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Willard Estey
Supreme Court of Canada

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*Willard Estey**

Professor Wade MacLauchlan: We have the great pleasure of being joined by Mr. Justice Willard Estey who, among other things, sits on the Supreme Court of Canada. As regards his involvement with commissions of inquiry, Mr. Justice Estey is eminently qualified to speak from many different experiences as advocate and counsel for various interests before commissions of inquiry during his long period as a busy practitioner. As well, during that period he served as counsel to a variety of commissions. Since going to the bench, he has conducted three inquiries; into the Steel Industry in Ontario, into Air Canada and, most recently, into the collapse of two banks in Western Canada. I suppose it tells you something about the person when you consider that in all three of those cases the inquiries were conducted expeditiously and on a fairly bare bones budget. I believe the longest of any of those three inquiries was ten months, the time required to conduct the banking commission.

Having worked with Justice Estey for a year myself, I can tell you that it is not inappropriate that he is having the last word in this session. I have no recollection of ever being involved in an exchange with him where he did not have the last word. At that, I will turn it over to him.

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* Former Justice, Supreme Court of Canada. Commissioner in the Air Canada, Steel Industry, and Western Banks Inquiries.

Mr. Justice Estey: The inquiry process is, of course, straightforward. The difficulty at the outset, which continues throughout, is to discharge your mandate without becoming an inquisition, without becoming unduly inquisitorial and without maligning the witnesses and behaving like a New York district attorney on the television. That is the main and number one problem with the commission's technique. It is very destructive of by-standers and people who have done nothing to get in the line of fire of the commission except write a letter, receive a letter or get a phone call. The bigger the name of the witness, the more tenuous the connection which can get him into the scene.

Gordon Henderson, Q.C., who has a lot of experience in this field, not unlike John Sopinka, said, "[t]he wide discretion of commissions to adopt a method or technique of investigation can easily transform a commission from an inquiry into an inquisitor." Well, it does not happen if you break the function down into the four parts and stay with it. First is the study phase, then the report on the facts, the conclusions and the recommended solutions if mandated. It works if commissioners and the counsel stay within those four corners and obey this simple theorem: the duty of a commission is to investigate and report on the assigned matters as the public interest may require, in the shortest time reasonably possible and at the lowest possible cost.

This new wave of staff expansion for inquiries, in my view, threatens the very usefulness and, indeed, the existence of the institution of the inquiry in the democratic community. The cost of the inquiry is now putting the process out of the reach of small provinces and municipalities and making it inappropriate or counter-productive, economically speaking, for certain topics. In my own day at the bar and on the bench, I have seen the cost of an inquiry go from $60,000 for the Steel Inquiry, which included the printing of the report, to $1,400,000 for the Banking Inquiry. Fifty per cent of that cost was paid out to lawyers, either the commission counsel and staff or (and I'll come back to this) to counsel for witnesses and participants whose active participation in the inquiry was essential to the success or discharge of the inquiry's mandate.

There are other reasons for this escalating cost; for example, translation and, although they will not allow me back in Ottawa for saying this, we are now forced to have the government printing bureau print the report. And, of course, that amplifies the cost by ten and the time factor by maybe a hundred. But there is nothing we can do about either.

Now, I would like to talk on the practical side of this issue. There are two things that have to be done when an inquiry is launched, in my experience. One is to hire the staff, if you can, the day that you are appointed — get a counsel and get him hiring. You hire and start the next day if you can. We started the Steel Inquiry the next day and the Air Canada Inquiry the next day, but the banking commission started three days late because we had to find a place in Ottawa to have a hearing.

But the reasons it is fortuitous and advantageous to you and to the community to start quickly are manifold. It is a great discipline for your staff. They realize this is no place to waste time. You have to find the witnesses, look at the documents and get the thing going.

I do not wish to sound as though I have been running around finding wrongdoing, but it is amazing how papers get put in a different order if you give people time to shuffle them. You are far better to come down like Old Granny Hawk in *Peter Rabbit's Bedtime Stories* and grab them the first day. Then there is a little chaos, but you have that anyhow, and, if you are a lawyer, you are used to it. You study the documents and decide what you are going to use and what you are not going to use. Also, it is great to get people in the witness box before they have had time to be advised and coached by their lawyers or their friends. Get their reaction to this problem as soon as you can.

And, of course, the last benefit is the quicker you start, the quicker you are finished and the report is no good unless it is timely. Whatever other virtues it might have are wasted if it is not delivered in a timely way.

We really should operate inquiries on a two-stage process. If you simply throw the gates open by running an ad in the paper saying you are open for all witnesses starting at ten o'clock next Tuesday, you are going to get what you deserve. There will be people coming in there with a complaint about the Sears-Robuck catalogue and everything under the sun. There will be people who mean well and who do have information but drown their kernel of information with a whole raft of irrelevancies. Worst of all, there will be documents surfacing in that process which are ultimately damaging to innocent by-standers; witnesses with no real connection to the alleged wrongdoing or whatever the subject matter of the commission inquiry.

The first stage is an *in camera* review of the evidence which will be tendered by a witness and the documents which will be displayed by a witness so as to cut out that which is damaging to the general public and to particular members of the public. In the case of the Banking Inquiry, for example, we expurgated thousands and thousands of documents. We had 4,900 exhibits and some of them had pages and pages. You can imagine the amount of paper in a bank office. We took out the names of all the borrowers and guarantors. We took out identifying circumstances, age, place of work and so on. And all that because the press would seize upon it in the locale of the bank branch and out would come damaging private information. So the first stage is to clean up the evidence before it goes out; not to censor it, but to protect the public, protect individual members of the public.

Then the second stage is the obvious one: the hearing in open forum. And that takes me to *in camera*. I see in judicial review cases some reference to the fact that *in camera* hearings are authorized, indeed, encouraged. I do not really believe that. I think the rule is the opposite. You should hold the

hearing in public so long as it is not going to cause difficulties: (a) for the public; and (b) for the efficient discharge of the mandate. Then you go *in camera,* and you get into all kind of difficulty. In the Air Canada Inquiry, we went *in camera* because the evidence, in my opinion, would have virtually destroyed the career of two or three people, some of whom did not work for the airline.

Now, as to the role of commission counsel, I said I am going to accept what John Sopinka said, but in his usual modest way, he did not cover some of the things that have to be said about commission counsel. First of all, he is counsel to the commissioner. He owes a duty to the commissioner and the commissioner to him or her. The planning of the presentation of witnesses is essentially counsel's. With one exception, he examines all the witnesses. The exception is where the witness asks to be examined by his own counsel and no apparent harm or delay would be caused by that. Then, you grant that request.

The counsel must present summations of evidence in the course of the hearing as segments are closed or at the end. He is the one that has to do that, in fairness to all participants. Where possible, he presents the summary of the evidence as he sees it to participating counsel well before he presents in open commission. When he comes to argument, it is the same thing. You outline the argument in written form and present it to participating counsel before they appear, because they are then able to meet the case against them and against their client. All that takes me to section 13 of the federal Act.[1] It provides that you must give notice, as you all know, when a comment adverse to the interest of a person or organization or group of persons might be made in the report.

Where you have a large scale record and a long hearing, it is very difficult to single out what it is that might find its way into your report. Of course, you can wait until you draft the report. That strikes me as being very unfair. You crystalize your thinking before you hear what the object of your report thinks about that point. The compromise which I "stumbled upon" is to instruct commission counsel to prepare their summation on the issues in a neutral way, a genuinely neutral way, where the pros and the cons are both given equal time and set out in writing, and that document is presented to all the participating counsel and any other participant who wanted to have it direct instead of through a lawyer. The purpose was that when summation was delivered, plus the summary of evidence prepared also in a neutral fashion by counsel, it was possible for people who might fear an adverse report, or comment adverse to their interest in the report, to come forward and say, "is that the notice?" or "I waive notice." Now, the reason they waive notice is that once you give out notice that there is going to be something adverse to Mr. A

1 *Inquiries Act,* R.S.C. 1985, c. I-11.

or Mrs. B, that is all the media really broadcasts. It is all over the place. I have been on two inquiries now, where professional people were involved, and if a notice is given that there may be something adverse in interest to the professional, that does untold damage in their professional neighbourhood and they are quick to say, "I waive my right to notice." It has to be an informed waiver, so you cannot ask it until you have delivered: (a) the summation of the facts, and (b) the summary of your commission's submissions and with a supporting warning that this is not binding on the commissioner, who, indeed, had nothing to do with its preparation.

That takes me to something else that I would like to dwell upon because it is a real, true, present-day, modern problem. As commissions of inquiry become more and more complex, as a mirror of our complicated society, it becomes more difficult for the uninstructed general member of the public to appear without risk before this creature, the royal commission. Therefore, most witnesses now come with at least one lawyer. In the Banking Commission we had a kind of a roll call kept by our secretary. Some days, we had 40 lawyers. Now, all of that is paid for by you and me, but think about the other side. People who are going to be examined look at this army of lawyers and they say, "by George, this is risky. I need a lawyer."

Let's take a practical, absolute, exact illustration. We have two banks that went into receivership and the management of the bank, of course, were in the line of fire for actions by debtors, creditors, boards of directors, shareholders, auditors, inspectors of banks and the federal insurance corporation. So they had to have legal advisors. We, therefore, had to sit down with them one at a time and work out how many witnesses we wanted to hear, which parties we were interested in and who their lawyers were. We had to bring them in and decide how much we would pay them. Now, that is a little risky because the arbiter should not be telling the defendant, the accused, how much of a lawyer he can buy. So we used the department of justice and they worked as a kind of a taxing master or taxing officers as we have over in Osgoode Hall. We set the scale on how much and how long and we had funny little rules. They could not bring their law student if they think we were going to pay him. They could bring them if they wanted. And they could not have an assistant unless we thought the issue was important enough at that time. We paid out some money, but I think that tomorrow or the next day, that is going to become such a great factor that we might make the institution of the commission of inquiry into the dinosaur of our legal institutions. They will just become prohibitively expensive, too invasive and, therefore, too expensive.

Well, that is enough of that. I do not want to leave the impression, however, that we could operate the inquiry without lawyers. The amount of blood on the walls would just be hopelessly irremovable and damage to the public, at large and in particular, irreparable and life-long. The law profession in its

highest role finds itself involved in this constant, increasing, escalating battle between the state and the citizen. It manifests itself in the inquiry as clearly as it does anywhere. The state is represented by that inquiry and the citizen is caught up in the laws of it. Those citizens have to have equal protection.

Even in my short time in this game, we have moved from the way I handled the Air Canada Inquiry. There, I absolutely refused to give out any such access to the treasury because we did not think the taxpayers should pay, but there was one organization that had to be present for our good and for their good and they submitted, what I thought, was a huge bill. The trouble is, I had been out of practice for five years; I did not realize it was a bargain and we would not pay. Today, you cannot do that. I think it is a good thing that we have shifted gears on that issue.

I remember writing a little report, mostly to myself in Air Canada, and looked at it the other day and saw that I said "We will not be party to putting in the hands of the law profession another combination to unlock the community treasury," and so we turned them down. But when we were faced with the issue in Calgary and Edmonton — impossible!

Things were are essentially political should go into a political forum for disposition, not before a judge. Not because he could not handle it. Most judges are aware of what makes the country tick politically. They cannot stand the perception the public will have any more than the institution of the inquiry can withstand the terrible perception which has come out of some inquiries, which are essentially criminal investigations running an end run around the *Criminal Code*'s[2] protective processes. The public, looking at it on television, thinks it is a trial, and a criminal trial at that. We cannot stand for that, the misuse of a judge.

The reason for having judges in on other issues is two-fold. One is the government gets them for nothing. The second thing is that they are trained as they were lawyers for a long time. They are trained on the assembly and analysis of facts, the drawing of inferences and the building of conclusions and from that, the construction of political science recommendations for new statute law. So it is attractive to appoint the judiciary to inquiries, but you have the problem of losing some inherent value in the institution.

Now, I come to the report. In my view, based on hard experience, if the commissioner is into a report of fact-finding or has the by-product of assigning blame, even indirectly and if the state and the executive and legislative branches may be adversely affected, the one thing the commissioner has to have is the right to print his own report, to time the release of his own report and to declare when it is released. The only time you can get this right is when

2 R.S.C. 1985, c. C-46.

you are being appointed, and they are anxious to get you appointed and get you going. Your bargaining power is great then; it is nil later.

Now, as to what you can do after the report is out. I am a strong believer that silence is golden on the part of a commissioner and a judge. You make your report and that is the end of that. Emmett Hall and I come from the same block, on the same street, in the same town, in the same province and we are diametrically opposed on this. At the time that he was around selling the worth of his medical report, I was a lawyer and outraged by it. I had been counsel for a number of royal commissions and commissions of inquiry and the last thing I thought the public needed was further education by the commissioner who may have been right in the first place, but probably was wrong in some aspects. He is *functus officio* when he is done and he should keep quiet. It is tough, for the reasons Mr. Justice Grange gave, because the press is abysmally incompetent. They cannot even get the scores right on the sports page so how are they ever going to get a royal commission report straight? (Or, in our case, where they print what they think is a resumé of our judgments.) Sometimes I do not recognize what I wrote.

A royal commission is a terrible mix-up and great temptation to straighten people out, but that is not what makes democracy tick. God knows what makes democracy work, but it is not made to function by the participation of a judge or a commissioner telling the public what he meant to say when he has exhausted the right to say it.

Well, then you come to the question, how do you make sure the press and the public get through and find out what you are doing? One way is to have a fixed camera which covers the proceedings, so the public can see, without any edited expurgation, what the witness said and what the witness looked like when he or she said it. I have had two inquiries like that and they have great value to the public and to the commission. One benefit is, you do not have the press running in and out all the time. You rig up a control room outside and they all have VCRs in there. They sit and write their notes and phone their office instantly from that control facility, which is quite cheap. They put it up themselves. And then you have an instant, constant, permanent, uneditable record of what went on.

The way to control commissions of inquiry is not to try and rig up a tight-fitting statute, but to expand judicial review. Personally, I do not think you need it. I toted up the judicial review cases a while ago, and I would say 50 per cent of the time the reviewing tribunal was wrong because they did not know how a commission of inquiry has to work. Once in a while they are all right. I think on a constitutional level, judicial review is functioning well. From the point of view of keeping a commission within its mandate, it functions well; perhaps not so well when it comes to telling them how they should conduct their affairs, as to rules of evidence and so on. I think that is up to the commissioner.

Where does all this lead to? What future, if any, does the institution of the inquiry have? Well, I think if you go back over the past, you can build a pretty good case that the usefulness of an inquiry as a fact-gathering and conclusion-drawing organization is on the wane. We have probably seen the last of the purely political inquiries. We probably have seen the last of the great major economic studies because they cost so much relative to what the legislature seems able to extract from them. But that does not mean we have come to the end. Probably the economics can be overcome by a more professional approach from the government itself in staffing these inquiries and keeping control of how much they are going to cost, how long they will sit and so on. I think as long as we have lawyers active in the community, we will have these show trials periodically as a cathartic in democracy and it is not bad.

I am sure that, whether we like it or not, inquiries will be here for a long time. I sometimes wonder if there will be a commission of inquiry appointed about the year 2100 whose subject of inquiry is "Why did we abolish the commission of inquiry about 1990?"