

1-1-1990

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MacDonald Commission

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Recommended Citation

A Cairns, S Grange J, and E C. Harris, "The Commission and Its Report: Public Education, Advocacy and Lobbying" (1990) 12:3 Dal LJ 161.

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The Commission and Its Report: Public Education, Advocacy and Lobbying

A. Cairns,* S. Grange J.,** and E.C. Harris***

Mr. Harris: The question concerning the justification of commissions of inquiry has been raised in the preceding discussions. If their sole justification is having the bulk of their recommendations implemented, the institution probably would have died out long ago. Nevertheless, it must be of considerable concern to commissioners that the record has not been good in terms of implementation and one of the questions that perhaps will determine how successful commissions are in this respect has to do with what happens when the report is delivered and thereafter. These questions will be largely the subject of the panel that we are about to present. You will not be treated to profound, scholarly papers on policy analysis or anything like that in this panel. There will be practical comments and suggestions.

Both co-panelists have been introduced to you earlier so I will not repeat the introductions. Mr. Justice Samuel Grange and Professor Alan Cairns, both of whom you heard yesterday. The first speaker in this panel will be Mr. Justice Grange.

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Mr. Justice Grange: I must confess to a touch of ambivalence about this subject which will probably destroy the value of anything I have to say on the subject.

First of all, I very much believe that somebody has to get out and, at least, explain the report. We cannot leave it to the media and I will tell you why. In the last very high profile commission I served, I found that the regular reporters who attended daily were, on the whole, excellent. They understood everything that was going on; at least, they understood as well as I did and they reported it as accurately as they could. The trouble is with the dilettantes. The commentators and the columnists who attended for a day or so, or not at all, and then concluded and pontificated with, more often than not, wrong or totally inadequate facts and little or no logical reasoning.

One columnist from the *Toronto Sun* wrote an article on the inquiry lamenting that we were grilling nurses and never called a single doctor to the witness stand. This was just after some 50 days of nothing but doctor testimony; all of it rigorously cross-examined and all of it reported by the regular columnist of the *Sun*.

And I remember a leading T.V. commentator complaining about the failure of the commissioner to go into the whereabouts and movements of the staff at the time of the deaths of individual babies. Well, if I had done that, I would have gone to jail. It never occurred to him that was precisely what I could not do under the Court of Appeal injunction against naming names. All of that had been thoroughly publicized in all of the media, including his own, and fully dealt with in the report.

Then, there were a great many complaints about the failure to deal with hospital procedure and the lack of recommendations about drug control and dispensing of drugs. All the media had to do was look at the terms of reference. I was told that I was to bear in mind the Dubin Inquiry, and the author of that particular report is now my boss, and I certainly was not going to put anything in the report that contradicted anything that he said. But at any rate, under the terms of reference, I was not to do it. I was not to duplicate anything that they had to do.

I sound as though I am sulking a bit and I am sulking a bit. I am really sulking about the lack of real in-depth study of the report. If some of those commentators had come into my court as ill-prepared as they were, they would not have lasted more than five minutes and the court would have recommended they take up some other profession.

It may be that I should not abuse them too much. I listened with a great deal of interest to what Professor Salter said this morning about their lack of resources. Maybe the first person we should hire should not be commission counsel but a public relations officer to keep the press informed and make up for the fact that their resources are insufficient. But my real complaint about it is that even when the resources are sufficient, even when they have all the

bodies that they need to inform them, they just do not seem to want to be informed.

Another problem about commentators and editorial writers, and I may be a little unfair, but only a little unfair, is whatever view they express, it has to be strongly expressed. They believe in black and white and if there is one thing that a life in the law has taught me, it is that there are two sides to nearly every question and the world is made up of infinite shades of gray.

A report, if it is any good, is the result of hearing all the sides to the question and balancing the opposing interests as carefully as a commissioner can. The best thing, of course, is to read the report itself, not someone's comment upon it, but few people have the inclination or the leisure for that and somehow we must struggle to get a fair presentation before the public.

Now, my ambivalence stems from my position. It is a long tradition that judges do not comment in public on their judgments and when judges are transformed into commissioners, it is also traditional that they do not comment on their reports. On the whole, I think it is a good tradition. I do not really relish the thought of having Chief Justice Parker and Mr. Stevens fight it out on a public platform. Anyway, I cannot speak for one of those potential contestants, but the other one is a very busy man who has no time for the contest even if he had the spirit.

In my case, I cheated a little. I had my very capable and thoroughly briefed counsel stand in for me. They were available on the day the report came out to give interviews and to answer questions for any of the media. I would not be too surprised to learn that the answers were almost invariably favourable to the report and even sometimes, though they choked a little, to the commissioner.

I suppose I can put it this way. I believe in public education about the report and that public education will be difficult without some cooperation, visible or invisible, on the part of the commissioner. I am not so sure about advocacy or lobbying. Under the present restriction, it is impossible for a judge to lobby and even with anyone else there is a problem. If you push your conclusions too much and too publicly, your objectivity, or certainly the public conception of your objectivity, will suffer. You may appear to protest too much. Much better if you can get someone else to push it for you. I will concede that sometimes your proposals are such that no responsible person can be found to support them. If so, it is about that time you should decide to take up another line of work.

Mr. Harris: Thank you very much. Notwithstanding that I am a lawyer by profession, my presentation this morning will be more on the side of the policy makers issues rather than the lawyers issues to the extent that those can be legitimately separated. As Professor McLauchlan indicated in introducing me, I have acted as both legal counsel to one provincial royal commission and

a member of another; the latter being a very major royal commission in terms of the scope of its mandate and the time that was spent in deliberation. Its period in office covered over three years and a further year was taken in the public debate and examination by government appointed bodies that followed the release of the commission's report.

We recommended a basic restructuring of municipal units in the province of Nova Scotia, which was not implemented, and a great many specific changes in the organization, funding and provision of provincial and municipal services, several of which recommendations were implemented in whole or in part over time. Our appointment was, in part, a fulfillment of an election promise made by the government of the day to have a public examination of the organization and funding of education in the province. Despite this background, it was comforting to me that two out of the three commissioners had no political affiliation. When it was realized that the educational system could not be examined in isolation from the organization and funding of other governmental services at the provincial and municipal levels, the commission was given the very broad terms of reference that I have already noted.

We commenced our work without detailed preconceptions of our conclusions, which took shape only gradually, but we ultimately realized that our mandate could not be properly fulfilled without recommending a radical recasting of the structure of municipal government in the province. One of our key recommendations was to reduce the existing 65 municipal units to 11. We realized that the implementation of these recommendations would prove politically difficult and that it would take determined leadership by the provincial government as well as strong support from various influential organizations in the province for implementation to occur. This realization led to some agonizing on our part. We felt we knew what was required to fulfil our mandate, but we also knew that our most important recommendations might be shelved as being too hot to handle, which is what ultimately happened.

Our experience raised acutely many of the concerns that are the subject of this panel. In particular, we had to consider to what extent we should be concerned about the political impact of and the public reaction to our report, and what steps it would be advisable for the commission to take at the time when its report was rendered and thereafter to explain, defend or sell its recommendations. It is also relevant for this panel to consider whether there is a basic difference, as has been suggested in many of the discussions in the last couple of days, between the commission whose task is primarily one of fact finding and one, such as ours, that was expected to make recommendations for changes in the status quo.

It is often said that when a government wants to take the heat off itself in a matter of public controversy, it appoints a royal commission. Well, of

course, such a step may only postpone the controversy to a later and possibly more convenient date; such as, just after rather than before an election.

The expiration of time may cause the issue to lose some of its urgency and the public may have lost interest in it. From the government's point of view, the mere appointment of the commission may have accomplished its purpose, while the commissioners may find that their report is anti-climactic. This may particularly be the case where, as often happens, the commission takes longer to complete its report than was originally contemplated. It may prove to be a real challenge to make the commission's findings and recommendations topical and of interest to the public and the government, particularly if the government has changed in the meantime or if the government had no real expectation of receiving useful guidance from the commission.

On the other hand, the opposite problem may occur. Public expectations may be too high and the commission's recommendations may be necessarily controversial, so that the response of special interests and opposing voices may be expected to be more prominent than the voices heard in support. To some extent, this was the case with the Carter Commission where, in the swirl of controversy, many valuable recommendations were lost as well as some that may have been impracticable.

If the government itself is taken by surprise because of the sweeping changes recommended by the report and the likely political flack involved in implementing it, the government may be faced with a problem of damage control. If there is strong support on both sides, the politically expedient approach would be to say that the matter needs more study in view of the absence of public consensus. Eventually, public interest in the matter will die down and most things will go on as before. This is what happened to several of our key recommendations; though, some ten years later, our chairman, John Graham, was quoted in the media as telling a public meeting that, in his view, the commission's recommendations were still valid answers to the problems that had led to its appointment, which problems had not gone away.

Budgetary implications of a commission's report can be troublesome. Sometimes cost factors are the essence of the commission's task, as in the case of the current Nova Scotia Royal Commission on Health Care. Where cost factors are not central to the report, however, they may not be addressed in detail in the report. It is easy for someone who is opposed to the main thrust of the report to undermine its position by claiming that nobody knows what its implementations will cost. Even if a commission takes pains to explain the cost implications of its recommendations, as we thought we had, it is easy for opponents to challenge that the commission's calculations are not convincing.

Then, of course, there's the most difficult problem that commissions face after the report has been rendered and one to which Mr. Justice Grange has

referred: the opponent who goes public with criticism without having first read the report with care.

As suggested earlier, the timing of the report and the extent to which the public is prepared to receive it may be crucial to its success in terms of implementation and acceptance. If the public and the appointing government can receive some advance indications of the likely main thrust of the report, the probability of ultimate acceptance should be enhanced and I believe that happened to some degree in the MacDonald Commission. In many cases, this will not be possible, either because the commission's task is primarily one of fact-finding or because of the urgency of completing the report once the commission has determined what its recommendations will be.

A somewhat related concern is that the appointing government, whether or not it first consults the commission, may wish to implement some changes that fall within the commission's terms of reference before the commission has rendered its report. This happened in our case, though we supported the particular change. While the commission is likely to find such a change upsetting, even if it agrees with the change, as a practical matter, life cannot stand still awaiting the results of the commission's deliberations. Perhaps the best the commission can do is to try to get the government to agree, at the time when the commission is appointed, that any such proposed changes will be discussed first with the commission and will be open to possible reconsideration after the commission has reported.

As well, it would seem wise for the commissioners, at an early stage after their appointment, to question representatives of the appointing government on the extent to which the government may be prepared to consider making radical changes if the commission's findings should point in that direction. One problem is that such a discussion at an early stage of the commission's task will tend to be quite general. As we found, a government that sees no objection in principle to implementing significant reforms may find any number of objections to a specific package of proposed changes; particularly, after the proposals have become public and vocal opposition has emerged. Another difficulty with any such advance commitment, of course, is that a different party, or a different leadership of the same party, may be in power when the time for implementation arrives.

On the day that our report was to be released, we pre-briefed both the government and the media. Undoubtedly, these sessions were necessary and useful, but having regard to the complexity of our report, I believe that they were insufficient. If the instantaneous release of the whole report is regarded as essential, there are serious security problems in allowing any significant period of time for pre-briefing either group. In such a situation, the commission's work should not be regarded as complete until they have prepared for release, along with the report, relatively concise summaries that not only merely list the recommendations, but also explain the problems addressed by

the commission and the basis for its conclusions in language that relatively unsophisticated readers can follow.

Commissioners who have lived long with their topic may easily develop an exaggerated opinion of the extent to which members of the government, the media and the general public understand the background of their recommendations or are prepared to devote the time and effort necessary to acquire that understanding. If it was possible to release the preliminary thinking of the commission at an early stage, the pre-briefing sessions when the report is ready are likely to be much more effective.

Under the governing legislation relating to public inquiries, the commission will generally be required to report to the appointing government which can then decide, subject to the application of any legislation concerning access to information, when, if ever, to release the report. The government may be tempted to postpone the release until a time that is politically more suitable, which may be less than ideal from the commission's point of view. Fortunately, in the case of a high profile commission, such as our own, it would be difficult for the government to sit on the report. If, at the time of their appointment, commissioners have doubts about the government's commitment to release the report when received, they might be well advised to seek an advance agreement to that effect.

The most difficult question for a commission after the release of its report is the extent and the length of time to which commissioners or members of their staff should be available to the public and media to explain the report or to defend it. Perhaps a stronger case can be made for explanation than for defence. I know that we tried to make that distinction, but we found that, in practice, the two could not be separated. In the case of what is essentially a judicial inquiry, as Mr. Justice Grange has indicated, public defence of the findings may be totally inappropriate and explanation may even prove difficult.

In our case, it was agreed that the commission would remain in office for about five months after the release of the report, during which time commissioners and staff members addressed many public meetings as well as sessions of the legislative committee appointed to consider the report. In my opinion, the government deserved to be commended for agreeing to this arrangement. Even after that time, while the public debate continued up to about a year after the release of the report, we, as commissioners, continued to be available to speak to interested groups. In view of the comprehensiveness of the report and the fact that, in our case, the three commissioners were unanimous in their recommendations, our availability to explain and justify the report seemed to us to be an important element in achieving public understanding and in promoting public debate on the merits of the report. To its credit, the government did nothing to muzzle the commissioners at any time.

Even so, at some point sufficient time will have been allowed for public understanding and public debate, after which the government must make some decisions concerning the report; even if it is only a decision to do nothing. At that stage, the commissioners should probably have nothing further to say, at least, until this stage is clearly passed. This happened in our case about a year after the report was released.

If the implementation of part or all of the report becomes an election issue, as it may, this may be embarrassing for the commissioners, but is a possibility that they must be prepared to face. Of course, they should cease to function as a commission before any such election campaign begins.

In some cases, it might prove useful for the commissioners, soon after their appointment, to agree with the appointing government that there will be a defined period of time after release of the report during which it will be acceptable for commissioners to be involved in the public debate and during which the government will not announce its intentions with respect to implementation. Such an arrangement can never be iron-clad because of the possibility that an election may intervene. Nevertheless it might prove particularly useful because it would restrain the government from reacting too quickly to the report, a possibility that commissioners rightly dread. Once the allotted time has expired, the commissioners would drop their public profile and the government would announce its position.

If the government has decided to implement part or all of the report, or is considering doing so, is it appropriate for any of the commissioners or members of the commission staff to be available, either on contract or as members of the public service, to participate in the implementation? Some of our staff members found themselves in that position with respect to some of our recommendations. I can see no objection to involving commissioners or staff members in implementation once the government has made its decision that the implementation should occur. People who are familiar with the background of our recommendations should prove very helpful to the government if they are available to draft or review implementing legislation.

While it has been mentioned several times that there does not seem to be a useful royal commissioner's manual to guide people who face for the first time the substantial responsibilities of being commission members, I hope that the experiences presented at this conference and perhaps some of the advice that has been offered, including this panel's, may be helpful for those who follow us.

Thanks very much.

The third panelist is Professor Alan Cairns.

Professor Alan C. Cairns: Well, as usual, I have not had a lot of time to collect my thoughts, thus, once again, duplicating the royal commission atmosphere in which we participated previously. What I would like to do is try to

make a couple of relevant distinctions and point out what I think might be some considerations pertaining to the post-report activity of the multiple actors involved in commissions, especially policy commissioners.

I think it is correct to say that the two previous speakers on this panel have tended to assume either one person commissions, in terms of the commissioner, or unanimous commissions. In either event, they have tended to look into the issue of what is the role of commissioners after the report. But, of course, there are many more actors than just the commissioners, especially in large policy commissions, involved in the construction of a royal commission report. So what I really wish to do, then, is simply try to make some distinctions and, rather tentatively, point out some concerns.

I guess the initial assumption is that everybody who gets involved in a royal commission has some obligation in their post-report activity not to do anything to undermine the on-going utility of, what we all take for granted is, a significant instrument of government; that is, there is a working premise that one has been privileged to be involved in a major public activity involving a delicate instrument called a royal commission and what you do after the report should pay attention to that fact. Involvement carries with it certain discretion which has to control, to some extent, what you do after the report.

What is really striking in retrospect, from my perspective as a staff member of the MacDonald Commission, is how the conditions were tacit. I am sure at some early stage we probably signed some document which indicated that we were to preserve confidentiality and not report on certain kinds of discussions, but this was a very low level way of drawing it to our attention. I do not recall any circumstance in which we were all brought into a room and told, "Look, after the report, these are the kind of boundaries within which you can undertake any activities in which you might wish to get involved."

I suppose the obligation to preserve the on-going utility of the royal commission instrument counsels a very high degree of discretion and, possibly, silence. However, I would like to raise the possible circumstance in which the obligation to preserve the utility of the royal commission instrument dictates to a particular commissioner or, conceivably, to staff to go public. In its subsequent response to the commission, the government may have been abusing the instrument, by treating in a cavalier way what was an attempt by those involved to make a very significant public statement about some policy issue or some matter which was on the public agenda. I have not really looked into the details of this, but I expect that such considerations might have gone through the mind of Commissioner Claude Forget when after his report (on Unemployment Insurance) was received, he travelled across the country and gave public explanations of his position as a majority commissioner. In a sense, he tried to defend the utility of what had been done.

I believe that Judge Duchesne did make several post-report comments of his report, indicating a certain apprehension or concern about how he thought the government had responded to some of his recommendations. So I think we do have to raise and then publicly explore what are the appropriate circumstances in which a commissioner can feel a certain obligation to go public, not necessarily to advocate the policies of the report, but to defend the utility of an instrument.

I think we have to try to make some distinctions. Professor Harris indicated an important distinction between explanation and advocacy, but that is a very difficult one to sustain because, essentially, a policy-oriented commission is an exercise in advocacy. That is, it is an exercise in propulsive reasoning typically designed to bring the reader on side with respect to the policy proposals. So although we are probably always happier to say that it is reasonable to go public to explain a report rather than to advocate adoption of a report since the report itself by definition has positive policy proposals, I think the distinctions will tend to fade as the discussion proceeds.

Now, a very important distinction, in terms of post-report activity, of all those involved in a royal commission is whether their post-report activity involves support of the major recommendations of the report or criticism of the major recommendations of the report. The two previous speakers on this panel have not had to face that issue, but in the case of many of these commissions, which increasingly involve very heterogeneous and diverse groups of commissioners brought together in the anticipation that they will mobilize consent for the policy proposals as they emerge, what happens is that there is a fractured commission and a number of commissioners who are not on side. So we have then to ask the question whether there are any differences in the post-report responsibilities of the chairman on the one hand and the commissioners on the other or commissioners on the majority side on the one hand and the commissioners on the minority side on the other.

Now, the chairman clearly has a greater involvement than anybody else, if for no other reason than that his or her name is attached to the report and, to some extent, the report is a sort of personal document of the chairman. It is clear, for example, that the chairman of the MacDonald Commission could have issued a report even if all 12 commissioners had dissented. It would have been the MacDonald Commission Report which essentially contained his personal position. That is not a very plausible or a very helpful stratagem, but that can well happen. So, post-report, the chairman must feel a greater obligation to participate in the debate because it is his or her reputation which is going to rise or fall with the subsequent reception of the report.

Is there a somewhat different obligation on minority commissioners? That is, should your dissent be kept in a discrete way simply in the pages at the back of the commission report or are you entitled, in exactly the same way as any other commissioner or the chairman, to go public after the report and

carry your dissent into the public arena? Certainly, on the MacDonald Commission a number of commissioners who were on the minority in particular issues have gone public about their minority position and have continued to argue against certain aspects of the report.

Presumably, a relevant discussion is, as Justice Grange mentioned, whether the chairperson is a judge or not. Apparently, the relevance of that is if one is a judge, one carries with one certain obligations related to being a judge as distinct from being the commissioner, which governs one's post-report activities. Be that as it may and, again, subject to checking the historical record, Emmett Hall, as I recall with respect to the Health Care Commission in the mid-60's, did conduct a very extensive public speaking tour on behalf of that report. Now, that was a policy commission rather than the kind that Justice Grange was concerned with and possibly the post-report role obligations on judges differ depending on which category of inquiry is involved. Or does it depend on the judge?

On the MacDonald Commission, of course, the chairperson was not a judge. He was a lawyer and a former cabinet minister, Donald A. MacDonald, and he has participated very extensively in the post-report debate, especially with respect to free trade. I have not heard any particularly negative public observation on his activity on the ground that he is allegedly doing something improper as a former chairperson of a commission which made an important public statement in that area.

What are the different obligations which attend the post-report activity of commissioners and various staff members? In general, one thinks staff members are pretty well subject to confidentiality; they are pretty well subject to following the commission line in any post-report activities in which they engage. On the other hand, as an academic who was involved with the MacDonald Commission, I have been in on a good baker's dozen academic sessions discussing the MacDonald Report. This was assumed to be part of my normal academic obligations to participate in public arenas discussing the report, pro and con.

What is the freedom with which those involved in commissions of inquiry can discuss the internal processes of the commission which led to the particular outcomes? In general, at this conference you have all seen people standing behind this lectern who know a lot more about what went on than they feel able to communicate to those who are sitting in front of them, because they do feel there is a certain necessary discretion and constraint which must govern their activities. That is, they were privileged observers and they must not abuse that privilege. But, on the other hand, this conference is testimony to the assumption that it is eminently desirable that we know a great deal more about the internal workings of royal commissions so that the future performance of these instruments of governments may be benefited by the release of that kind of understanding.

For example, we have had one quite interesting piece, to which Liora Salter referred, by Richard Simeon who was one of the research co-ordinators of the MacDonald Commission. He explains there, in analytical terms, why he thought the MacDonald Commission came to the particular outcome that it did in relation to, essentially, free trade and preference for the market. That was done in terms of process and I think it was a perfectly acceptable activity for Professor Simeon to become engaged. On the other hand, had any of us, who were privileged to sit behind the table when the commissioners were discussing some of these issues and to participate, when asked, in the discussion, disclosed who was on which side and who won and who lost, that, I would think, would have been an improper disclosure.

A final point is whether commission staff identify their commission role when they engage in post-commission comment on the report. Commissioners do not have the choice. Lots of academics who were involved with the MacDonald Commission report have engaged in the public debate about the report and, in most cases, I do not think they have identified that they have a connection with the report. It is complicated to know whether they should, not necessarily parlay their report connection into something which gives a special credibility to what they might say, but indicate discretely to those hearing what they say that it should be put in a context of recognition that they were involved in the report.

Well, no answers, but many questions. Thank you.