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## Introduction & Table of Cases

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# Introduction

*Innis Christie and A. Paul Pross\**

## 1. INTRODUCTION

Commissions of inquiry have been popular mechanisms with Canadian governments. Despite a widespread view that they are used principally to delay action while removing embarrassment from the immediate vicinity of governments, it is a fact that commissions of inquiry have repeatedly — and often highly successfully — served as vehicles for analyzing policy, for evaluating outworn or failed policy, for identifying a consensus about policy and for building support for new policy directions. They have brought facts to light both about specific incidents and about matters of policy concern; facts as diverse as what actually happened at a given time and place and the real makeup of public opinion on the subject matter of the inquiry. The roster of inquiries that have served in these capacities is long and impressive.<sup>1</sup>

Every institution has its day, however, and in recent years the usefulness of commissions of inquiry has been called into question. As Bruce Doern and Richard Phidd have pointed out, all too often public assessment of their work

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\* The authors are respectively Dean of the Faculty of Law and Director of the School of Public Administration at Dalhousie University. They were assisted in planning and organizing the conference on "Commissions of Inquiry: Lawyers' Values and Public Policy Makers' Values" by Professor Wade MacLauchlan and Dianne Pothier of the Faculty of Law. The conference received financial assistance from the Law Reform Commission of Canada. Mrs. Heather Brenton, secretary of the Dean of Law, provided invaluable organizational and secretarial assistance. Mr. Michael Deturbide, editorial assistant for the Dalhousie Law Journal, gave many hours to putting this volume into final shape.

1 See G.F. Henderson, *Federal Royal Commissions in Canada, 1867–1966: A Checklist* (Toronto: University of Toronto Press, 1967) and Lise Maillat, *Provincial Royal Commissions and Commissions of Inquiry, 1867–1982: A Selective Bibliography* (Ottawa: The National Library, 1986).

has reflected a “scoreboard mentality”: “How much did the commission cost? How many recommendations did it make and how many were adopted by the government?”<sup>2</sup> They suggest that with the plethora of bodies currently able and eager to advise governments on policy, it is often hard to determine whether or not a particular commission has been influential. At the same time, both in assessing the functioning of inquiries and within inquiries themselves, an important value conflict between what we have called lawyers’ values and policy makers’ values has served to render commissions more complex, time-consuming and expensive.

The Dalhousie conference on commissions of inquiry was called to discuss the extent to which this conflict of values has changed — or perhaps even undermined — the work of modern commissions. It asked whether lawyers’ values have dictated so many changes in the procedures used by inquiries that inquiries themselves have failed to meet the needs of policy makers. That is, to what extent are procedural arrangements that reflect legal concerns for the rights of individuals contributing to a growth in the costs of inquiries and to the time they consume? To what extent do lawyers’ concerns inhibit the proper discussion of public business by narrowly restricting the scope of a commission’s inquiry and by hemming in public input with elaborate procedural requirements? From the other perspective, to what extent do lawyers’ concerns respond to threats to individual rights posed by an unbridled instrument of government caught up in a new love affair with the media and with television in particular?

The conference, which was the first to be held on this subject, was sponsored by Dalhousie Law School and the School of Public Administration at Dalhousie University and benefitted from the financial support and participation of the Law Reform Commission of Canada. It attracted a large and well-informed audience and an impressive group of papers, which are reproduced here, culminating in a salty, practical overview by Mr. Justice Willard Estey, then of the Supreme Court of Canada, and one of the country’s most experienced and effective commissioners.

In his dinner address which opens this volume, the then Deputy Minister of Justice, now Chief Justice Frank Iacobucci of the Federal Court of Appeal, briefly taps the vein of cynicism that runs through many discussions of commissions of inquiry, quoting from A.P. Herbert’s poem, “The Royal

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2 G. Bruce Doern and Richard W. Phidd *Canadian Public Policy: Ideas, Structure, Process* (Toronto: Methuen, 1983) at 542–543. An excellent survey of the role of inquiries is found in V. Seymour Wilson, “The Role of Royal Commissions and Task Forces” in Peter Aucoin and G. Bruce Doern, eds., *The Structures of Policy-Making in Canada* (Toronto: Macmillan, 1971) at 113–129.

Commission on Kissing".<sup>3</sup> More seriously, Chief Justice Iacobucci names some of the many major policy advisory commissions of inquiry which stand as sign posts in Canada's modern history: The Rowell-Sirois Commission, The Massey Inquiry, The Gordon Commission, The Glascoe Commission, The Hall Inquiries into health care, The Carter Commission on taxation, The Bilingualism and Biculturalism Commission, The Royal Commission on the Status of Women and, most recently, The MacDonald Commission. "The two questions to ask," Chief Justice Iacobucci says, "are: in what circumstances is a commission of inquiry the proper instrument and, when a commission has been used, how do we assess its effectiveness?" These general questions, and the specific standards which he suggests should be used in answering them, provide a useful framework within which to ask the more specific questions about lawyers' values and policy makers' values that we have posed.

In the opening session, Professor A. Wayne MacKay of Dalhousie Law School sets the stage by considering the mandates, legal foundations and powers of commissions of inquiry. He identifies the dichotomy between policy advisory and investigatory commissions, so strongly advocated by The Law Reform Commission of Canada in its working paper and report of 1977 and 1979,<sup>4</sup> and relates that dichotomy to the legal root of commissions of inquiry in the Federal *Inquiries Act*<sup>5</sup> and its provincial counterparts. Most important, Professor MacKay flags potential dangers to the rights of individuals and discusses what protection there may be for them in the various inquiries Acts, in the *Charter of Rights and Freedoms*<sup>6</sup> and in the common law rules of natural justice. After all, it is the possibility of judicial review in the courts of any aspect of an inquiry commission's work that gives lawyers' values the ultimate upper hand. Professor MacKay does not, however, hesitate to call into question some of the traditional "home truths" about the strengths, and the weaknesses, of judges and lawyers in this sort of role, and the notion that law and policy, or politics, are separate and distinct entities.

On a different plane, Professor MacKay leaves us with the question: how will a commission of inquiry be identified through its life and in history, by the name of the commissioner or chairman of the commission, or by its subject matter? Perhaps the name of the person whose activities or treatment led

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3 As Mr. Iacobucci points out, the true "Royal" commission, established under the Crown prerogative is no longer used. See also A. Wayne MacKay's comments in his keynote address.

4 Law Reform Commission of Canada, *Commissions of Inquiry (A New Act), Working Paper 17, 1977* (Ottawa: Minister of Supply and Services, 1978) and *Advisory and Investigatory Commissions, Report 13, 1979* (Ottawa: Minister of Supply and Services, 1979).

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

6 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

to its appointment? In this respect, by the stroke of a pen, the media can set the public focus. In the end, it is that public focus with its potential for damage to individual interests by trial in the media or, indeed, by trial by the commission itself which, without the protections afforded in court proceedings, has given rise to the tensions that were explored at the conference.<sup>7</sup>

## 2. IS THERE A CONFLICT BETWEEN PUBLIC POLICY MAKERS' VALUES AND LAWYERS' VALUES?

The policy maker sees commissions of inquiry as stepping-stones to policy. In this guise, inquiries serve several functions, of which the most important are the elucidation and education of public opinion, the discovery and exploration of policy options and the making of recommendations for action. There is an assumption that policy-oriented commissions will work systematically and objectively to determine both the public interest and the extent to which the people will permit the state to impose a particular interpretation of that interest.

The legal practitioner, on the other hand, is primarily concerned with fact-finding commissions of inquiry. A lawyer may well be retained by a client whose conduct is the subject matter of such an inquiry. In that setting, every lawyer will embrace the words of Mr. Justice Schroeder of the Ontario Court of Appeal:

It is true that [the clients] are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover, it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.<sup>8</sup>

Even more invidious is the potential effect on witnesses, who are, after all, usually before the commissions of inquiry only because they are "thought to possess useful information innocently obtained", or the effect on "someone who was not present and knows nothing of the inquiry in question"<sup>9</sup> but finds

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7 Professor MacKay alerts us to the significance in this context of the Canadian constitutional division of powers. A commission can only work within the constitutional jurisdiction of the government that appoints it. See David Grenville's paper for discussion of a joint federal-provincial commission of inquiry: *The Ocean Ranger Inquiry*.

8 *Re the Ontario Crime Commn.; Ex parte Feeley and McDermott*, [1962] O.R. 872, 133 C.C.C. 116, 34 D.L.R. (2d) 451.

9 Law Reform Commission of Canada, Working Paper 17, *supra*, note 4.

himself or herself adversely affected by the proceedings. As The Law Reform Commission of Canada stated in its 1977 working paper:

Those appearing may find that their conduct is called into question by Commission Counsel or by witnesses. The nature of the "case" that they have to "meet" may never be explained; perhaps there is no opportunity to make a full statement or cross examine witnesses; legal counsel may not be present; the proceedings may be public and widely reported. Similarly, someone not even appearing as a witness may be mentioned in an adverse manner in the course of an Inquiry; for him, there is not even the limited safeguard of, at some point, actually appearing before the Inquiry. It is possible that a man not suspected, let alone charged, with wrong doing may be ruined by irresponsible accusers whom he has not even been able to properly confront.

David Scott, Q.C., addresses many of these concerns in his paper "The Rights and Obligations of Those Subject to Inquiry and of Witnesses". It is clear that there are differences in the law from province to province and in the federal jurisdiction, but, generally, the rights and interests of individuals, with which lawyers' values are so much concerned, are far from well protected by legislation, even, as Professor MacKay reminds us, with the *Charter* now playing a role. We do need to be concerned that lawyers' values not impede the public policy advisory function of commissions of inquiry, but civil rights are important, and commissions of inquiry can be instruments of oppression.

Lawyers, of course, also act as commission counsel, a role particularly important in investigatory commissions. In his paper, John Sopinka, now of the Supreme Court of Canada, poses many of the dilemmas facing a lawyer in this role and provides assistance in resolving some of them. Mr. Justice Samuel Grange of the Ontario Court of Appeal and Mr. Justice Willard Estey, of the Supreme Court of Canada at the time of the conference, are experienced public inquiry commissioners. In their addresses to the conference, they demonstrated the down-to-earth practicality good lawyers can bring to quite diverse inquiries, including those with a significant policy advisory function.

Patrick Robardet, a lawyer with The Law Reform Commission of Canada, explores the fundamental question of whether the "adversarial" model, which appears to guide the approach of investigatory commissions of inquiry, should be changed to a more inquisitorial model. Foreshadowing the perspective of the scholars of public administration and policy making who addressed the conference, Dr. Robardet questions the very existence of the dichotomy he addresses.

The policy perspective was represented in the conference through the papers presented by Alan Cairns, Liora Salter and Peter Aucoin, all of whom brought their own experience in commission research to bear in their analyses of the policy task and policy roles of inquiries. For Cairns and Aucoin, both of whom were associated with the MacDonald Commission inquiry into

Canada's economic development, the policy role was dominant and the impact of lawyers' values on commission work was minimal. Professor Salter, on the other hand, reflected on her own experience and her research into a number of inquiries that had been expected to make policy recommendations and that had investigated the facts surrounding the use and misapplication of chemicals. In her view, legal values have a significant and often deleterious impact on the policy side of inquiries. She sees the problem displayed most clearly in the fact that "inquiries set up all participants as equals, according them all the same type of rights of participation," despite the fact that some are there to defend the interests of their clients in law while others want to engage in policy debate. The former seek to limit the range of inquiry and to introduce procedures that protect the rights of individuals; the latter want to extend discussion and to engage the participation of all relevant interests.

Professor Salter's assessment of the tension between lawyers' values and policy makers' values leads her to reject the long-standing practice favoured by The Law Reform Commission of Canada which classifies inquiries according to whether they are concerned with finding fact or with exploring policy. Like Patrick Robardet, she argues that there is no dichotomy separating types of commissions. She does not address the issue in terms of the adversarial and inquisitorial models, as he does, but rather rejects the traditional dichotomy for a continuum ranging from inquiries into "public issues" to investigations into "individual misconduct". At the latter end of the continuum the work of the inquiry is closely related to that of the courts. The major distinction is that the investigation into matters of fact has the potential to engage public issues. Matters of broad public concern are dealt with by inquiries working at the other end of the continuum. These distinctions are not very different from those made in the "policy inquiries" and "fact-finding inquiries" dichotomy. But Professor Salter prefers a continuum because it allows her to insert a third type of inquiry, one that is both "fact-finding" and "policy-making", and to suggest a graduation of these two functions from one end of the continuum to the other.

Thus, in inquiries into misconduct the clash of values is explicit and open, as lawyers seek to defend their clients' interests and policy analysts search for information that will indicate how similar problems can be prevented in the future. In the middle of the spectrum of inquiries — where matters of fact may be in question, but matters of policy are equally important, as in an environmental assessment — the clash of values is implicit and has much less impact on the ability of the inquiry to investigate issues or to secure public participation (though it does have an impact). At the other end of the spectrum — in pure policy enquiries — there is no clash of values.

The significance of Salter's continuum lies in its implications for the organization and conduct of inquiries. As she points out, inquiries into fact tend not to establish procedures that take into account the different interests

and approaches of participants. Presumably inquiries conducted at the middle of the continuum would do this. In fact, as David Grenville's paper suggests, the Ocean Ranger inquiry did precisely this when it organized a special conference at which Commissioners, industry and government representatives, and experts discussed the policy import of the commission's hearings and the research findings. Similarly, an awareness of the implicit clash of values at the middle range of the continuum might suggest organizational arrangements that would facilitate policy debate and fact-finding. For example, instead of assigning the overall direction of the inquiry solely to a commission counsel, as is usually the case in inquiries into misconduct, it might be useful to appoint as well an executive secretary who would be responsible for ensuring that the policy implications of the inquiry were properly examined. Again, the Ocean Ranger inquiry offers a practical example.

### 3. THE MANAGEMENT OF INQUIRIES

In the work of inquiries, as in most aspects of public administration, good management generally goes unremarked, but poor management is obvious. At every stage of an inquiry's life, whether it involves the definition of the policy task, the weighing of alternatives or the communication of its findings and recommendations, the quality of management will determine the success or failure of the commission.

David Grenville, who was Commission Secretary to the Ocean Ranger inquiry, described to the conference just how complex and multi-faceted the task is. Detail cannot be ignored. Equally, major concerns, such as the physical location of the inquiry, must be thoroughly understood and their ramifications provided for. Neither of these points should surprise anyone who has observed one or two inquiries, even from a distance. What is striking, however, in David Grenville's account is the extent to which the commissioners and their core staff — most of whom will be unfamiliar with the practices of the sponsoring government and of the process of conducting an inquiry — are left on their own to organize the endeavour and to make crucial decisions on organization, research strategy, the timing and conduct of public hearings, and the assimilation of findings. As Grenville points out, "it would seem reasonable to expect that the government which sets up a commission of inquiry should, in the initial stages, provide it with considerable practical assistance and advice." He attributes a failure to do this to a respect for a commission's independence. This may be so, but it may also be caused by the *ad hoc* nature of the inquiry business. As Aucoin points out, there is a lack of collective memory concerning the general management of inquiries. Even the federal government assigns an extremely small staff to the unit of the Privy Council Office which is responsible for looking after inquiries. A core group of experienced officials is not available to assist neophyte commissioners and



their lieutenants, though an informal roster of talented individuals is maintained.

Perhaps this is as it should be. The independence of a commission has to be preserved and it might be undermined if the core staff of the inquiry were to be closely associated with the sponsoring government. Equally, the diverse concerns of inquiries probably make it desirable that their supporting staff be more familiar with the substantive field under investigation than with the process of inquiry administration. Nevertheless, it is disconcerting to realize that the chief staff and support of commissioners as they set out on their quest is Harry A. Wilson's *Commissions of Inquiry: A Handbook of Operations*,<sup>10</sup> which is an invaluable guide at the federal level, and useful for provincial commissioners, but no substitute for the day-to-day advice and assistance of someone who knows the ropes.

If good management is the key to the success of a commission, the key to good management is the quality of the staff the inquiry can attract. In this respect, David Grenville's paper demonstrates the need for administrators who are familiar with the workings of the sponsoring government and for research directors and technical advisors who are highly experienced in their professions. The pressure to complete an inquiry within a short time and the public nature of the task allow very little room for learning on the job.

The Ocean Ranger inquiry faced several unusual conditions and was also a trend-setter. As the first commission of inquiry to be sponsored by two levels of government, the inquiry had at the outset to overcome the entanglements that could result from trying to conform to the administrative procedures of different governments. It also had to conduct its investigations very far from the officials who were charged with accommodating its administrative needs, monitoring its financial management and providing translation and publication services. In consequence, its use of advanced communications technology was extensive, as is evident from David Grenville's account, and has demonstrated several important applications for future inquiries. The electronic communication of text, for example, permitted long-distance translation and publication. Teleconferencing assisted consultations with expert advisors. Facsimile transmission of documents also aided in consulting experts. It is quite clear from Grenville's account that technological innovations of this sort have introduced new dimensions into the conduct of inquiries. There is less need for them to be closely tied to a major administrative centre; information gathered in the research and hearings processes can be more readily retrieved and consultations with experts or witnesses in distant communities will be a lot easier.

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10 Harry A. Wilson, *Commission of Inquiry: A Handbook of Operations* (Ottawa: Privy Council Office, 1982).

The chair of the conference's session on "Managing the Inquiry", in which David Grenville's paper was presented, was J. Gerald Godsoe, Q.C., Commission Secretary to the MacDonald Commission. In his comments following David Grenville's paper, Mr. Godsoe spoke of some of the terms which, in his opinion, management of a commission of inquiry should ensure are part of its mandate before it goes to work; a sunset clause, a right of access to government documents and the right to publish. In his closing comments, Mr. Justice Estey also emphasizes the importance for the commissioners of getting into their mandate, from the outset, aspects of inquiries which they consider important. His Lordship mentions particularly publication of the report. Mr. Godsoe advised those charged with responsibility for writing a commission's report to "think early and often" about the substance of the report they would ultimately produce. Mr. Godsoe's comments are valuable and they are reproduced in part, following Mr. Grenville's paper.

As Mr. Godsoe, who is himself a lawyer, pointed out, the MacDonald Commission had no commission counsel, presumably because it was viewed as an entirely advisory "policy" commission, rather than an investigatory one. However, the Inquiries Acts, both federal and provincial, appear to contemplate a probable role for commission counsel in commissions of all types. For example, section 11(1) of the *Federal Inquiries Act* authorizes commissioners, both those named to conduct inquiries under Part I and those authorized to conduct departmental inquiries under Part II, to engage expert assistance as they deem necessary, "and also the services of counsel to aid and assist the commissioners in the inquiry".

Mr. Justice Estey emphasizes the importance of commission counsel. In some very small inquiries commission counsel may be the only non-clerical staff. In others, particularly those investigating misconduct, commission counsel may be the chief of a very large staff. The roles vary, apparently, from that of "counsel to the commission", which is the way Mr. Justice Estey sees the role, to a rather independent role somewhat akin to the prosecutor's role in a criminal court. The Law Reform Commission of Canada stated in 1977:

Their duties may easily extend to advising the commissioners about testimony or on the course the inquiry should take, assisting the commissioners in assessing evidence, and writing some or all of the final report. *To some witnesses, and perhaps to the public, counsel's apparent dual role may seem grossly unfair; we all know that no man should be a judge in his own cause.* [emphasis added]<sup>11</sup>

This and other less controversial aspects of the role of commission counsel are addressed by John Sopinka, Q.C., as he then was. Surprisingly, the law on the proper role of commission counsel is unclear but "the better view" (as

11 *Supra*, note 4 at 40.

lawyers say) appears to be Mr. Justice Sopinka's conclusion that a commissioner should "bear in mind that if he allows his gladiator to thrash about in the arena, the latter's transition to the dias may invoke a public clamour".

A key task of the inquiry that must be managed with special skill and understanding is the research function. Alan Cairns discussed this from the perspective of his experience as one of three research directors for the Macdonald Commission inquiry into the state of Canada's economic union and the country's development prospects. Here too, the transient nature of the commission, as well as the urgency of its task, effects the organization of the undertaking and the attitudes of those who are engaged in it, but for Cairns it is less troubling than it is for Grenville. This may be a reflection of temperament, but it is more likely to stem from the different nature of their tasks. For the person responsible for the care and general well-being of the commission, ready access to supplies and facilities, a knowledge of the administrative practices of the sponsoring government, a capacity to secure competent staff and, above all, an ability to plan the activities of the commission are extremely important. For the research director, the absence of a collective memory, the temporary character of the organization and the dispersal of the research staff is not unlike many academic endeavors in which teams of researchers are assembled for special projects and where collaborators may be scattered around the globe. In the commission setting, in Cairns' view, these characteristics are functional, inhibiting a premature agreement on what must be done, and by whom and the development too early in the life of the inquiry of a common understanding of the problem and the correct policy response to it. In Cairns' view the "appropriate philosophy to guide the organization of a royal commission must facilitate the recurrent rearrangement of commission personnel in the light of new tasks and ongoing assessments of individual performance." Anything less flexible would hinder the process of exploration.

This is not to suggest that continuity and a measure of security are out of place in the commission research setting. The very adaptiveness that Cairns speaks of could not thrive without a stable administrative environment. Even within the research task there is a need to obtain as early as possible a clear understanding of the commission's mandate and agreement on the central research questions. The framework thus established should be loose enough to permit a heuristic approach to the research endeavour.

Cairns makes a strong case for ensuring that the management of commission research provide for an imaginative understanding of the respective roles and backgrounds of commissioners and researchers. The working habits and career objectives of researchers, particularly academics, have to be accommodated if their contribution is to be useful. Equally, however, the inquiry has to exploit the tension that emerges naturally between commissioners, aware of the inexorable march of time and their obligation to make credible recommendations, and the researchers, who are both challenged by the investigation and

constrained by professional norms for determining the reliability of their findings. By creating an appropriate academic milieu and, in particular, by ensuring that research will be vetted for publication, Cairns argues, the research effort provides reliable material for commissioners.

#### 4. INQUIRIES AND PUBLIC POLICY

The policy role of inquiries has been debated for as long as governments have used them. Is their advice heeded? Is the inquiry an effective way of establishing fact and sounding public opinion? Is it effective, but prohibitively expensive? The questions are familiar, and they were canvassed once more at the conference. So were a number of less familiar concerns that have surfaced through recent developments in the conduct of inquiries.

Several of the latter had to do with the capacity of inquiries to assimilate the mass of information presented to them. The Macdonald Commission is a case in point. It held extensive hearings across the country and mounted a major research programme which was organized into three segments: economics, political science and law. Through these, the commission sponsored about 300 separate projects, all of which had to be brought to completion in 15 months if they were to have any impact on the commissions' thinking. As research director for the political science segment, Alan Cairns had hoped to follow research developments in law and economics in order to achieve some integration of perspective, but the "crushing" task of managing the projects in his own field and the relentless pressure of time made that impossible. The commissioners were equally constrained. In addition to assimilating the final reports of the research projects, they had to absorb 59 days of testimony at which 700 presentations were made and read 1100 briefs that sometimes accompanied the testimony but were often submitted separately. As Cairns notes, the mass of documentation was beyond the capacity of the commissioners to absorb and several strategies were used to integrate the material. These included the capacity to retrieve testimony from computerized records of hearings and, as research neared completion, a continuous programme of seminars in which commissioners and members of the research groups debated findings and their implications. Even with these devices, the commissioners seem to have been unusually dependent on the research group for assistance in drafting the final report.

Some of those participating in the conference on inquiries were inclined to treat the experience of the Macdonald Commission as a case apart. It is true that the commission had an unusually broad mandate, but there have been other commissions similarly mandated; the Laurendeau-Dunton Commission on bilingualism and biculturalism, for example, or the Gordon Commission on Canada's economic prospects. Inquiries of large scope are needed periodically and ways have to be found to assist commissioners to make full use of

the research that is at their disposal. The Macdonald Commission's decentralized approach was one response. A more conventional pattern of a strong research group at the centre, supplemented by a number of commissioned projects might have permitted greater integration between disciplines, which in turn would have conveyed to the commissioners a clearer sense of the general state and direction of the Canadian political economy. Whether either approach can adequately deal with and assimilate the diversity of information that is created by and brought to large inquiries is a moot point, and the conference reached no conclusion about it.

A second interior concern of inquiries is the impact of hearings. Cairns argues that they do more than simply legitimize the inquiry and build a consensus that will ultimately support the commissioners' recommendations. In his view, the hearings are learning mechanisms for the commissioners and a means of testing the feasibility of potential recommendations. What was not clear, though, from the conference discussion was the extent to which hearings can affect the inquiry's research. If, as Cairns suggests, the research group plays a large part in developing the text of a report and if research is carried out as a stream of activity separate from the hearings process, is it not possible that the countless hours spent by witnesses and organizations in preparing for and testifying before inquiries will have no other consequence than to create a vague sense in the commissioners' minds of the nature of the problem they are investigating; a sense that will be articulated only in rather general directives to those drafting the report? This seems an inadequate outcome for a vast expenditure of money and effort.

Both the Macdonald Commission and the Ocean Ranger Inquiry experimented with responses to this problem. The Macdonald Commission issued an interim report, *Challenges and Choices*, which elicited public response and was the subject of a round of seminars with invited participants. It is not clear how much influence this exercise had on the research programme, though it doubtless helped the commissioners sharpen their perception of the issues. The Ocean Ranger Inquiry conducted the special conference to which we have already referred. This included members of the research group and may have had a greater impact on their thinking than did the Macdonald Commission sessions. Perhaps future commissions will build on these experiments and thus achieve a greater ability to be informed by the experience of individuals and groups who, as the Salter and Cairns papers demonstrate, have considerable difficulty influencing inquiries because they stand outside the conventional wisdom of the research disciplines that support commissions. As Salter shows in her discussion of the Berger Inquiry, it is possible for commissions to use the hearings process to solicit new kinds of public participation and to move away from the generalist-reformist tone of most commission reports to something more far-reaching.

The costs of inquiries is much debated by the press and have received their measure of attention at the conference.<sup>12</sup> Discussion was inconclusive, however. The rising costs of inquiries cause concern, but as several participants pointed out, giving the scope of many inquiries and the limited time vouchsafed to commissions to complete their mandates, it is not always possible to achieve the necessary results without spending more lavishly than might otherwise be the case. A few voices warned that the costs of commissions might force governments to abandon the public inquiry in favour of surveys and in-house policy groups. Mr. Justice Estey, for example, called modern inquiries “dinosaurs”<sup>13</sup> and Mr. Justice Grange says he has been “appalled” by the time taken and the cost of inquiries he has conducted and notes that others have been even worse. However, the majority were not persuaded, arguing that the ability of commissions to focus public attention on an issue, to build consensus and to secure legitimacy make them too effective as instruments of political communication to permit their abandonment. As Peter Aucoin points out, these qualities have encouraged governments to establish commissions of inquiry throughout the last two decades despite a general trend in the late 1960s to “de-commission” public policy debate by establishing permanent bodies for policy analysis.

On the much larger question of the policy impact of inquiries, discussion was equally inconclusive.<sup>14</sup> Commission recommendations, it was felt, are inputs into the black box of government decision-making. The fact that a government appears to accept them or reject them tells us very little about their real influence on its thinking. A recommendation that is ultimately rejected may have been influential. On the other hand, a government claim that it is following commission advice may be misleading; commissions are quite capable of telling a government what they know it wants to hear. Input does not explain output. Consequently it is more useful, as Aucoin’s paper makes clear, to assess commissions of inquiry for their role in the development of policy debate than to evaluate them in terms of the acceptance or rejection of their recommendations. Their impact on the processes of policy analysis is generally more significant than their capacity to deliver acceptable recommendations.

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- 12 Shortly before the conference, the Nova Scotia Attorney General had revealed that the Marshall Inquiry would probably cost \$7 million, three times the original estimate. See *The Globe and Mail* (1988 January 22).
  - 13 See Jennifer Henderson, “Conference Weighs Costs of Public Inquiries” *Financial Post* (1988 March 7).
  - 14 For a recent and interesting assessment of the impact of inquiries concerned with economic and cultural nationalism see Sylvia Bashevkin, “Does public opinion matter? The adoption of federal royal commission and task force recommendations on the national question, 1951–1987” (1988), 31 *Canadian Public Administration* 390–407.

In short, commissions of inquiry continue to be a viable mechanism for eliciting public opinion, ascertaining the facts of a situation and developing a policy direction although their advice may not always be heeded and their costs may cause complaint. On the fact-finding end of the continuum, the final judgment may be equally paradoxical. The great danger to individual rights posed by public inquiries is condemnation in the court of public opinion without proper procedure — what the Americans would call “due process” — and yet the very essence of the process is that it is “public”. Its justification is satisfaction of the public’s need to know.

##### 5. THE PUBLIC IMPACT OF COMMISSION HEARINGS: LAWYERS IN A DIFFERENT FORUM

Patrick Robardet concludes that the only way to make effective use of inquiries is to achieve “a practical, yet legal and principled, compromise” which will serve the diversity of ends sought by the wide range of public inquiries under consideration but at the same time protect “potential victims of inquiries”. This, he thinks, makes more sense than to worry about a false dichotomy between adversarial and inquisitorial models of inquiries. No one disagreed that flexibility has been, and must continue to be, the hallmark of commissions of inquiry.

Indeed, as Dr. Robardet points out, inquiries need not necessarily always be “public”. Only the Ontario statute explicitly provides discretion to conduct the inquiry *in camera* in dealing with intimate, personal or financial matters, but both John Sopinka, in discussing the role of commission counsel, and David Scott, in discussing the rights and obligations of those subject to the inquiry, see this as an important power in commissions generally. Mr. Scott addresses both sides of the question, the right to demand a hearing in public or a hearing *in camera*. He also suggests that material which will eventually become public may be received *in camera* initially, to avoid unfair adverse publicity in the interval between the introduction of prejudicial evidence and the final opportunity of the “victim” of the inquiry to give his or her side of the story. The media, Mr. Scott observes, may not give the closing rebuttal coverage equal to that given the first scandalous revelations.

The lawyer’s concern is that his or her client, or indeed any individual, must be afforded proper procedural protection lest he or she does indeed become a “victim of the inquiry”. This is reduced to a series of further specifics in David Scott’s paper. Quite apart from the *Charter*, the procedural protections developed in the common law of judicial review and the law of evidence, the federal and provincial inquiries Acts themselves afford substantial protections, but they vary widely from one jurisdiction to the next. Mr. Scott examines, in turn, the right to counsel, the right to participate, the right to respond to charges of misconduct in the report of a commission of inquiry,

the right to insist on the applicability of the rules of evidence and the subpoena powers of commissioners, as well as the right to demand a hearing in public or *in camera*. He concludes with a discussion of the vexed issue which, some would say, determines whether all of these "rights" are real: funding! Probably because the generous funding of both individuals and groups substantially affected the Marshall Inquiry, this aspect of Mr. Scott's paper gave rise to the greatest number of questions from the floor. What ought to be the balance of the protection of individual rights, cost and the policy thrust of the inquiry? How can any balance be maintained where a wide range of "affected people and groups", represented by counsel paid from the public purse, jostle to exercise their legal rights with respect to every disputed fact and many of the arguable issues? Mr. Justice Estey says flatly that governments simply cannot fund all interested and affected parties. Mr. Scott's responses to this and the other issues he raised are included in the text of his address, supplemented by some portions of the transcript of the lively discussion that followed his presentation.

For lawyers involved in commissions of inquiry the public dimension of the process raises special questions. How do they deal with what Mr. Justice Grange calls "the electronic jury"? Bar societies look askance at lawyers suspected of self-promotion through the media, but it is increasingly widely recognized that in many contexts lawyers have a role to play in gaining public understanding and support for their clients. Since many public inquiries are intended primarily to inform the public, or perhaps to marshal public opinion, they provide a context in which lawyers are most acutely aware of the media. In considering the role of commission counsel, Mr. Justice Sopinka points out that the counsel's opening statement may be quite different from the one he or she would make in a trial, because it is directed primarily to the public, not to the commission. Mr. Justice Grange emphasizes that commission counsel "must always be cooperative with the media, keeping them informed of the programme and helping them to understand the evidence." "There is a danger," he tells us, "that lawyers unaccustomed to working in front of television cameras may forget that it is their client's welfare with which they must be concerned, not their own images."

Leaving aside such aberrant behavior, lawyers are not doing their duty, as demanded by the canons of legal ethics, unless they are acting as zealous advocates for their clients. Within the limits of the law, and legal ethics, they *must* do all in their power to pursue their clients' interests, not the interests of the government which appointed the commissions of inquiry, not the interests of the policy-makers who want the commissions of inquiry to function effectively and not the interests of the public. When, therefore, there is a right to counsel, because individual rights and interests are in jeopardy, lawyers will press a commissions of inquiry on behalf of their clients as they would a



court. To deal effectively with counsel, commissions of inquiry must understand the lawyer's role, its value and its limits.

## 6. THE COMMISSION AND ITS REPORT: PUBLIC EDUCATION, ADVOCACY AND LOBBYING

The penultimate question asked at the conference was: "What is the appropriate role of a commission of inquiry once its report has been written and passed over to the government that appointed it?" Three panelists with considerable experience on different kinds of commissions of inquiry addressed this question. One was a judge, Mr. Justice Grange, one a lawyer and academic, Edwin C. Harris Q.C., and one a political scientist, Dr. Alan Cairns. They agreed that, quite obviously, the most important determinant is the mandate of the commission. But, by accepting appointment to the commission, have the commissioners taken on any obligation to educate the public or advocate the acceptance of the recommendations? Usually there is no such explicit mandate, and the question may seem to be, rather, whether it is proper for commissioners of inquiry to "sell their product".

As a judge, Mr. Justice Grange would never, of course, comment in any way on his disposition of a case, beyond his official reasons for judgment. Apparently, he takes the same view of his report in an investigatory commission, although it is not clear whether this is because he, personally, is a judge or because he sees the commissioner's role as involving the same constraints on comment other than that contained in the report itself. On the face of it, different considerations would appear to apply.

Edmund C. Harris was one of three commissioners on the Graham Commission, a major inquiry into education and municipal government in Nova Scotia. That commission decided that each of the three commissioners should be quite prepared to speak on their voluminous report in an effort to see that it was understood, both by those who might be affected by it and by those who would be involved in the decision-making process by which it might get implemented. Professor Harris' useful comments on this process contrast with Mr. Justice Grange's views, but may, of course, be explained by the fact that the Graham Commission was a quite different type of inquiry from those conducted by Mr. Justice Grange: notably the Mississauga Train Crash Inquiry and the Nelles Inquiry.

Professor Allen Cairns, Director of Political Science Research for the MacDonald Inquiry, spoke from the vantage point of a member of a research staff, rather than as a commissioner. In that capacity *ex post facto* commentary may, of course, be subject to limitation by the terms under which the researcher agreed to work, which may be express or implied. In any event, many academic researchers have made the information and understanding acquired in the service of a commission of inquiry grist for their mills. As

long as they do not breach obvious confidences or set about to defeat the object of the commission of inquiry which employed them, there appears to be no problem in this.

## 7. THE CHALLENGE

Mr. Justice Estey comes close to concluding both that “you can build a pretty good case that the usefulness of a inquiry as a fact-gathering and conclusion-drawing organization is on the wane”, and that “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 the conference as a whole was not so negative, and even His Lordship relents in the end, with the suggestion that “probably the economics can be overcome by a more professional approach from the government itself” in staffing inquiries and controlling how long they will sit and how much they will cost. That, surely, is the challenge and the answer. Governments must carefully tailor the mandates of inquiries to the purposes for which they are established.

Lawyers’ values, by which we mean concern for individual rights and interests, are important, but they are expensive to protect in the context of an inquiry which holds public hearings or writes a report that “names names”. Policy makers’ values, which are concerned primarily with the full and objective study of the public impacts of available policy options, may be served without direct damage to individuals. If governments could be satisfied to deal with individuals through established mechanisms, the courts, ombuds and the like, and to establish commissions of inquiry to deal with policy formulation for the future, not with past transgressions, unmanageable expense might be avoided. If the dichotomy between investigative and advisory commissions could be maintained, and the former used very sparingly, commissions of inquiry might continue to be useful instruments of policy formulation.

The problem, of course, is that the dichotomy is not always so clear, nor are existing investigative mechanisms always suitable. Inquiry into societal failures naturally calls for recommendations for future improvements; recommendations of better policy, in other words. And policy advice must be based on history, which in many contexts requires investigation of what went wrong, not only study of the received wisdom. Thus, in reality the best we can call for is clarity of thought in drawing the mandates of commissions of inquiry, not the absolute separation of advisory and investigatory roles.

There will continue to be a clash of lawyers’ values and public policy makers’ values in the middle of Liora Salter’s spectrum from purely advisory to purely investigative commissions. The challenge is to minimize this expensive clash by being clear about the role of each particular inquiry, and by the imaginative but careful structuring of the phases of any major inquiry; using both investigative and consultative techniques, but keeping them

separate, as David Grenville tells us was done in the Ocean Ranger Inquiry. For good reasons, and bad, commissions of inquiry will continue to be heavily relied upon in Canada. How time-consuming, expensive, dangerous and useful they are will depend on the governments that establish them.

## **Part I**

# **Commissions of Inquiry: Do They have an Identity Crisis?**



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