

# PRIVATE BUSINESS AND ROYAL COMMISSIONS

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ON the 12th April, 1921, the Canadian Government appointed a Royal Commission to investigate the handling and marketing of grain. On the 11th of July following, Mr. Justice Curran of the King's Bench, Manitoba, made permanent an interim injunction previously granted by Mr. Justice Galt, and thus for the time put an end to the work of the Commission.

Two applications were made for this injunction. One was made by the United Grain Growers' Limited, a farmers' company of which Mr. T. A. Crerar is President. The other was made by a number of men engaged in the grain business. The two applications were independent of each other, though Mr. Justice Curran naturally heard them together. The purpose of this article is to state the case of those grain men who made the second application.

## *Method of Appointing the Royal Commission.*

In appointing the Royal Commission the government did not proceed by a special Act of Parliament, and it did not proceed under the provisions of the Canada Grain Act. It proceeded by order in council, and it based the order in council upon the Public Inquiries Act. This appears from the following sentences, the first of which is quoted from the order in council, and the second from the commission issued in pursuance of the order in council:—"The Minister therefore recommends that a commission be issued by the Governor in Council under and in pursuance of the provisions of Part 1 of the Inquiries Act, Chapter 104, Revised Statutes of Canada, 1906." "And we do hereby, under the authority of the Revised Statutes respecting inquiries concerning public matters, confer upon our said commissioners," etc.

## *The Inquiries Act.*

The title of this Act is "An Act respecting Public and Departmental Inquiries." The Act is divided into two parts, Part 1 on public inquiries, and Part 2 on departmental inquiries. Part 1 of the Act consists of five short clauses, of which the important one is clause 2: "The Governor in Council may, whenever he deems it expedient,

cause an inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof."

Grain men do not dispute the validity of the Inquiries Act, and they do not dispute the authority of the Governor in Council to make certain inquiries under this Act, but they claim that their private business affairs are not matters connected with the good government of Canada or the conduct of any part of the public business thereof, and therefore that the Governor in Council cannot legally appoint a commission under this clause of the Inquiries Act to investigate their private business affairs. In this contention the grain merchants were upheld by Mr. Justice Curran, as the following quotations from Mr. Curran's judgment show:

"The question 'what is a matter connected with the good government of Canada' is sometimes a difficult one to answer. If it can be shown that the matters authorized by this order in council to be inquired into are really connected with the good government of Canada, or with the conduct of any part of the public business thereof, unquestionably the order in council could be supported in law as a valid exercise of the powers legally vested in the federal executive by the Inquiries Act."

"I have tried to show that federal interference in this matter cannot be justified by resort to section 91 of the B. N. A. Act, and that it cannot be justified either upon the ground that the investigation or inquiry is into and concerning a matter connected with the good government of Canada. Can it still be upheld on the ground that it is connected with the conduct of any part of the public business of Canada? I hold that it cannot, for the grain trade is not a part of the public business of Canada, but is a private enterprise conducted by individuals or corporations as a means of private gain or profit."

The issue, therefore, between the grain merchants and the Royal Commission is a simple one. It is whether the private business affairs of a merchant are matters affecting the good government of Canada or the conduct of any part of the public business thereof. It is an issue, moreover, of considerable importance to every business man in Canada.

#### *Investigations Into the Grain Business.*

The grain business has been more frequently and more thoroughly investigated than any other business in Canada. Since 1899 there have been investigations into the grain business nearly every year, and it is difficult even to compile a complete list of all those that have been held. The federal government created one

Royal Commission on the grain business in 1900, another in 1906, and a third in 1921. In 1912 it created the Board of Grain Commissioners, a permanent body, and placed the grain business under the control of that Board. In 1917 the federal government conducted, by means of an eminent firm of chartered accountants, a minute investigation into the public terminal elevators at the head of the lakes. The Saskatchewan government created one Royal Commission on the grain business in 1910, a second Royal Commission in 1914, and another investigating body in 1921. The Manitoba government prosecuted the grain trade in the courts in 1908, and in the trial practically the whole of the western grain business was reviewed. The Georgian Bay Canal Commission, the Cost of Living Committee, the Board of Commerce, and committees of both Houses of Parliament, have all conducted inquiries into some phase or other of the grain business. It is no exaggeration to say that for the past twenty years the grain business has been under close and constant investigation, nor is it any exaggeration to say that all these investigations have resulted in practically nothing in the way of disclosures of illegalities and criminalities on the part of the grain trade. Indeed, it is well within the mark to say that the reports of the various Royal Commissions and investigating bodies, and the judgment of the courts in Manitoba in the prosecution conducted by the government of Sir Rodmond Roblin, have vindicated the grain trade both as to the methods of handling and marketing grain now in existence, and as to the working of these methods by those engaged in the grain business.

A study of the investigations that have been made reveals two things. First, that the charges made against the grain trade remain very much the same from year to year. The accusations during the past year are just the charges that were made in the year 1899. They have been heard and dealt with by practically every investigating body named in the above list. They were the grounds of the prosecution by the Manitoba Government in 1908, and they were comprehensively dealt with by Mr. Justice Phippen when he vindicated the grain trade. Second, that none of the investigating bodies discovered any more economical or efficient methods of handling and marketing grain than those methods that had been the product of commercial evolution, and that had been put into operation by the grain trade.

If it be said that a considerable body of legislation—now known as the Canada Grain Act—has resulted from all this labour, the answer is that it would not be difficult to show that the effective parts of the Canada Grain Act have been parts recommended by the grain

trade themselves, formulated by the grain trade, and put into practice by the grain trade.

*The Board of Grain Commissioners for Canada.*

Most of the investigating bodies above referred to were temporary. The Board of Grain Commissioners is a permanent body. It was created by Act of Parliament in 1912. Its three members devote the whole of their time to the work of administering the Canada Grain Act, and in that work the Board employs a very large staff.

That Board controls the grain business of Canada, and its control is no mere nominal one. Every elevator, and every individual or corporation that buys grain from farmers or that handles grain for farmers must get a license from the Board every year, and must conform with the Grain Act and with such rules and regulations as the Board makes effective. Commercial men in Eastern Canada little realize how close and constant is the supervision over the grain trade. The Board's powers to investigate grain matters are provided by sections 14 and 120 of the Grain Act:

*Section 14.* The Board shall, within thirty days after the close of each calendar year, make to the Minister a report respecting—

- (a) all such matters as appear to the Board to be of public interest in connection with the inspection, weighing, storage and transportation of grain; and
- (b) such matters as the Minister may direct.

*Section 120.* 1.—The Board shall also receive and investigate all complaints in writing, under oath—

- (a) of undue dockage, improper weights or grading;
- (b) of refusal or neglect to furnish cars within a reasonable time;
- (c) of fraud or oppression by any person, firm, or corporation owning or operating any elevator, warehouse, mill or railroad, or by any grain commission merchant or track-buyer;
- (d) of any violation of any provision of this Act, or of any rule or regulation made in pursuance thereof.

2.—The Board shall have all the powers of a commissioner appointed under the provisions of Part 1 of the Inquiries Act, chapter 104 of the Revised Statutes of Canada, 1906.

3. The Board shall also apply such remedy as is provided by statute, and shall institute prosecutions at the government expense whenever it considers a case proper therefor.

If western grain merchants have been violating the Grain Act they have been doing so while under the control of a Board clothed with complete authority, and equipped with adequate means, to detect and punish them.

Further, some constitutional questions arise here. The Inquiries Act is a general Act applicable to all lines of business if to any; the Grain Act is a special Act applicable to grain alone. Parliament through the Grain Act created the Grain Board, clothed it with authority, and supplied it with the means to investigate grain matters, and Parliament enacted that the members of the Grain Board should hold no other public position, but should devote the whole of their time to the administration of the Grain Act. Lawyers of high standing contend that the Cabinet has no legal right to appoint by order in council another body to conduct such grain investigations as are obligatory upon the Grain Board, and that in appointing one member of the Grain Board to act on the new body while retaining his old position the Cabinet violated a statute enacted by Parliament.

#### *Public Ownership and Farmers' Companies.*

Not only is the western grain business subject to government control such as is applied to no other business in Canada; it is also unique in this respect, that it is a business in which both the Dominion government and the farmers' companies are directly engaged as competitors with the grain trade. The federal government has built a line of large terminal elevators at Fort William, Moose Jaw, Saskatoon, Calgary, and Vancouver, and these elevators compete with commercial terminal elevators.

The farmers have organized two large grain companies, the Saskatchewan Co-operative Elevator Company and the United Grain Growers. These two farmers' companies own and operate 632 country elevators and 4 terminal elevators at the head of the lakes. They also buy and sell grain, acting as cash brokers, commission houses, shippers, and exporters. They are now among the largest corporations in the grain business in the world, and they buy grain from the farmers upon the prairies and sell it to European buyers, handling it every step of the way.

The position of the grain trade of Western Canada is indeed

a peculiar one. Controlled by the Board of Grain Commissioners, competing with the federal government elevators on the one hand and with the farmers' companies at every step of the grain business on the other, it is inconceivable that these commercial grain men could survive if a tenth part of the accusations flung against them were true. The facts are far different. There is no other article of commerce in Canada so economically handled and marketed as grain. There is no article of commerce in Canada in which the margin between producer and the final consumer is smaller. There is no other business in Canada so closely controlled by the government, and there is none in which there is such fierce competition. And there is no business in Canada that less needs investigation by Royal Commissions.

*The Grain Trade and the Royal Commission.*

After the appointment of the Royal Commission the grain trade decided upon two lines of action. First, they decided to follow the policy which they had pursued for over twenty years, viz., the policy of giving evidence, of explaining and justifying the methods of handling and marketing grain. Grain men realize that the grain trade bulks big in the commercial life of Canada, that the methods of financing and marketing grain are complicated, and that they have nothing to lose, but everything to gain, by an inquiry conducted along scientific lines. They therefore selected several committees, one on each distinct part of the marketing system, to prepare and present their case to the Commission. Second, they decided to take steps to appeal to the courts in case the inquiry rendered such action necessary. Statements had been made in Parliament and in the press that caused apprehension as to the objects and methods of the Royal Commission. There is a very large amount of capital invested in the grain business, and many of the owners of this capital were alarmed. The trade therefore determined that, while they would co-operate with the Royal Commission so long as the inquiry was conducted along scientific lines, they would appeal to the courts if they found that they were being subjected to unfair or illegal treatment, and they instructed their lawyers accordingly.

From the time of the appointment of the Commission these two lines of preparation were made by the grain trade—one by their committees on the economics of grain marketing, and the other by their lawyers, and the dividing line between the two cases was clear; the committees prepared to give evidence on the system of

grain marketing, while the lawyers prepared to protect the private business affairs of the individual merchants or companies.

*Methods of the Royal Commission.*

The Commission began its work by sending out questionnaires, and merchants at once realized that the inquiry was to be in the nature of an inquisition into their private affairs. They were instructed by their counsel that some of the questions were questions which the Commission had no right to ask, and that they should either refuse to answer such questions, or ignore the questionnaires altogether.

Meantime the Commission was holding public sessions at various places, and the grain merchants were struck by two features of those sessions. One was that the Commission undertook to receive and deal with specific complaints against individuals or companies, although such complaints were within the jurisdiction of the Board of Grain Commissioners or of the ordinary courts of the land. The chairman of the commission, Mr. Justice Hyndman, changed this on his return to the work of the Board, on the ground that such complaints lay outside the work of the Commission. The other feature was that the Commission subpoenaed the managers of country elevators, with the elevator books and records. An elevator company that operates, say, one hundred country elevators found itself in this position, that an inquiry was being conducted into its affairs at different points in the country, while the general policy and the general business of the company were formulated and managed at the head office in Winnipeg. These two features of the public sessions of the Commission increased the uneasiness at Winnipeg. Then early in June a demand was made by the auditors of the Commission that brought matters to a climax. This demand was contained in a letter to elevator companies containing the following: "The Commission require the production, for perusal, of all correspondence, letters, wires, etc., in connection with your elevator business. Price-Waterhouse & Company will see that these are returned to you in proper form." The period for which this correspondence was demanded was from July last year until the end of May, a period of ten months.

The grain merchants refused to surrender these documents, and they had good reasons for this refusal. They could not operate elevators without the documents in question. A general manager operating, say, fifty country elevators, at each of which he buys grain for his company, and at each of which he handles grain for farmers, is dependent upon the correspondence between his fifty

country elevator managers and himself; take that correspondence from him and he is for the time helpless, and yet—though rendered helpless—he is legally liable to every farmer who has shipped grain through his country elevators.

The demand for these documents and the refusal of the companies to surrender them led to the application for an injunction.

*Refusal of Documents by the Government.*

The refusal of the grain merchants to give documents about private business matters to the Royal Commission is on all fours with the refusal of the Ministers to give to Parliament, or to a committee of Parliament, reports, accounts, correspondence and papers regarding the management of the Canadian National Railways, the Canadian Mercantile Marine, and the Canadian Wheat Board.

On March 22nd last, Mr. Mackenzie King moved:

“Subject to the reservation that in exceptional cases there may be documents of a confidential character which, in the public interest, may properly be withheld from publication, the House declares that it is the undoubted right of Parliament to demand and receive copies of all reports, accounts, correspondence and papers in relation to the management of every department of the public service, including the affairs of the Canadian National Railways, whether operating directly under the control of the department, or under corporate form.”

The Ministers refused to produce the documents demanded in this motion, and in the course of the debate the Prime Minister, Mr. Meighen, made the following statement:

“The Canadian Pacific Railway Company would refuse to any man or to any Parliament the disclosure of business that is its own; it knows that it cannot conduct the administration of that great enterprise and at the same time disclose to everybody just what it is doing from time to time. Not that what it is doing is wrong, but every business enterprise knows that it is impossible to get the advantages which every business must get if it is to succeed, if everybody doing business with that enterprise and the public generally is to know all its moves on all parts of the chess board from morning till night and from day to day. But because the Canadian Pacific does not have to do that, is it shrouded in mystery? Not at all. Why should it be shrouded in mystery any more than any other business? Why should the Canadian National Railway system be shrouded in mystery any more than any other road? Or why should it be enveloped with the suspicion that because it conducts its affairs the way any other enterprise must conduct its affairs, it is merely an engine of political patronage?”



So much for the demand that the documents should be given to the House. With regard to giving the documents to a committee, the Prime Minister stated:

“It must never be thought that we should give to a committee powers or duties exceeding those we ourselves are ready to exercise. For example, if it is not in the interests of the country that we so hamper the management of the road as to render efficiency impossible by doing in this House what this House decided some few days ago it would not do, namely, bring out merely upon question or motion all information, no matter what it is, if that is not going to be done by Parliament, then Parliament is certainly not going to commit to a committee the power to do what in the public interest it is not right for Parliament to do itself. That would not be considered at all.”

This position had already been taken by Sir George Foster in regard to the Canadian Wheat Board, and it was taken later by the Hon. Mr. Ballantyne in regard to the mercantile marine.

The Prime Minister and his colleagues assert, and were supported in the assertion by a majority of the House, that there are documents which Parliament has no right to demand from business concerns, and which committees of Parliament have no right to demand. This is the identical position taken by the grain merchants in regard to the Royal Commission, and this is the position which was confirmed by Mr. Justice Curran, viz., that the private affairs of merchants are not matters affecting the good government of Canada.

If it be asked why Ministers holding such views should appoint a Royal Commission on grain, the answer doubtless would be given thus: The Ministers had in view an investigation into the methods of handling and marketing grain. They had in view a scientific inquiry into the economics of the present grain marketing system. They had not in view such an inquisition into the private affairs of individuals or companies as the commissioners attempted, and they had not in view an inquisition that would supplant either the Board of Grain Commissioners or the law courts within their respective spheres. And such a scientific inquiry would have been consistent with the stand taken by the Ministers in regard to the rights and limitations of Parliament, and committees of Parliament, in the demanding of documents.

#### *Something to Hide?*

It is easy to say that the grain trade secured an injunction because they were guilty, or—as the phrase goes—because they had

something to hide. It is just as easy to say that the Ministers refused to produce the required documents because they had something to hide. It is doubtful if there is one business man in Canada who would sincerely censure the Ministers in the stand they took on that matter. It is not because of there being something to hide, something implying illegality or criminality, that business men refuse to make public their business papers; it is because it is their right to refuse, and it is because they could not compete, they could not be successful business men, if they did not so refuse. It is not an easy matter to hide illegal transactions; the "other fellow" is not likely to keep quiet. And in the grain business it is peculiarly difficult to hide illegal transactions, because there are not only the courts of the land to which the other fellow may appeal, but there is besides the Board of Grain Commissioners.

#### *Property and Civil Rights.*

The main issue between the grain trade and the Commission arises from the interpretation of the Inquiries Act. That issue, however, leads to others of grave importance. In the British North America Act matters of property and civil rights are assigned not to federal Parliament but to the provincial legislatures, and the judgment of Mr. Justice Curran rests partly on this fact. And while Mr. Justice Curran did not deal with the validity of the Canada Grain Act, his judgment raises once again the question whether that Act, in whole or in part, lies within the jurisdiction of the federal Parliament.

This question is of peculiar importance at the present moment. The federal Parliament has laid a heavy hand upon the grain trade during recent years. Apart altogether from the fact that it operates elevators in competition with the trade, it has steadily increased its control over the trade; it has multiplied inquiries and investigations; and from the years 1917 to 1920 it put the grain merchants out of business altogether. And now the question is raised whether after all the federal authorities have not been ignoring or violating the British North America Act, whether or not the Grain Act is valid. Should the Grain Act be challenged in the courts, should a large part—the sections that interfere with property and civil rights—be declared to be *ultra vires* of the federal Parliament, the result would be very far different from that aimed at by the Royal Grain Commission and those who created it.