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JUDGES AS ROYAL COMMISSIONERS

A CONTINUING SOURCE of irritation to many Canadians has been the appointment of judges to positions on royal commissions, particularly as chairmen. Those opposed to such a practice argue that members of the bench must retain utmost impartiality towards political affairs, and total aloofness from them, in order not to destroy public confidence in the performance of their judicial duties. Appointment to act as royal commissioners, they assert, does irreparable harm to the independence and impartiality of the judiciary. The controversy is by no means exclusively one of recent times. As early in Canadian history as 1872, a resolution was introduced in the House of Commons to the effect that payments received by judges for extra-judicial work including service on royal commissions "are calculated to impair the independence of the judiciary and are in contravention of the spirit of our laws designed to secure the independence of the judges."¹ The following statement by R. MacGregor Dawson is typical of those of the modern critics:

There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings—no matter how correct and judicial they may be—are liable to be interpreted as favouring one political party at the expense of the other.²

During the past two decades the most vocal parliamentary critic of employing judges as royal commissioners has been John G. Diefenbaker.³ While in Opposition, Mr. Diefenbaker voiced apprehension over the government's continued use of judges for non-judicial tasks. In a 1942 discussion of the Hong Kong Inquiry he stated:

If there is one thing that has been established as a result of the Chief Justice of Canada having been placed in the position of commissioner in connection with this matter, it is that the time has come when judges of high courts should not be placed in

control of royal commissions. I have a record here of the number of royal commissions which have been appointed since 1923. The number is eighty-three, and the fees and expenses to judges total \$180,000. This principle is wrong. We are placing the judges in a position where their prerogatives and their independence are denied because of the fact that reports that they bring down either please or displease one side or the other.⁴

On many other occasions as an Opposition member, Mr. Diefenbaker voiced the same criticisms,⁵ asserting at one time that "appointment of judges to royal commissions is undermining our judiciary, because it places judges who are presumed to be removed from any influence whatever, in a position where . . . the suspicion arises that political considerations are not always forgotten."⁶ The extent to which such criticism was little more than the Opposition's bounden duty in a parliamentary system was illustrated best by Mr. Diefenbaker's about-face once he assumed power.

After coming to power, Mr. Diefenbaker apparently had second thoughts on the matter of placing "judges . . . in control of royal commissions", for during their six years in office the Progressive-Conservatives selected judges to head no less than 25 per cent of their royal commissions (four of sixteen commissions). Perhaps one should not be surprised to discover that the four judges selected as chairmen of the royal commissions also received their judicial appointments from the Diefenbaker government,⁷ a fact which leads one to concur with Mr. Diefenbaker ". . . that political considerations are not always forgotten" when royal commissioners are selected. By examining Table 1 one can appreciate the fact that the topics assigned by the Progressive-Conservatives to the judge-led commissions were by no means non-controversial. The four judges were in charge of royal commissions responsible for (1) indicating a preference for one of two alternative railway routes to the Great Slave Lake, (2) recommending some type of national health plan, (3) suggesting changes that could be made in the Canadian financial structure and system, and (4) recommending alterations to safeguard and improve the Canadian pilotage system.

The fact that twenty judges were appointed to royal commissions between 1946 and 1964 attests to the government's recognition of certain values in securing that type of individual to serve in a public capacity. The question, therefore, might logically be asked: what are those values? Surely one reason for the use of judges stems from the government's anxiety to preserve the semblance of "impartial" bodies investigating specified subjects. A statement to the effect that only by appointing judges to royal commissions can a government hope to gain acceptance of that commission's work was given by a one-time CCF member of Parliament (Mr. Angus

MacInnis) who, unlike most Opposition spokesmen, was commendatory of the practice of appointing judges to royal commissions. Mr. MacInnis stated:

A judge has a certain position in our society not only with lawyers and those who have to do with the courts, but with the public; and when the public wants a royal commission, generally, I think, it feels more satisfied that an impartial report will be made if a judge is at the head of that commission. You can make your other appointments as you like, and these appointees will be supposed to represent different factions or sections or classes, as the case may be, but if you do not put a judge as chairman of such commission you may have very great difficulty in finding another person who will be satisfactory to all concerned.⁸

TABLE 1

Members of the Judiciary Appointed to Canadian Royal Commissions, 1946-1962

<i>Year</i>	<i>Royal Commission</i>	<i>Total Number of Commissioners</i>	<i>Total Number of Judges</i>	<i>Judge as Chairman</i>
1946	Espionage	2	2	Yes*
1947	Japanese Property Losses	1	1	Yes
1951	War Claims	1	1	Yes
1952	War Claims	1	1	Yes
1954	The Law of Insanity as a Defence in Criminal Cases	5	2	Yes
	Criminal Law Relating to Criminal Sexual Psychopaths	3	2	Yes
	Patents, Copyrights and Industrial Designs	3	1	Yes
1955	Coasting Trade	3	1	Yes
1957	Firemen on Diesels	3	3	Yes
	Newfoundland Finances	3	2	Yes
— Change in Government —				
1959	Great Slave Lake Railway	3	1	Yes
1961	Health Services	7	1	Yes
	Banking and Finance	7	1	Yes
1962	Pilotage	3	1	Yes

* The two judges were co-chairmen of this royal commission.

A second possibility could be that the government recognizes genuine merit in the appointment of a certain individual; that is, the fact that a man is a judge may be a less important consideration than some other. This could easily have been the case, for example, in the appointment of then Chief Justice Hall of Saskatchewan to head the Royal Commission on Health Services (1961), for the chairman was not only a member of the judiciary but a man with considerable experience in the fields of health and welfare in Canada.⁹

A third possible reason for the use of judges as royal commissioners could be that the subject-matter requires the knowledge and abilities belonging in particular to judges. Evidence of this possibility is to be found in the appointment of two Justices of the Supreme Court of Canada as co-chairmen of the Royal Commission on Espionage in 1946. The then Prime Minister, Mackenzie King, explained their appointment in the following manner:

The government realized that questions as to the liberty of the subject and of individual freedom were certain to arise in the exploration of the extent and development of this system of espionage, and it would therefore be most desirable and indeed, absolutely necessary to have as commissioners persons who, above all, would be most anxious to protect the liberty of the subject, and to see that justice was done—and justice only.¹⁰

The subject-matter of the three royal commissions appointed in 1954 (The Law of Insanity as a Defence in Criminal Cases; Criminal Law Relating to Criminal Sexual Psychopaths; and Patents, Copyrights and Industrial Designs) lent themselves ideally to judicial erudition and experience as, indeed, have several others throughout Canada's history.

Whatever the reasons for the appointment of judges to royal commissions (and surely Mr. MacInnis' explanation is as sound as any), it seems fair to conclude that judges are as much a part of Canadian royal commissions as are representatives of interests and regions. One might anticipate that so long as the body politic and the operations of government remain essentially unchanged, members of the judiciary will continue to be appointed as royal commissioners. Certainly Mr. Diefenbaker, despite his earlier protests, was no exception. He may not have enhanced the "prerogatives" and the "independence" of the judiciary when he appointed members of the bench as royal commission chairmen, but Mr. Diefenbaker no doubt attempted to "displease one side or the other" as minimally as possible.

NOTES

1. Canada, *Parliamentary Debates*, III (1872), 1020.
2. Dawson, *The Government of Canada* (4th ed. rev. by Norman Ward; Toronto, 1963), p. 445.
3. Before the Liberals' defeat of 1957, the critics of the practice were members of the Progressive-Conservative and CCF parties, the defenders coming, naturally, from the governing Liberal party. See the comments of Mr. John T. Hackett, M.P. (Progressive-Conservative), and Mr. Clarence Gillis, M.P. (CCF) in 4 *Debates* (Commons), CCLVII (1947), 3180-81 and 1 *Debates* (Commons), CCLIV (1947), 97. No parliamentary criticism of the employment of judges on royal commissions has been noted since the defeat of the Liberals in 1957.
4. 5 *Debates* (Commons), CCXXXIII (1942-43), 4783.
5. 2 *Debates* (Commons), CCXL (1944-45), 1988; 3 *Debates* (Commons), CCLI (1946), 2718; 4 *Debates* (Commons), CCLII (1946), 4274-76; 4 *Debates* (Commons), CCLVII (1947), 3156-57.
6. 3 *Debates* (Commons), CCLI (1946), 2732.
7. Mr. Justice Manning (appointed Judge of the Supreme Court of Alberta in 1959), Chairman of the Royal Commission on the Great Slave Lake Railway; Mr. Justice Hall (appointed to the Saskatchewan bench in 1957), Chairman of the Royal Commission on Health Services; Mr. Justice Porter (appointed Chief Justice of Ontario in 1958), Chairman of the Royal Commission on Banking and Finance; and Judge Bernier (appointed Judge for the Superior Court for the District of Quebec in 1961), Chairman of the Royal Commission on Pilotage.
8. 4 *Debates* (Commons), CCLII (1946), 4277.
9. *The Leader Post* (Regina), January 7, 1961, p. 13.
10. 1 *Debates* (Commons), CCXLIX (1946), 50. The Minister of Justice commented: "Here, if ever, there was a case [Espionage] where the public must be satisfied of the impartiality of the commissioners and the reliability of their findings, and therefore we felt we were completely justified in going to the highest tribunal in the land and taking two judges from that court and setting them up as a royal commission." 4 *Debates* (Commons), CCLVII (1947), 3219.