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Commissions of Inquiry and Public Policy in Canada

*Frank Iacobucci, Q.C.**

1. INTRODUCTION

Most Canadians attach a great deal of importance to commissions of inquiry. When commissions of inquiry are appointed and when they report, great public attention is usually focussed on the substantive and serious issues discussed.

The impact or lack of impact of royal commissions of inquiry on the making of public policy is therefore not a new nor a unique concern. The Sir Allen Herbert poem entitled "Pageant of Parliament" more popularly known as "The Royal Commission on Kissing" took a light-hearted look at royal commissions. It begins:

I saw an old man in the park;
I asked the old man why,
He watched the couples after dark;
He made this strange reply: —

*I am the Royal Commission on Kissing,
Appointed by Gladstone in '74;
The rest of my colleagues are buried or missing;
Our Minutes were lost in the last Great War.*

* Deputy Minister of Justice and Deputy Attorney General of Canada

*But still I'm a Royal Commission
Which never has made a Report,
And acutely I feel my position
For it must be a crime (or a tort)
To be such a Royal Commission.
My task I intend to see through,
Though I know, as an old politician
Not a thing will be done if I do.¹*

Herbert's poem, in spite of its light-hearted approach, obviously has the same purpose that we share at this conference, that of raising fundamental questions about the utility and methodology of commissions of inquiry.

The role of commissions of inquiry has been subject to scrutiny on other occasions. There has even been a royal commission on royal commissions. The 1966 British Royal Commission on Tribunals of Inquiry noted that:

From the middle of the 17th century until 1921, the usual method of investigating events giving rise to public disquiet about the alleged conduct of ministers or other public servants was by a select Parliamentary Committee or Commission of Inquiry.²

In Canada, the history of such commissions reveals that they have dealt with many of the most pressing issues of their times. For example, the early years following Confederation saw commissions of inquiry delving into the central issue of Canada's early years, transportation policy. The other major topic of inquiries in Canada's early years, paralleling the British experience, was alleged instances of lapses in accepted standards of public administration.

As the dominant issues of public policy shifted, so did the matters of concern to commissions of inquiry. During the first decades of this century, commissions considered the ownership of natural resources, industry and banking, as well as immigration and defense policy. Transportation and scandal continued to be frequent topics.

The concerns, scope and size of governments grew massively following the Great Depression and World War II. The famous commissions that dealt comprehensively with broad economic and social issues were a consequence of this growth. These include the Rowell-Sirois Commission

1 Sir Allen Herbert, "Pageant of Parliament." *Punch* (June 27, 1934) Vol. CLXXXVI at 708.

2 U.K., Royal Commission on Tribunals of Inquiry (London: Great Britain Law Commission, 1966).

on Dominion-Provincial Relations, the Massey Inquiry into Arts and Letters, the Gordon Commission on the Economic Prospects for Canada, the Glassco Commission on Government Organization, the Hall Inquiries into Health Care for Canadians, the Carter Commission on Taxation, the Royal Commission on Bilingualism and Biculturalism, the Royal Commission on the Status of Women in Canada, and most recently, the MacDonald Commission on the Economic Union and Development Prospects for Canada.

Functions of such inquiries were to gather information and make recommendations on the basis of the information gathered. It is worthy to note that for these early Commissions, impartiality was not an essential characteristic.

Prerogative or true "royal commissions" are no longer utilized. The basic structure of federal commissions of inquiry is established by Part I of the *Inquiries Act*³ although such inquiries are still often referred to as Royal Commissions. Legislative provision is now made for such inquiries in the provinces as well.

Under the various legislative schemes, the objective of commissions of inquiry is to respond to the needs of the executive branch of government by investigating and advising independently and impartially on assigned issues.

It was perhaps inevitable that a system of government utilizing the adversarial court system would develop a mechanism for the consideration of issues using an inquisitorial approach. Until recent years, there were few institutions of government within our system which utilized such an approach in resolving issues. This fact has contributed substantially to the uniqueness and utility of commissions of inquiry.

The inquiry process is characterized as much by investigation and research as by a contest between versions of truth. It may point the way to a solution without identifying how it is to be implemented. Theirs is the intermediate though important purpose of undertaking research and analysis which other institutions for one reason or another may not appropriately undertake. Commissions of inquiry frequently have fulfilled their task when they identify issues for consideration or resolution by the other institutions of government.

A wide range of tasks may be assigned to commissions of inquiry. Their flexibility is a significant strength. Their role may vary from inquiries which are specific, narrow and discrete to those which are broad and far-ranging. Additional flexibility arises because of the personnel of inquiries. Inquiries can range widely in selecting expertise among individuals who

3 R.S.C. 1985, c. I-11.

need serve only for a limited period of time, whether commission personnel or its research staff. Such staff can be specially and uniquely qualified to examine the issues at hand. The assembled team will not be bound by entrenched attitudes and accepted truths nor by an institutional culture.

Commissions do not have to equivocate or qualify their questions or answers to take account of political realities. A commission can have great flexibility in respect to its procedure, who appears before it and with respect to the questions it addresses within the scope of its mandate.

It appears, then, that if government seeks to conduct a flexible, impartial inquiry on either a specific or a general topic, to range widely in developing and considering sources of information, to canvass wide ranging and innovative solutions to problems without necessarily being bound to identified or recommended courses of action, a commission of inquiry should be considered. Before one can evaluate the initial choice to follow the commission route, however, one must also consider the alternative to inquiries.

2. CONSIDERING THE ALTERNATIVE TO INQUIRIES

There is a broad range of possible choices. The function of inquiring into issues, discovering facts and reporting on these findings with a set of recommendations is not unique to commissions of inquiry. There are many institutions which from time to time may carry out such functions, most notably, of course, Parliament and the courts.

Commissions of inquiry are not courts, structured to reach the most reliable final conclusions about facts, nor can they make the representative decisions about values which Parliament may be required to make.

While it is clear that commissions of inquiry can address political questions, it would appear that questions which are at their base political are best resolved by Parliament rather than by a commission of inquiry. As questions move from the broadly general and political toward the specific and factual they move out of the realm of the political in the direction of the law and the courts. If the issue is specific, the parties involved not too numerous and the issue raises substantive issues of law, it may most appropriately fall to the courts to be resolved. It was to allow the courts more flexibility in serving as an alternative to commissions by engaging an inquiry in the provision of advice, where there was no such specific issue, that the device of an advisory opinion was created.

There are other factors which may indicate that courts be chosen rather than a commission of inquiry. In general, the better developed and appreciated an issue is, the less will be the utility of directing a commission of inquiry to consider it. The great flexibility of a commission in defining

issues and in rapidly developing the information necessary to allow them to be considered are of little value if the issue has already been well defined and the facts are well known and appreciated. Another key factor will be timing. It may be that at varying stages of development, an issue may be appropriate for the courts at one stage, Parliament at another or a commission of inquiry at another. It is not uncommon that issues which are first considered in a commission of inquiry will subsequently be considered by the courts or by Parliament.

A commission of inquiry will be less helpful in resolving an issue involving ethical or value choices. Neutrality lends little authority for the making of choices that clearly depend primarily on values. A Parliamentary committee, or in an extreme case, even a free vote in Parliament, will be of far greater utility and hence be far more effective in making such a choice.

The possibility that the bureaucracy might be appropriate to address the issues must also be considered. However, many issues, which commissions consider, will be issues that the executive or bureaucracy might have handled but which, because of reasons such as the need for open public input or a perceived need for an independent and impartial approach, cannot be resolved internally by government. The issue may involve an inquiry into the other elements of government or of the bureaucracy itself. Sometimes the issues may be too controversial.

In situations where the subject of inquiries tends to repeat itself over time, other institutions have, by statute, been given functions involving the conduct of inquiries or the development of advice of the type conducted by royal commissions. Large administrative agencies such as the Canadian Radio-television and Telecommunications Commission (C.R.T.C.) and the Canadian Transportation Commission (C.T.C.) routinely inquire into factual situations or consider broad issues of public policy of the type which had formerly been considered on an *ad hoc* basis by commissions of inquiry. In certain specific areas, such as human rights or the access to government information, bodies of an inquisitorial nature have been established to carry out some of the more specific types of inquiries. The Canadian Judicial Council, for instance, provides a mechanism to inquire into the behaviour of members of the judiciary. In some provinces ombudsmen perform inquisitorial functions.

At a general level, there is a developing capacity within our system of government to conduct other types of inquiry when the need arises. With the expanded role of parliamentary committees, the capacity of the legislative branch of government to carry out inquiries has increased considerably. When questions demand considerable expertise and the participation of both the federal government and the provinces, national or federal-

provincial task forces are frequently utilized. Committees of independent experts may be requested to report on specified issues of concern.

When the relatively wide variety of choices is considered, a number of other very subtle considerations come to bear. How quickly is a decision required? What kinds and how much input is required? What sort of relationship to the other institutions of government will be most effective and appropriate? Where is the best available expertise to be found to consider the matters in issue?

It is also important in making this assessment to recall that as well as the basic functions of gathering information and formulating recommendations, commissions of inquiry have a variety of subsidiary uses and purposes. These include educating the public or the legislature in order to generate pressure for intended legislation, sampling public opinion, carrying out specific investigations into the other branches of government, permitting the voicing of grievances and enabling the government to postpone action on a question where the imperative to act is not yet clear. It may be that in some circumstances these subsidiary functions have had great influence on the choice of a commission of inquiry to address an issue.

There are obviously many more elements that could affect the institutional choice, but the above factors present a useful starting point. Whether a commission of inquiry was the proper instrument is clearly a first and basic question. The choice of a commission of inquiry should be viewed in the context of these factors and within the broad context of available alternatives.

3. EVALUATING THE EFFECTIVENESSES OF COMMISSIONS

Deciding whether a commission of inquiry effectively carried out its mandate requires careful attention to its function and objectives. What constitutes success will vary with the environment encountered by the commission.

As already mentioned, it may be that the role of the commission was more to give definition to a question or issue than to resolve it. It may be that the problem was not capable of resolution or that the necessary facts could not be established. A real assessment of whether the commission was effective will require not only an appreciation of the flexible nature of its role and attention to its objectives, but also some assessment of how it interacted with its environment.

Central to any evaluation of the activities of a commission are issues of procedure. This requires an awareness of the fact that, functionally, the basic nature of the inquiry is generally inquisitorial and not adversarial and that the basic focus must be the search for truth and not the defeat or subjection of opposed interests.

One must consider whether the rights of all those with an interest or involved in a commission's activities were properly protected in the course of the proceedings. Some important questions come to mind in this respect. Were all the interests that were required to be considered by the commission represented and considered? Were only necessary and appropriate issues considered? Did the commission make its task unduly long or time-consuming through the procedures which it utilized? Did the commission carry its inquiry past the point where the rights of individuals should have required the full protection of courtroom proceedings?

Commissions of inquiry must also be assessed against the standards of efficiency, economy and effectiveness. The issue of efficiency raises sub-issues of whether the activities of the commission were necessary and actually contributed to the effective resolution of the issues before it. Again, the answer may be dependent on the commission's role and function. If the commission sought only to define issues to establish facts, accomplishing only this may fulfill the commission's mandate. If the commission also gave advice this may be a proper subject of evaluation.

Since a commission of inquiry does not have the power to implement its own recommendations, then one of the key tests of its efficacy is the degree to which it meshes with other instruments of government. A commission must make intelligent and informed decisions about the extent to which it should leave certain issues and choices to other institutions.

The issue of economy has risen repeatedly with respect to royal commissions. There are many factors which must be weighed in considering if the cost of a commission was excessive. The commission must make its own judgment about the degree to which it must follow more formalized procedure, allow a broader representation of interests, conduct broader and more fundamental research, travel to a greater or lesser degree or hear a broader spectrum of views. Economy is more likely to be a concern when the issues presented to a commission are not well defined. As the issues become broader and more far-reaching, the greater will be the costs. However, where the type of inquiry is similar to that of a court, the commission may have to follow more formal, judicialized procedures which also can prove very expensive. The issue for consideration here will most likely be whether the commission struck an overall appropriate balance.

It should be kept in mind by those who would criticize the economy of commissions of inquiry that as a general rule, they are of defined and limited duration. If the expenditures on the part of an inquiry are onerous, it is of course important that such expenditures will not continue indefinitely and may not result in the creation of a permanent bureaucracy. The potential for saving is clear.

In considering the effectiveness of a commission of inquiry, it is of course of critical importance to consider the results. Did it get the facts and

get them straight? Did it raise consciousness about and understanding of the issue? Was the public effectively consulted and was the best information obtained?

There inevitably will be a tendency to conclude that the final measure of the effectiveness of a commission is the degree to which its activities and recommendations are accepted by the other institutions of society and by the public. One must be cautious in employing such a measure.

In particular, one must avoid evaluating inquiries by their success in achieving the execution of policy. Other institutions of government are designed to implement policy. If inquiries were so designed, they would lose most of their unique advantages, such as their detached independence from the political arena and bureaucratic politics, their flexibility and their ability to be self-determining within the terms of their mandate. Inquiries often should leave their implementation to other institutions.

4. CONCLUSION

These are just some of the standards that we can articulate and consider when deciding whether a commission of inquiry was the best choice in the circumstances and whether it has or has not usefully carried out its job. I am sure the contribution which this conference and its participants are making to public debate on the role, function, utility and efficacy of royal commissions will enable many others to be identified. We, in the future, may be able to utilize this important instrument for the formulation of public policy to even a greater effect than has been the case in the past.