majesty’s officers and Thomas Kelly & Sons is the charge continually repeated,” reported the *Winnipeg Evening Tribune*.¹⁶⁸ In these extraordinary circumstances, the members of the Court of Appeal prepared to review Justice Prendergast’s dismissal of Anderson’s application for injunctive relief.

Before the Court of Appeal beginning Tuesday July 27th, Anderson reiterated arguments made before Justice Prendergast. Manitoba’s Lieutenant Governor had no power to appoint an inquiry, the provincial inquiries legislation was ultra vires, the Mathers inquiry was illegal, it had invaded the province of the courts, and even if legal, the inquiry had no power to make a finding. Anderson contended that:

it was necessary to appreciate the significance of introducing that system of investigating crimes. It meant putting tremendous powers in the hands of commissions and also meant relieving the proper officers of the government of their responsibility. These commissions had no rules applicable to them; they made their own rules and their own procedure.

His polemical use of “star chamber,” “unfair,” “un-British,” against the inquiry, combined with his assertion that the *Canada Evidence Act* and the *Manitoba Evidence Act* failed to provide safeguards for Kelly against the demands of the Mathers inquiry, invited the Court to go beyond the questions of constitutionality and jurisdiction to review the day-to-day

¹⁶⁵ “Mathers Commission Ends Hearings”, *Winnipeg Evening Tribune* (20 July 1915) at 1.

¹⁶⁶ “Indefensible Were The Acts of Sir Rodmond”, *Manitoba Free Press* (21 July 1915) at 1.

¹⁶⁷ “Civil Action Started by Hudson”, *Winnipeg Evening Tribune* (21 July 1915) at 1.

¹⁶⁸ “Sues Thos. Kelly for \$1,000,000 On Government Job”, *Winnipeg Evening Tribune* (21 July 1915) at 2.

procedures of the Mathers inquiry through the prism of the doctrine of natural justice.

Anderson's appeals fell on stony ground. The Manitoba Court of Appeal's rejection (three to one) of Anderson's appeal made front page news.¹⁶⁹ The court ruled that "the Lieutenant-Governor-in-Council of the province of Manitoba has power, as part of the Royal prerogative vested in him, and without any statute expressly conferring such power upon him, to issue a commission to investigate matters which fall clearly within any of the classes of subjects assigned by the British North America Act exclusively to a provincial legislature," and that the province's inquiries legislation was "intra vires of the Legislature of the province."¹⁷⁰ In dismissing Anderson's claims against the Mathers inquiry, Chief Justice Howell noted that the Manitoba statute had been in force since 1873 and had never before been questioned in legal proceedings.¹⁷¹ The powers granted to the commission of inquiry through the act to compel witnesses to give evidence under oath, to produce documents, and to compel the "revelation of all matters appertaining between the contractor and the government" were unquestionably legal.¹⁷² And the inquiry had used these powers within its limited jurisdiction: the inquiry had not usurped matters reserved for the courts.¹⁷³ Chief Justice Howell rejected Anderson's contention that the inquiry should not be allowed to report. Such an inquiry would be incomplete without a report.¹⁷⁴

Mr. Justice Cameron¹⁷⁵ extended the Chief Justice's position. He asserted that the Lieutenant Governor of Manitoba was "on the same footing as to prerogative and power as the Lieutenant-Governors of the other provinces," and the Manitoba legislature had the power to enact the *Inquiries Act* and undertake inquiries. Here, he pointed to the "luminous"

¹⁶⁹ See for example "Appeal Court Denies Kelly Plea For Injunction", *Winnipeg Evening Tribune* (2 August 1915) at 1.

¹⁷⁰ *Kelly v Mathers et al* (1915) 23 DLR 225 at 230, 25 Man R 580 [*Kelly v Mathers*].

¹⁷¹ *Ibid.*

¹⁷² "Appeal Court Denies Kelly Plea For Injunction", *supra* note 169 at 1.

¹⁷³ "Kelly Loses Out in Court of Appeal", *Manitoba Free Press* (2 August 1915) at 3.

¹⁷⁴ *Ibid* at 1.

¹⁷⁵ On Cameron (not related to Lieutenant Governor Cameron) see Brawn, *supra* note 2 at 207-14.

judgment in *Hodge v. The Queen* that affirmed provincial pre-eminence on matters under a province's jurisdiction. Justice Cameron had "no doubt that the Orders-in-Council are properly founded and the commission also." He asserted that in considering the scope of the provincial inquiries act, the courts were compelled to ensure "a fair, large and liberal construction and interpretation as will best ensure the attainment of its object in accordance with the rule of construction laid down in our *Interpretation Act* (sec. 13, ch. 105, R.S.M.)." He cited the original 1846 *Inquiries Act* to sustain his position that Mathers had the right to "enforce attendance of witnesses and to compel them to give evidence..." Justice Cameron conceded that civil proceedings were pending against Thomas Kelly and that criminal proceedings might be instituted. No matter; neither were grounds to interfere with the inquiry. The existence of a prosecution in the courts did not provide grounds to deny the inquiry power "to summon witnesses and to require them to give evidence and to produce documents..." In Justice Cameron's assessment "to withhold these powers from the Commissioners would, or might, have the effect of rendering the Act nugatory."¹⁷⁶ Finally, with Howell CJ, Justice Cameron dismissed Anderson's claim that the commissioners had no business submitting a report on their findings. Manitoba's legislation contemplated the causing of "an inquiry to be made," he observed, the wording of the act implied that the commissioners would come to conclusions. Even if the submission of a report was not mentioned in the Act, nothing prevented the Lieutenant-Governor-in-Council from requesting the Commissioners to do so.

Anderson's polemical charges against the Mathers inquiry as "unfair, "un-British," a "star chamber," were not ignored by the court. Chief Justice Howell found nothing to object to in how the inquiry had been conducted; as the inquiry came to a close, he assumed that "the Commissioners will conduct the inquiry strictly within their powers."¹⁷⁷ Ditto Justice Cameron: "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," observed Justice Cameron.¹⁷⁸

¹⁷⁶ For similar reasons, Mr. Justice Perdue also rejected Anderson's appeal. Justice Richards, without providing reasons, cited *A-G for Australia v Colonial Sugar Refining Co*, [1914] AC 237, as the basis for his dissenting vote.

¹⁷⁷ *Kelly v Mathers*, *supra* note 170 at 242.

¹⁷⁸ *Ibid* at 248.

Anderson could not have reasonably expected more. Contra the case made by Justice Gwynne in *Godson v City of Toronto*, Kelly was named in the terms of reference for the Mathers inquiry, and the charges against him were outlined. Moreover, he was given ample opportunity to address them with legal counsel before the inquiry. He may have considered the protections offered under the Canada and Manitoba *Evidence Acts* as inadequate, but he could not deny that they were there to request.

In addition to confirming the prerogative powers of Manitoba's Lieutenant Governor and the constitutionality of its inquiries legislation, the ruling of the Manitoba Court of Appeal thus underlined the procedural autonomy of executive inquiries. The ruling of the Court of Appeal on Anderson's procedural complaints provided implicit recognition of the validity of C.P. Wilson's comment during the course of the inquiry that that "no power had ever been conferred on a Manitoba court to supervise the actions of a royal commission."¹⁷⁹ More broadly, the court's rejection of Anderson's appeal provided important precedents that bolstered the authority and independence of subsequent Canadian executive inquiries.¹⁸⁰

A few days after the ruling, the Liberal Party, under T.C. Norris, in no small part because of the disclosures before the Mathers inquiry, destroyed the Conservative Party in the provincial election, winning 39 seats compared to four for the Conservative Party.¹⁸¹ Two weeks later, as Anderson and Kelly considered an appeal to the JCPC, the Mathers inquiry submitted its report to the newly elected Norris government. In it, Mathers and his fellow commissioners made detailed their findings in the language of the *Criminal Code*. They concluded that the contract for the parliament buildings involved "a fraudulent scheme or conspiracy" designed to provide the Conservative Party with kickbacks for an election fund. The original

¹⁷⁹ "Decide Today on Kelly Injunction", *Winnipeg Free Press* (15 July 1915) at 5.

¹⁸⁰ See e.g. *North West Dealers Ass'n v Hyndman United Grain Growers, Ltd v Hyndman*, [1921] 31 Man R 302, 61 DLR 548; *Braaten v Sargent and Attorney-General for British Columbia*, [1967] BCJ No 122, 61 DLR (2d) 678; *Reference Re A Commission of Inquiry into the Police Department of the City of Charlottetown* (1977), 12 Nfld & PEIR 80, 74 DLR (3d) 422; *Quebec (Attorney General) v Canada (Attorney General)*, [1979] 1 SCR 218; *O'Hara v British Columbia*, [1987] 2 SCR 591.

¹⁸¹ "Landslide Against Rogers - Aikins Party", *Manitoba Free Press* (7 August 1915) at 1. Two independents were also elected.

parties to this “conspiracy” were Roblin, G. R. Coldwell, and Thomas Kelly; over time, others became participants in the original conspiracy.

In 1919, the Norris government would withhold a Royal Commission Report on the origins of the Winnipeg General Strike because, observed Norris, the release might have prejudiced the outcome of the trials of strike leaders.¹⁸² Though criminal charges were on the horizon, no such courtesy was extended to Sir Rodmond Roblin and others named in the Mathers report before it was released to the press for publication.¹⁸³ Asked to comment on the report, Minister of Justice A.B. Hudson said nothing about fair trials: he told the press that “we shall set ourselves to the doing of our full duty – to fulfilling our trust to the people – no matter how unpleasant or seemingly ruthless that duty must be.”¹⁸⁴ Hudson privileged the restoration of confidence in the liberal state over concerns that the release of the report might prejudice potential jurors in soon-to-be-launched criminal proceedings against Roblin and his alleged co-conspirators.

Only days after the release of the report on August 28, 1915, Provincial Police Chief Edward J. Elliott swore an information (*Criminal Code, Form No.3*, titled *Information or Complaint on Oath*) before Winnipeg Justice of the Peace A. A. Aird charging that “Sir Rodmond P. Roblin, Walter H Montague, George R Coldwell, and James Howden between the 1st day of May A.D. 1913 and the 12th day of May A.D. 1915... did unlawfully by fraudulent means conspire together and with Thomas Kelly, R.M. Simpson, Victor W. Horwood and others... to defraud the province of Manitoba.”¹⁸⁵ Aird immediately issued warrants for the arrest of Roblin, Montague,

¹⁸² “Robson General Strike Report Is Published”, *The Winnipeg Evening Tribune* (30 March 1920) at 3.

¹⁸³ The report appeared in the “Text of Royal Commission’s Report On Parliament Building Investigation”, *Winnipeg Telegram* (25 August 1915) at 9 and “There Was A Conspiracy To Rob Province”, *Manitoba Free Press* (26 August 1915) at 1. In 1912, amendments to the federal *Inquiries Act* had required that no “report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.” *An Act to Amend the Inquiries Act*, *supra* note 51. In 1915 Manitoba’s *Commissioners Act* contained no similar safeguard for those subject to investigated by a public inquiry.

¹⁸⁴ “Government Will Do Its Full Duty”, *Manitoba Free Press* (26 August 1915) at 1.

¹⁸⁵ “Here are the Charges On Which the Warrants Were Issued”, *Winnipeg Telegram* (1 September 1915) at 1.

Coldwell, and Howden, who were taken into custody August 31st.¹⁸⁶ Criminal proceedings began in Winnipeg Police Court on September 1, 1915, and stretched on for two years.¹⁸⁷

VI. CONCLUSION

Even before it had concluded its work and submitted a report, the Mathers inquiry had discredited the Roblin regime, contributed to the election of a new Liberal government, and ended a crisis that had unsettled public life in the province. The inquiry's effectiveness affirmed coercive inquiries in Canada as valuable instruments of rule for those in charge of the liberal state. Just as the Mathers inquiry helped to reshape Manitoba politics, the juridical affirmation of the inquiry's constitutional propriety and legal authority contributed to the evolution of coercive inquiries in Manitoba and across Canada confirming (for any who had doubts) the legal status and authority of Canadian coercive inquiries and their utility as instruments of state power.

¹⁸⁶ "3 Ex-Ministers Under Arrest", *Winnipeg Evening Tribune* (31 August 1915) at 1; "Four Ex-Ministers Are Under Arrest", *Winnipeg Free Press* (1 September 1915) at 1. In November 1915 Thomas Kelly was taken into custody in Chicago by American authorities and extradited to Canada. Through civil proceedings the government of Manitoba recovered (taking control of several Kelly properties) over \$1,400,000. Kelly was tried and convicted of criminal conspiracy and jailed for two and half years in Stony Mountain Penitentiary. Released, he moved south eventually settling in Beverly Hills, California where he died in 1939; "Thomas Kelly, of Parliament Bldg. Fame, Dies", *Winnipeg Tribune* (21 March 1939) at 3, 5.

¹⁸⁷ "Four Ex-Ministers Are Under Arrest", *supra* note 186 at 1. Roblin and his co-conspirators (by arrangement through counsel) arrived at the Winnipeg Police Station where they were placed under arrest and granted bail. A September preliminary hearing led to a trial in the summer of 1916 that ended in a hung jury. Death (Montague died mid-November 1915 - it was reported that "apoplexy is said to be the cause"), and doctor's testimony about Roblin's declining health ("Sir Rodmon Roblin's life might be seriously endangered by any excitement or mental strain if the trial was continued at this time or any future time"), forestalled further proceedings. In January 1917, a new trial was contemplated, but postponed, in June the Norris government had the charges stayed. In political retirement, Roblin presided over an auto dealership—Consolidated Motors Limited—on Main Street until death came in 1937 during a vacation in Hot Springs, Arkansas. Roblin was eighty-four. "Dr. Montague Dies; Apoplexy is Said To Be Cause", *Winnipeg Evening Tribune* (15 November 1915) at 5; "Roblin Men Are Freed By Crown", *Winnipeg Evening Tribune* (26 June 1917) at 9.

For better or worse, the success of the Mathers inquiry hastened the coming apotheosis of Canada's tradition of coercive inquiries in 1946 with the work of the Kellock-Taschereau inquiry headed by two members of the Supreme Court of Canada appointed to investigate charges of Russian espionage in Canada. It sat in camera, limited access to cautionary advice or legal counsel to those under investigation or called to give testimony, and arrived at findings that make criminal proceedings a foregone conclusion. In a defence of the procedures followed by this inquiry—a full chapter in the Kellock-Taschereau report—concluded with the assertion that Canadian commissions of inquiry while “sitting, and until its existence terminates it is not subordinate to any body. It is independent in every sense. It is not subject to or under the control of the Courts.” Moreover, “it is the sole judge of its own procedure” and its “report is not subject to review by any Court, nor is it subject to appeal.”¹⁸⁸ The Manitoba court rulings on the Mathers inquiry were vital steps on the road to 1946.

¹⁸⁸ *Agents of a Foreign Power*, *supra* note 42 at 683.