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The Role of the Commission Counsel

John Sopinka
Supreme Court of Canada

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The Role of Commission Counsel

*John Sopinka, Q.C.**

1. INTRODUCTION

Commissions of inquiry have been prominently featured in this country for decades. For instance the Durham Report on the 1837 Mackenzie-Papineau Rebellion was the product of a public inquiry. As well, other inquiries have played a pivotal role in the development of our public and economic life. We had, for example, the Rowell-Sirois Commission on Dominion-Provincial Relations, the Royal Commission on Bilingualism and Biculturalism, the McDonald Commission on the Economy, the Dubin Inquiry on Aviation Safety and the Estey Inquiry on Bank Failures to mention a few. In 1979, the Law Reform Commission of Canada estimated that there had been 400 full-blown public inquiries and close to 1500 departmental investigations held since Confederation.

Most inquiries examine matters relating to broad social and economic questions and can be a useful tool of public administration. In recent times, however, it has become fashionable to establish an inquiry whose specific task

* Commission Counsel in the Dubin Air Inquiry and the Estey Western Bank Inquiry; Counsel to Susan Nelles and Sinclair Stevens; currently a Justice of the Supreme Court of Canada.

is the examination of the conduct of individuals. The Grange and Parker Inquiries were of this type. These inquiries, operating under the full glare of media attention, have all the appearances of trials without the safeguards for individual rights which trial practice affords.

The public is fully justified in asking whether these inquiries are not in fact trials under another name. The law has long recognized that in this type of inquiry the parties affected have certain rights.

In *Re Shulman*,[1] the Ontario Court of Appeal reviewed a decision of Mr. Justice Parker (as he then was) acting as Commissioner, who ruled that one Morton Shulman, who had made serious allegations against the government, was to have his evidence elicited in the first instance by Commission Counsel.

Aylesworth J.A., speaking for the court, reversed this ruling holding that Shulman could be examined by his own counsel in the first instance. His lordship said:

> Dr. Shulman, who has made substantial allegations against persons in office, really is liable to be discredited in the eyes of the public if those allegations upon proper inquiry should prove to be unfounded and in that aspect of the matter he may well be considered to be a person affected.
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> . . .
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> Because of the very nature of an inquiry of this character and of the duties of the learned Commissioner, much must be left to his discretion and to the common sense of competent counsel appearing before him.[2]

In *Restrictive Trade Practices Comm. (Can.) v. Irvine*,[3] the Supreme Court of Canada referred with apparent approval to

> [T]he emerging requirement to "act fairly" even in a purely investigatory process where the principles of judicial review and of natural justice had not theretofore been applied.

Estey J. was referring to the decisions of Lord Denning in *Re Pergamon Press* and *Selvarajan v. Race Relations Board*.[4]

This means that commissions of inquiry are no longer a law unto themselves. They are subject to judicial review and indeed they may be

1 [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.).

2 *Ibid.* at 377, 379.

3 [1987] 1 S.C.R. 181, 24 Admin. L.R. 91, 34 C.C.C. (3d) 481, 15 C.P.R. (3d) 289, 41 D.L.R. (4th) 429, 74 N.R. 33 at 71.

4 *Re Pergamon Press*, [1971] Ch. 388, [1970] 3 W.L.R. 792, [1970] 3 All E.R. 535 (C.A.); *Selvarajan v. Race Relations Bd.*, [1976] 1 All E.R. 12, [1975] 1 W.L.R. 1686 (C.A.).

subject to section 7 of the *Charter*.[5] Their procedures will have to be re-examined in light of these developments. In the very forefront of the conduct of a commission stands commission counsel. His traditional role, as described in the few writings in existence, may now be circumscribed by principles of fundamental justice.

2. LEGAL STATUS OF COMMISSION COUNSEL

Although the jurisprudence is sparse with respect to the legal status of commission counsel, there is general agreement that he is the commissioner's counsel. His conduct must be governed at all times with this in mind. Conversely, the commissioner or commissioners must bear in mind that commission counsel's actions are attributed to the commission. A number of conclusions with respect to the scope and limits of commission counsel's mandate can be drawn from this simple proposition. First, commission counsel is subject to the direction of the commissioner. After consideration of the rights of other parties and individuals appearing before the commission, the commissioner can authorize his counsel to carry out any duties that are within the terms of reference of the commission. For instance, although the commissioner could conduct the examination of witnesses himself, there are cogent reasons for not so doing. A learned Australian author sums it up as follows:

> Ultimately a Commission or Board has control of an inquiry. It has the duty to conduct the inquiry and counsel is briefed merely to assist in the discharge of that function. Nevertheless, there are cogent reasons for allowing a counsel assisting a degree of latitude or independence in the performance of his function . . . but unless the eliciting and presentation of evidence is left to counsel assisting Commissions and Boards might be seen to be partisan.
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> It is difficult for a person to assess evidence objectively if he has to himself elicit facts.[6]

To the extent that the rights of persons affected are increased, limitations are imposed on the conduct of commission counsel.

The duties of commission counsel have been equated with those of a prosecutor in a criminal case. In the Inquiry into Royal American Shows and its Activities in Alberta, Mr. Justice J.H. Laycraft, as he then was, said:

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5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

6 L.A. Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Sydney: Law Book Co., 1982) at 216-17.

> [T]he duties of Commission Counsel . . ., in fact, are virtually identical [with those of a prosecutor].[7]

It is evident, however, from the following that the prosecutorial duties to which his Lordship was referring were those requiring that all evidence, pro and con, be addressed:

> The role of a Crown Prosecutor in England and in Canada is not to struggle at all events for conviction. His duty is as an officer of the court to ensure that all evidence, both favourable and unfavourable to the accused, is put before the court. This has been repeatedly stated in courts here and abroad. In the Supreme Court of Canada in *Boucher v. The Queen*, [1955] S.C.R. 16, Rand, J. said at page 23:
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> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
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> In my view, this definition of the role of the Crown Prosecutor is also an apt description of the duty of Commission Counsel in an Inquiry such as this one.[8]

This statement cannot be extended to apply to the role of commission counsel generally, as did the Parker Report.[9] A prosecutor is not the agent of the judge. His acts are not attributable to the judge. He does not confer with the judge to determine what evidence to call nor does he participate in the preparation of the report. These and other factors demand more impartiality from commission counsel than is required of a prosecutor.

The balance of this paper will explore how commission counsel carries out this role in the various facets of the inquiry that are typically assigned to him.

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7 J.H. Laycraft, *Royal American Shows Inc. and Its Activities in Alberta: Report of a Public Inquiry* (Edmonton: Queen's Printer, 1978) at A-15.

8 *Ibid.* at A15-17.

9 *The Royal Commission to Investigate Allegations Relating to Coroner's Inquests* (Ontario, 1968) Transcript at 336.

3. PRE-HEARING STAGE

(a) Interviewing Witnesses

From the material supplied to the commission generated by the controversy that gave rise to the inquiry, commission counsel will identify the principal witnesses to be called before the commission. In order to prepare this evidence, interviews must be arranged, preferably through counsel for the witnesses if the witnesses are represented. In advance of the interview, the documents that relate to the evidence of the witness should be obtained. In keeping with the non-adversarial role of commission counsel these should be obtained by enlisting the co-operation of the witnesses and their counsel. The use of subpoenas should be used only as a last resort where co-operation is denied or it is apparent that documents are being concealed.

The interview itself should be in the presence of counsel for the witness. If requested by the witness, the interview should not be used to impeach the witness' testimony but solely for the assistance and information of commission counsel.

(b) Advising About Procedure

Prior to the commencement of hearings the commission will ordinarily formulate some basic rules of procedure. The rules of each commission will differ to some degree. It is in the interest of all concerned that the commission run smoothly without disruptive challenges to the procedures adopted. The commissioner's counsel, therefore, has a duty to advise the commissioner with a view to adopting procedures that will have the general support of the parties. He should, therefore, draft the basic rules of procedure dealing with such matters as examination of witnesses, order of examination, proof of documents, order of argument and matters to be heard in camera.

This draft should not be adopted by the commissioner until commission counsel has met with counsel for persons who he is aware will be accorded status before the commission. Their views should be considered and any proposed changes to the draft should be communicated to those interested.

The commissioner should be advised to hear submissions with respect to the draft procedures in advance of the hearings. Commission counsel should take part in this debate so that his views, which have been imparted to the commissioner, will be shared with other parties before the commission. After taking into account the submissions made, the commissioner can then adopt rules which are best designed to ensure the orderly conduct of the inquiry.

Other preliminary matters will arise which will require disposition before the evidence begins. These include: applications for standing, applications for funding, applications by the electronic media to record the proceedings and

applications to clarify the terms of reference. It is commission counsel's duty to advise the commissioner in these matters and he should do so publicly by taking part in the submissions.

4. THE HEARING

(a) Opening Statement

After Administrative matters and procedural matters have been dealt with, commission counsel should open the hearings with a statement outlining, in a general way, the matters into which the commission will inquire. The purpose and content of an opening statement in an inquiry differs from that in a court action. The latter is designed primarily to lay out for the judge or jury the issues and the evidence so as to make the presentation of the case more intelligible to the trier of fact. In an inquiry, the commissioner will be familiar with the issues and the general tenor of the proposed evidence. The purpose of the opening statement is, therefore, largely for the information of the parties affected and the public.

The opening statement in an inquiry differs in content because it should be less specific. This is due to the fact, in part, that the inquiry deals with matters that are largely unknown, whereas in a court action, the facts have been ascertained by the parties, although there may be a dispute about them. Furthermore, commission counsel must be careful at this stage of the inquiry not to draw conclusions which may reflect adversely on the conduct of persons involved and which may not be borne out by the evidence. Otherwise, the intense media interest at the start of an inquiry may result in serious damage to the reputations of persons identified in the statement.

(b) Examining Witnesses

Two different approaches have been used by commissions as to the presentation of evidence.

1. Commission counsel examine all witnesses in the first instance subject to exceptions which may be sought by special application to the commissioner.
2. The calling of witnesses is left to the participants with commission counsel taking part only to the extent of filling the gaps.

There are a number of variations which adopt a course between these two basic themes.

The following direction in the Land Deals Board of Inquiry, which adopted the first approach, is one that is favoured by most commissioners:

> Except under special direction all evidence is to be led through counsel assisting the Inquiry and parties seeking to adduce evidence will be expected to place the projected evidence before counsel assisting the Inquiry for presentation by him; that may be the subject of special direction if the circumstances justify it, that is to say, if the circumstances justify any particular party being allowed to produce evidence through their particular counsel.[10]

The second method is difficult to rationalize with basic concepts. Why should participants who are dragged into an inquriy be required to take responsibility for it and to either defend agaisnt an anticipated charge or allegation or to adduce evidence against themselves? Surely the commissions' duty to inquire carries with it the obligation to take the leading role in the production of the evidence.

An exception is usually, and probably must be, made with respect to a witness against whom some misconduct is alleged. In *Re Shulman*, the Ontario Court of Appeal reversed a ruling by Commissioner Parker which required Shulman to be examined in the first instance by commission counsel. Aylesworth J.A. said:

> In our view, the present inquiry is decidedly of the type with which this Court was called upon to deal in *Re Children's Aid Society of the County of York* . . . and a type of inquiry, therefore, to be distinguished from an inquiry directed to the gathering of information for the purposes of reporting . . . . Dr. Shulman should be accorded the privilege, if he so requests, of having his evidence-in-chief upon any allegation which he has made brought out through his own counsel and he should be subject to cross-examination not only by counsel for the Commission but by any person affected by his evidence. Cross-examination, wherever it is permitted, is not to be a limited cross-examination but is to be cross-examination upon all matters relevant to eliciting the truth or accuracy of the allegations or statements made. Similarly, any person affected by allegations made before the learned Commissioner should be accorded the privilege of examination as a witness by his own counsel and should be subject to a right of cross-examination, not only be counsel for the Commission but by any person affected by the evidence of that witness.
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> . . .
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> They, as well as the learned Commissioner himself and the learned counsel for the Commission are, of course, engaged in furthering the very object, if not the sole object of the inquiry itself which is to elicit in the fullest and fairest manner all relevant information on the subject-matter thereof. It goes without saying that counsel for the Commission has a heavy responsibility in these matters and will

10 (1977) Transcript at 8.

> be the proper person to call witnesses and to examine them in chief where those witnesses are not represented before the Commission by their own counsel.[11]

(c) Cross-Examination

Whether a witness is examined in the first instance by commission counsel or by his own counsel, the former is not restricted by the ordinary rules with respect to impeachment. Commission counsel has an obligation to ascertain the truth and therefore must be free to test and challenge any witness or evidence. The extent that he does so will depend on whether all points of view are represented at the inquiry. As Justice Freedman explained in the Inquiry in the Matter of Wilson D. Parasiuk:

> In the proceedings of this Commission the phenomenon of a one-sided presentation became early discernible. The witnesses and their counsel all seemed to be on the same side, the side of Parasiuk . . . Our Commission of Inquiry confronted the danger of virtually only one side being heard. In that setting Mr. Raymond Flett, counsel of the Commission, determined to do what he could to plug the gap, at least in part. When Mr. Parasiuk took the witness stand Mr. Flett assumed the role of opposing counsel and subjected Parasiuk to a cross-examination that was vigorous, searching and intelligent. Mr. Parasiuk may have been taken by surprise by the turn of events, but the Commission is pleased to assert that he responded to the challenge with dignity and wisdom, and as one guided by the white light of truth.[12]

In carrying out this duty, however, commission counsel must guard against becoming the advocate exclusively for one point of view. This is a natural tendency for counsel, generally, whose entire experience and training is to be on one side or the other.

Examination by other counsel participating in the inquiry will usually be permitted if a sufficient interest is shown. The order will vary but generally the examination by commission counsel will be followed by counsel for the witness and others in the same interest. Examination by parties adverse in interest will follow. Commission counsel will usually be permitted a re-examination which again is not restricted by the ordinary rules.

(d) Closing Argument

Of all the facets of the inquiry, the role of commission counsel in closing argument and in preparation of the report create the greatest disagreement. It

11 *Supra*, note 1 at 378.
12 *Supra*, note 9 at 336.

is the view of some commissioners[13] that it is illogical to have the commissioner's own counsel present argument to him. Others would subscribe to the following practice:

> It is the normal practice for counsel assisting to make the final closing submission. Counsel representing various interests naturally takes the opportunity to present the evidence in the most favourable light in regard to those interests. It is logical that counsel assisting should make the final address as he is concerned and identified with the function of the Commission or Board. *The opportunity is available for him to try to present a balanced view of all the evidence and submissions for the benefit of the Commission or Board.*[14] [emphasis added]

In the Inquiry into Certain Bank Failures, Commissioner Estey permitted a very full argument by commission counsel on the understanding that the argument did not represent the views of the Commission.[15] The argument was pur forward on two bases. First, that it is preferable to have commission counsel express his advice to the commission publicly and not in private. Second, by arrangement with counsel, section 13 Notices under the *Inquiries Act*[16] were waived by parties who might be adversely affected. In order to secure waivers, however, counsel for these parties wished to have particulars of the possible inferences that might be drawn from the evidence against their clients.[17]

Where this course is adopted, it would be wrong to have commission counsel advise the commissioner privately without giving the parties affected by such advice an opportunity to meet it.

In the second Corry Lecture, Justice Berger (as he then was) said:

> Then there is the problem of assuring that the Inquiry's own staff do not wind up writing the report of the Inquiry. To put it another way, there is the problem of ensuring that the Inquiry staff are not allowed to put their arguments privately to the Commissioner or to the Inquiry. I have sought to overcome this by laying down a ruling that the recommendations that the Inquiry staff wish to develop should be presented to the Inquiry by Commission Counsel at the formal hearings. In this way the Inquiry staff will be developing what they conceive to be the appropriate terms and conditions to be applied, but they will not be enabled to do so privately. It will be necessary for them to place them before the Inquiry, where they can be challenged, adopted or ignored by the other participants in the Inquiry.[18]

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13 Notably Commissioner Dubin in the Air Inquiry.

14 *Supra*, note 6 at 222.

15 *The Inquiry into the Collapse of the CCB and Northland Bank* (Ottawa, 1986) Transcript at 12212-3.

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

17 *Supra*, note 15 at 12221.

18 Thomas R. Berger, "The Mackenzie Valley Pipeline Inquiry" (1976), 3 Queen's Law Journal 3 at 14.

This leads me to the most difficult aspect of the role of commission counsel which is assisting in the preparation of the report.

5. PREPARATION OF REPORT

One of our most fundamental rights is to have any decision affecting individual interest proceed from a free and independent tribunal. We are often prepared to tolerate the wholesale departure from rules of evidence and procedures, but we do so on the premise that at the end of the process the decision will be made by a fair and impartial commissioner. This principle is expressly embodied in section 11 of the *Charter* and, as well, in section 7. Our system recognizes that judges and other tribunals will require the assistance of staff. The extent of the use of staff is generally not questioned unless staff is identified with a party. In the latter case, the tolerance that existed disappears.

In *Re Sawyer and Ontario Racing Commission*,[19] the court disapproved of the practice of allowing counsel, who tendered the case for the commission against a member for breach of commission rules, to assist in preparing the reasons of the commission. The court said:

> In my opinion the Commission misunderstood the function of counsel who presented the case against the appellant before them. He was variously described as counsel to the Commission, counsel for the Commission and counsel for the Commission Administration. But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission . . . . He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired.[20]

And in *Re Bernstein and College of Physicians and Surgeons of Ont.*,[21] the Divisional Court condemned the use of counsel for the College in polishing the reasons of the discipline committee.

19 (1979), 24 O.R. (2d) 673, 99 D.L.R. (3d) 561 (C.A.).

20 *Ibid.* at 564-565.

21 (1977), 15 O.R. (2d) 447, 76 D.L.R. (3d) 38 (Div. Ct.).

In *Re Emerson and Law Soc. of Upper Can.*,[22] Henry J. invalidated a regulation of the society because it required the secretary of the society, the prosecuting body, to write the report of the discipline committee.

These sentiments are appropriate to govern the role of commission counsel in assisting in the preparation of the report. If he has been regarded as an adversary or a prosecutor and plays a role in the writing of the report, justice will not be seen to be done.

The following statement is particularly apt:

> An active counsel, who presented evidence and cross-examined the witnesses of others, has played a role which may suggest that he will not bring total impartiality to report writing. *This appearance of bias is particularly evident if the evidence inquiry counsel was required to call was all on one side of an issue; this could have occurred where there were no participants to call that evidence and, to retain a balance in the information before the inquiry, that counsel appeared as an advocate for a particular point of view.*[23] [emphasis added]

A commissioner who intends to enlist the aid of his counsel in preparing the report must, therefore, bear in mind that if he allows his gladiator to thrash about in the arena, the latter's transition to the dias may evoke a public clamor.

22 (1983), 44 O.R. (2d) 729, 41 C.P.C. 7, 5 D.L.R. (4th) 294 (H.C.).

23 R.J. Anthony and A.R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985), at 144.