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How Should Lawyers and the Legal Profession Adapt?

*Justice S.G.M. Grange**

Of all the love affairs with which the people of this world have been blessed or afflicted, that between public inquiries and the media is certainly one of the strangest. I have been in and about the law for over 40 years and in that time I say immodestly I have pleaded, what to me were, some very interesting cases and I have in the last 14 years had occasion to sit in judgment on some, not only interesting but, perhaps important cases. But I know perfectly well that when the time comes to take my departure, if I am mentioned at all in the obituary columns, it will be only for the period spent investigating some overdosages of digoxin at the Hospital for Sick Children in Toronto with perhaps a line about playing with derailed trains in Mississauga.

I do not fully understand the phenomenon, but it is sometimes true that commissions bring instant fame to the participants even if the fame, as the late Mr. Warhol put it, lasts only 15 minutes. I say “sometimes” because we all know of commissions that have laboured in obscurity and wasted their sweetness on the desert air. The other day Martin Freedland, well known to all the academics and an old friend of mine, came out with a report on indexing of pensions, surely a matter of enormous importance, at least to old men like me.

* Supreme Court of Ontario, Commissioner in the Susan Nelles Inquiry and the Mississauga Train Explosion Inquiry.

I didn't know he was doing it or if there was such an inquiry and if I hadn't caught the news that night I probably still would not.

The trouble with his Commission, important as it was, was that there was a lack of sex appeal — not in Marty, I hasten to say, but in the subject of his inquiry. The media want to know about human transgressions. Sexual transgressions are of course the best — does anybody here remember Gerda Munsinger? I fear that the obituary of Wishart Spence — although he may prove immortal and never have an obituary — will concentrate on that inquiry which played so small a part in his great judicial life. But even without any sex at all, the media loves to see human fault or error of any kind exposed. Perhaps I should not blame the media too much; it is a presumed reflection of public taste. They are giving, or think they are giving, the public what the public wants.

I think the media may be underestimating the public. Certainly it is human nature to enjoy the spectacle of the fall, particularly of titans, but I think the public has other tastes as well, some of them bordering on the intellectual. It is a great and almost completely untapped entertainment source and we in the legal and judicial fields can do much to help the tapping.

The media popularity of commissions is not just because of the subject matter of some of them. There is sex and misconduct and high drama revealed in the courts everyday but, most of it goes by unnoticed or noticed only in its barest outline. Why is that? I think the answer is clear. Commissions are more available and less mysterious.

Let us deal with both of those propositions. As to availability, inquiries are public but so in theory are the courts. We know, however, that the public who watch court proceedings consist mainly of the retired or the unemployed with an occasional shepherded high school student thrown in. Most of them cannot hear much of what is said and get to see none of the documentary evidence. Moreover, except for the sensational trials, the public has little advance notice of what the case is about and for the sensational trials there is never enough room in the courtroom to accommodate those who want to observe.

Commissions have a simple answer to the problems of accessibility. They bring in the television cameras. Because people can see the proceedings, their interest is doubled or quadrupled. A fan of hockey would prefer to see the game rather than to read about it in the paper. But if he has seen it, he will much more readily and happily and intelligently read about it the next day. And he will also more likely want to see the next game. The judiciary have, in my view very foolishly, so far kept television out of the courtrooms. It is only a personal impression, but it is at least based on considerable experience, when I say all of the objections to television in the courtrooms can be readily answered and there is the enormous advantage of making the judicial system

more accessible and better understood. But that is another lecture for another time and place.

The other great attraction of television is that it helps to dissipate the mystery. As I have said, the judicial process is a mystery to most of the public and to much of the media as well. It forever amazes me how the public, egged on by the media, always want to complain about sentences, sometimes too heavy but usually too light, to the Canadian Judicial Council who, fortunately for their sanity and the judicial system, have no jurisdiction to do anything about it. The answer of course is the Court of Appeal and all it would take is a little television in the Court of Appeal to show how often and how happily that Court corrects the sentences of trial judges.

There is, however, a mystery which is built into the courts that is not found in commissions and tends to make the latter more popular or at least more comprehensible, and it lies in the manner of determining fact or obtaining evidence. We have built up a wall against the introduction of unreliable evidence. The reason of course is the commendable one — to do justice between the Crown and the accused and between the parties. But, the perception often is that we are conspiring to keep the evidence out when we should be trying to get it in. Commissions do not have that problem. The commissioner is expected and required to get the evidence any way he can. Hearsay goes to weight, not to admissibility, a concept much easier for the layman to understand.

I promise I will get to the subject at hand, namely, how the legal profession should adapt to the different conditions of the commission but I thought I should first set fourth what those different conditions are and how they came about. Here are my thoughts.

First of all, just because you have a larger audience, you must not forget who your client is. No one will do that deliberately but sometimes the attention of the media will go to the head of an inexperienced counsel. I remember once a young counsel asked to see me privately in the course of a day's sitting. I found it strange because when I saw him he complained of a slighting remark made to him by another counsel. I, of course, told him that while not to be encouraged it was a common occurrence in any litigation. He accepted that but explained his main worry was that, with television giving a play-by-play description, his wife and his friends might take it in and laugh at him. He had forgotten for whom he was working. It is not your image but your client's that is important.

I am happy to inform you that I understand the marriage survived. That is an example of too much concern about the media. Sometimes, however, counsel tries consciously or unconsciously to use the media. And, if one thing is certain in life, it is that the media, most of them, are only too happy to be used.

In the last commission, I can only remember two rows with lawyers. They were not serious, but they both related to the media. One was when one publicly-funded counsel told the press about a private meeting with me where I had set a limit on his fees. The second was where another counsel had made a public complaint about the manner of cross-examination of some of her clients by other counsel. Both were legitimate complaints, or at least legitimate subjects of complaint, but my objection was that they were made in the wrong place. They should have been made to me. They could have been made publicly and received just as much publicity but then so would the reply. Not only should you remember who your client is, but also you must remember the forum in which he is being tried.

A constant problem in the judicial system is the relationship of some counsel to the media and their use of the media. As I have said, most of the media are happy to be used. Indeed, the tragedy is that many allow themselves to be manipulated by certain counsel. I do not want to go back to the old days where no reputable counsel would speak to the media. Of course, he or she can speak to the media to explain the issues and even the evidence and the argument. But it can be very dangerous; it is too easy to overstep and argue your case in the media even before you argue it in court. In the Ontario Court of Appeal, it is usual to say at the beginning: "We have all read the reasons and the factum and any other material we thought necessary. We are familiar with the facts and the issues. You may proceed directly to your argument." Sometimes nowadays I am tempted to say: "We also heard what you had to say on the radio this morning. Have you any further argument?" So far I have resisted. In the interests of justice, we try not to be adversely affected by such conduct but it is not easy. All I can say is that arguing a case in the media before it is argued in court has never, in my experience, assisted a client's cause.

I am prepared to concede, however, that there is a subtle difference between the conduct of a case in court and the conduct of one in a high profile commission which is dictated by the presence in the latter of what is aptly called the electronic jury. I hasten to make clear that I do not subscribe to the theory that television or constant press exposure makes counsel more histrionic. There is a bit of the ham in every good counsel. I have never seen and I never expect to see any counsel play to the media in his own interest. But it must be recognized that sometimes it is in the client's interest to cater to the public. I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries. When I was told in the course of the Hospital for Sick Children Commission that I could not name names, that is, identify the perpetrators of the deaths of those babies (even if the evidence justified it), I wondered what all the evidence and the time and expense was

all about and whether it was all being wasted. But after I had reflected awhile and got over my sulks, I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along. Counsel cannot therefore let many of the things pass that they would in ordinary litigation — the sort of thing that has a lot of colour and little or no evidentiary value. Nor can they always wait leisurely to refute some adverse evidence.

It may be necessary for counsel to take immediate action, either by cross-examination or the calling of evidence, before the damage has penetrated. I think commissioners should appreciate the problem and cooperate, but even if they do not, the mere asking for the relief may repair some of the injury with the electronic jury. I always made it a practice, regardless of what order of cross-examination had been settled, to allow counsel for the person most injured by the testimony to cross-examine last. Occasionally I did not know who that person was and had to be told, but usually it was obvious and counsel was grateful not to have to make the application. If it was a question of calling refuting evidence I, of course, was entirely dependent on counsel. It is a matter of discretion and I think commissioners should lean to obliging, because of the electronic jury, as a judge most assuredly would not in a regular trial. Even if he refuses, the application itself may repair some of the damage.

Of all the decisions a commissioner must make, perhaps the most important is the choice of commission counsel. There is no reason why you can not let the government make recommendations. Very often there is a civil servant who has taken a special interest and done much research and can be very helpful. But commission counsel is a very special person and must not be chosen for political purposes. Nor do you want to choose a former partner or an old crony if only because of the public perception. Ours is an adversarial system but you do not want a combatant-type lawyer. You want someone with courtroom experience capable of probing cross-examination because often he will be the only one who probes the evidence of some of the witnesses, but you do not want him fighting with the other counsel. Indeed, I think a commission cannot be run successfully unless there is cooperation between commission counsel and counsel for the interested parties. He must always be cooperative with the media, keeping them informed of the programme and helping them to understand the evidence. He must not, of course, like any other counsel, argue any point of view in the media. I confess, it is a delicate line. He must, perhaps most importantly, be industrious enough to seek out all the evidence and intelligent enough to appreciate it. In a sentence he or she must be conscientious, intelligent and fair. Where do you get such people?

Well, first of all I give to commissioners choosing counsel the same only slightly frivolous advice I give to governments choosing commissioners. Don't choose anyone who wants the job. If he does, he's probably unhappy where he is and he'll more than likely not want to go back. If he's anxious to get back to his post or profession, he will tend to wrap up the affairs of the commission as quickly as possible and that is to everybody's advantage. So you just have to ask around, contemplate and finally choose and hope for the best. To a certain degree, it is a matter of luck and I acknowledge I have been very lucky.

The commissioner, of course, has no choice in the selection of counsel for the interested parties. But that does not mean I do not have some advice for them. They may fight as much as they like among themselves, but they should be very circumspect about fighting with commission counsel. Remember, he is not the enemy. He may appear so one day but the next day he may be your closest friend. If you have called him every name in the book the day before, he may find some difficulty in articulating that friendship.

And remember please — this applies to all litigation but perhaps particularly to commissions where so many parties are involved — offence is not necessarily or ever usually the best defence. When your client has not been accused, his best interest may well be advanced by silence. The best thing you can do for him may be to run away and hide. I have seen it done often and with success. I may have been very suspicious of his client's conduct, but I had no ammunition with which to condemn him.

The besetting sins of commissions are two, and they are very well known. They are time and money. Commissions take too long and cost too much. I would like to offer some solutions, or rather palliatives, for those defects, though you may well ask what are my qualifications. I was appalled by the time the Mississauga Inquiry took (nearly a year) and its cost (nearly a million) and determined that the next time I would do better. The next time (the Hospital for Sick Children) lasted a year and a half and cost nearly three million. I am comforted a little by the development that no one seems to have done much better since. Indeed, the high profile ones would appear to the uninitiated to be dead set at establishing something for the Guinness Book of Records. Not unnaturally, I have some sympathy for them. Everybody seems to want them to be as wide-ranging as possible and the media mutter darkly about cover-ups whenever the commissioner declares something to be outside his terms of reference and refuses to hear evidence. And every interest that might conceivably relate to the subject wants to be represented and everybody wants to be funded.

I can understand all that, but the trouble is there is no opposition. You all know how easy it is to get an *ex parte* order. I can tell you that it is even easier to give one. In retrospect, however, I have wondered whether we really needed all those representations and if we did, if we needed them all the time. The

trouble, I think, is that the commissioner is not informed enough when standing and funding are settled. Certainly persons whose reputations are at risk generally require standing and funding — however rich they may be or however serious the alleged transgression — but they do not need it all the time. All the inquiries Acts of which I am aware forbid the commissioner from reporting adversely on anyone unless that person has been given notice and an opportunity to refute that allegation. I think, now, that persons on the periphery should be given only partial standing. All the high profile inquiries have a transcript and most now have daily transcription from which the curious can find the evidence. All reputable commission counsel will warn counsel in advance about when their client's peccadilloes are likely to be investigated.

But that is not the only reason for controlling standing. Every additional counsel means additional cross-examination. Most counsel are responsible and try to stick to the issues, but the repetition can be very hard on the schedule and there are too many counsel representing clients with a great deal of curiosity and nothing to lose. The old saw about never asking a question unless you know the answer or can overcome a bad answer goes out the window when you do not care what the answer is.

It is probably true enough that the public has some difficulty in appreciating the finer issues in a Royal Commission. But one thing the layman can do just as well as any lawyer or commissioner is appreciate the cost. When the cost of the commission starts to run into the millions of dollars, there is a very natural reaction, and that reaction is expressed in one word — why? The question is not easily answered. Some expenses are inevitable, some are dictated by inexperience and inefficiency. I may say I have never resented the advice of government officials in the administration of commissions. I consider that help, not interference. We get into trouble, however, in trying to control the fees of counsel for interested parties with standing. As I have said, in most cases individuals whose reputation are at stake must, in fairness, be funded. But they need not be funded on a full-time basis. And people with closely allied interests should be required to form an alliance to cut down the cost. At the Hospital for Sick Children, I simply put a lid on the monthly fees of counsel based in part upon the experience of counsel and in part upon the exposure of his client. It had a touch of the arbitrary about it and it certainly did not increase my popularity with the counsel, but it did keep the cost down and I do not think it adversely affected anyone's legal position or defence.

A commission cannot be conducted cheaply, but neither should it be extravagant. Neither commissions nor counsel have the right to unlimited expenditures. They represent their clients but they are paid by the public and the public has the right to an accounting of their money. It is regrettable but the public has the impression that judges and lawyers are paid too much. Where they get that idea about judges I cannot conceivably imagine. Judges

cannot be paid as commissioners and are confined to what the government gives them by way of salary, a sum which the recipients and their bankers and creditors have always considered inadequate. But let us do something to control those expenses which can be controlled. Commissions serve a very important function in the government of the country and the provinces. We do not want to lose that benefit by runaway expenses. Money is not an uplifting subject — indeed it is a little vulgar — but it is essential that we face the problem and I can think of no more appropriate place than a conference such as this.

Part IV

The Use and Abuse of Inquiries: Do They Serve a Policy Purpose

