The Conduct *of* Public Inquiries

law, policy, and practice

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Commission counsel acts "on behalf and under the instructions of the commissioner." In other words, counsel is an extension of the commissioner. Accordingly, if commission counsel is acting in opposition to the interests of a party, it is reasonable for that party to perceive that the commissioner is also opposed in interest. And in this respect, "the credibility of the whole exercise," and confidence in the impartiality of the commissioner, may be disturbed, threatened, or lost.

Justice Ian Binnie made the following observation in delivering the judgment of the Supreme Court in *Consortium*:

> Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants. Judicial inquiries are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.[14]

This is a fair and legitimate objective. But it often meets practical difficulties.

The problem arose in the Stevens Inquiry and it is interesting to note how Commissioner Parker addressed it in his final report:

> A true understanding of the inquiry process therefore must reflect the need to balance considerations of due process with the investigation required of an inquiry.
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> This tension raises the question of the proper role of Commission counsel in such proceedings. I am satisfied that his or her task is to ensure that all of the evidence, all the issues, and all possible theories are brought forward to the Commission. In this context, counsel's obligation is most often described as the duty to be impartial.
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> During the course of this Inquiry, some parties accused Commission counsel of being too adversarial .... Their complaint lay with the manner in which certain cross-examinations were conducted as well as Commission counsel's submission that certain inferences, adverse to their clients, should be drawn from the evidence .... In this Inquiry, although numerous parties were granted standing, no one appeared who

14 *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 41, Binnie J. delivering the judgment of the Court [*Consortium*].

> on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced. We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with an impartiality inseparable in degree from that of the commissioner.[17]

She also described as a "core principle" that "commission counsel is the commissioner's *alter ego*."

But the reality is that rigorous cross-examination can be rough business, as a matter of necessity, "for some witnesses are so penurious of the truth that they will only part with it when torn from them by violence."[18] It is not a role that a commissioner should perform and, when performed by commission counsel, it should be done at arm's length from her. The reality is also that rigorous cross-examination cannot be impartial. It is adverse in interest to the witness. It is adversarial.

Some commissioners have attempted to address potential partisan perceptions of commission counsel at hearings by limiting their role in other respects. The role of commission counsel in the Somalia Inquiry was defined in this way by the commission: "At the end of the hearings, Commission Counsel will summarize the issues and evidence for the Commissioners but will not make submissions regarding their views of the evidence or on the findings or recommendations which the Commissioners should make." Moreover, commission counsel would not participate in drafting the final report. Counsel for the Gomery Inquiry made no submissions at the conclusion of the hearings (of the investigative phase). However, counsel for former prime minister Chrétien did not consider this to enhance the fairness of the process. On the contrary, he brought a motion (unsuccessful) before the commissioner to require his counsel to make public any private submissions regarding factual findings that could be supported on the evidentiary record. The concern was that commission counsel was familiar with a significant body of information not introduced in the hearings as well as having met many people not called as witnesses. This information could find the commis-

17 Toronto Leasing Inquiry, Ruling (15 October 2003).

18 *Murray v. Haylow* (1927), 60 O.L.R. 629 (C.A.).

of commission counsel assisting in writing the final report. It is also applicable to other advisory functions.

The Law Reform Commission of Canada articulated the conflict in commission counsel's role in this way:

> 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.[23]

A problem for the commissioner is that the areas where aggressive advocacy is required are also likely to involve some of the most difficult and controversial issues to be determined. These are often the critical issues on which the commissioner could most use a sounding board to explore alternative approaches and offer advice. There is a strong perception of unfairness if commission counsel participates in the deliberative process after taking adversarial positions against parties during the hearings.

An attempt was made to prevent counsel for the Krever Inquiry from participating in the preparation of the final report. This was done on the basis that counsel had access to information not available to the parties and that, by preparing notices of misconduct, they had adopted a position adversarial to some parties. The Federal Court of Appeal had said that wide latitude should be given to commission counsel participating in writing the report in this broad *obiter* statement:

> We must be careful not to impose too strict standards on a commissioner who is conducting a public inquiry of the nature and scope of this Inquiry, in terms of the role he may assign to his counsel once the actual hearings have concluded. A final report is not a decision and the case law that may have developed in relation to decisions made by administrative tribunals, particularly in disciplinary matters, does not apply. We must be realistic and pragmatic. The Commissioner will not likely be able to write all of his report himself, or verify the accuracy of the facts set out in it on his own, any more than he could reasonably have asked

23 Law Reform Commission of Canada, *Administrative Law: Commissions of Inquiry*, Working Paper No. 17 (Ottawa: The Commission, 1977) at 40.

> least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of the commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure.[43]

A commission of inquiry may not have the benefit of civil pre-trial procedures but it has the power to compel the production of documents and the testimony of witnesses. These powers are often persuasive in encouraging cooperation from parties and witnesses prior to the actual hearings.

In marshalling the evidence for presentation at the hearings, commission counsel should strive to avoid them becoming a "multi-party examination for discovery" by providing maximal pre-hearing disclosure. A commission of inquiry should be governed by the principle of complete and open disclosure in the absence of exceptional circumstances. In some circumstances, this may be not only desirable but required by the principle of fairness. This requirement was examined recently in relation to a New Brunswick inquiry into allegations of sexual abuse in the Kingsclear Youth Training Centre. The applicant sought judicial review to quash findings against him and one of the grounds was a denial of procedural fairness because of inadequate pre-hearing disclosure.

There was no dispute that the applicant was entitled to some degree of procedural fairness but the issue was the extent required. Similar to the *Inquiries Act*, and other provincial and territorial Acts, the New Brunswick Act precludes any findings against an individual who has not received adequate notice and an opportunity to respond. It does not explicitly provide for disclosure of the related adverse evidence. Chief Justice Joseph Daigle concluded that the principle of fairness imposed such a duty of disclosure, one that went beyond the statutory requirement of notice.[44] This case is discussed further below in relation to interviewing witnesses.

While fairness requires the parties to know the case they have to meet, there is flexibility in how a commission or other tribunal may fulfill that obligation. The Ontario Divisional Court recently said:

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43 *Consortium*, above note 14 at para. 41.

44 *Richards v. New Brunswick (Commission of Inquiry into the Kingsclear Youth Training Centre* (1996), 180 N.B.R. (2d) 1 at para. 24 (Q.B.) [*Kingsclear*].

the Goudge Inquiry may have made this approach less threatening than might be the case for some other investigative inquiries.

A related issue is the need for a commission of inquiry to make these relevant documents available to the parties, particularly the documents that are selected to form part of the record as exhibits. The Goudge Report describes the process it adopted for this purpose. Each document was scanned into litigation-management software with a unique document number as well as other objective identifying features such as author, recipient, date, and source. This permitted those with access to search the content of the documents. The documents were stored on a secure server that permitted the parties to download them over the Internet through a strict security system.

Counsel and their clients who had access to these documents were required to sign undertakings of confidentiality. In turn, if counsel wanted to share these with others such as law clerks or secretarial assistants, they would have to sign a "third-party" undertaking, tailored to the particular circumstances of each third party and prepared by commission counsel. Documents would be available to the public when entered into the record.

Documents did not have to be entered as exhibits during the hearings. They were simply identified by their unique document number, referred to above, and became a part of the record if they fell into one of the specified categories. These included, for example, certain reports, affidavits, written evidence, documents referred to in a documentary notice, and documents referred to in testimony. This efficiency in storing and making documents available electronically was imported into the hearing room to permit the hearings to proceed as "a largely paperless process."[50] It has now become standard for the terms of reference of federal commissions of inquiry to require the commissioner, as the Mulroney-Schreiber terms state, "to use the automated document management program specified by the Attorney General of Canada and to consult with records management officials within the Privy Council Office on the use of standards and systems that are specifically designed for the purpose of managing records."

When an investigative commission is examining potential misconduct, some parties may be concerned that commission counsel is not

50 See Chapter 5, Section C(1).

adequately taking their interests into account in assessing relevance. Hearings counsel might not consider a document to be relevant but counsel to a party might find in it some aspects that are important to the party's interests. In such inquiries, hearings counsel should cast the net of potential relevance very broadly. Consideration should be given to the interests of the parties both when making demands for documents and when assessing their potential relevance. Even when she does not intend to introduce a document into the record, it should be available for the parties to assess. They should then be permitted to demonstrate its relevance to them and request its introduction into the record.

Where an issue of privilege cannot be resolved informally, it is within the authority of a commissioner to examine the documents, hear submissions on the issue, and make a ruling on its admissibility.[51] However, a practice appears to be developing in Ontario, at least, of commission counsel reviewing such documents with counsel for the party claiming privilege. If agreement is not reached, the issue is referred to a judge other than the commissioner for a ruling. This process was adopted by consent during the Walkerton Inquiry. The Goudge Inquiry's rules of procedure specifically designated, for this purpose, "the Associate Chief Justice of Ontario or his designate" (although, the commissioner also retained the authority to make a ruling). The Cornwall Inquiry's rules designated "a Judge of the Superior Court of Justice of Ontario." The Toronto Leasing Inquiry referred the question of privilege to the "Regional Senior Justice or his designate." In *Lyons*, the court described the rationale for this approach as follows:

> [T]he Commissioner has deputized Commission counsel to screen the sealed documents to determine privilege, in part for reasons of efficiency and in part to shield herself from seeing any privileged documents.[52]

In this situation, any adversarial aspect of commission counsel's role is marginal and it is carried out in private with opposing counsel. But it suggests another reason for bifurcation of the role of commission counsel.

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51 *Lyons v. Toronto (Computer Leasing Inquiry—Bellamy Commission)* (2004), 70 O.R. (3d) 39 (S.C.J.) [*Lyons*], Swinton J. for the court (O'Driscoll and Then JJ.). National Security Confidentiality falls within a separate category, discussed further in Chapter 8, Section D(2).

52 *Ibid.* at para 38.

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all of the cases dealing with natural justice and with fairness.[48]

The following points have already been made but should be emphasized. If fairness is denied, any related findings will be a nullity. Since fairness is a jurisdictional requirement, it cannot be satisfied by consent of the parties but that could be a factor in determining fairness. The principle may be supplemented by statutory procedures but cannot detract from such procedures. Since the principle of fairness arises from common law, it may be reduced or eliminated by statute but only where the statute speaks very clearly to that effect.[49] When speaking of a statute here, the terms of reference are included as a statutory instrument.

2) Fair Tribunal

The requirement of an independent and impartial tribunal is often expressed in the negative as the absence of bias. In considering this issue, there seldom will be evidence of an actual bias. To protect both the interests of affected parties and the public view of the legitimacy of the process, the courts have adopted a test related to a "perception" or "apprehension" of bias. The Supreme Court of Canada[50] recently confirmed that "one standard" has emerged for determining whether there is a reasonable apprehension of bias. This test was established by Justice L.-P. de Grandpré in the National Energy Board case, as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—

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48 *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602 at 630–31 [*Martineau*].

49 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

50 *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 60 [*Wewaykum*].

> conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[51]

These "right minded persons," in effect, represent whether or not public confidence in the process would be adversely affected. The test attempts to impose a practical and objective assessment rather than one based on speculation. In *Wewaykum*, the Supreme Court also emphasized that there is a strong presumption of judicial impartiality.[52] This presumption probably extends to a commissioner in the sense that a person who agrees to fulfill an important public service can be expected to do so fairly and in good faith.

The issue of bias already has been discussed in various situations. Reference was made to one of the original commissioners resigning from the Somalia Inquiry. A perception of bias existed because of her association with senior officials of the Department of National Defence who were potential subjects of the inquiry.[53] The circumstances that led to a finding of bias against Commissioner Létourneau with respect to Brigadier-General Beno and the Federal Court of Appeal decision overruling that finding were described.[54] The same section contains a discussion of the circumstances leading to a finding of bias on the part of Commissioner Gomery against former prime minister Chrétien also were discussed. This case also confirmed that issues of procedural fairness are reviewed as questions of law subject to the standard of correctness.[55] The Beno and Chrétien judgments provide a full analysis of the application of the concept of bias to commissioners. For a broader canvassing of this subject, see the hundreds of Canadian precedents collected and classified in the book simply entitled *Bias*.[56] Ultimately, the determination of a reasonable apprehension of bias will simply rest on a judicial perception of the thinking of "right minded persons."

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51 *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394 [*Energy Board*].

52 Above note 50 at para. 76.

53 See Chapter 3, Section B(5).

54 *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia — Létourneau Commission)*, [1997] 2 F.C. 527 (C.A.). See discussion in Chapter 5, Section B(3).

55 *Chrétien*, above note 18 at para. 66 citing *Dunsmuir v. New Brunswick*, [2002] 1 S.C.R. 249 [*Dunsmuir*]. Also discussed in Chapter 5, Section B(3).

56 Robert D. Kligman, *Bias* (Toronto: Butterworths, 1998).

3) Fair Process

In *Chrétien*, Justice Teitlebaum quoted the following passage from *Baker* which, again, simplifies the basic objective of the principle of fairness:

> underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[57]

In assessing whether a commissioner has met the principle of fairness, one need ask only whether this broad objective has been met. It is simply an elaboration of the question asked above by Justice Dickson: Did the tribunal treat the person affected fairly? However, Justice Teitlebaum went on to address the "five non-exhaustive factors" articulated in *Baker* for determining the extent of the procedural fairness required in any particular context. The following is a summary of his analysis:

1) *The decision and decision-making process*: The more that a commission resembles a court, the greater is the degree of formal procedural protections required. The hearings of an investigative commission closely resemble those of a court: testimony, counsel, cross-examinations, procedural motions. But, unlike trials, commissions of inquiry are inquisitorial, with "wide-ranging investigative powers" to achieve their objectives. The role of fact finding and recommending is also different from the decision making of courts. These differences suggest that a lower level of procedural fairness is required, according to Justice Teitlebaum.

   In my view, this analysis places too much emphasis on "form." The reality is that when reputation is at stake, the principle of fairness results in a hearing that is indistinguishable from a judicial hearing. Also, a "finding" of misconduct affecting reputation really amounts to an adjudication about conduct, quite apart from any recommendation.

2) *The statutory scheme and statutory provisions*: The *Inquiries Act* requires notice and an opportunity to be heard before findings of mis-

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57 Above note 47 at para. 22.

conduct can be made. Although the report does not involve a legal determination of issues, it is determinative as the final "say" on what has been investigated within this inquiry. It has a finality in the sense of an absence of any appeal. This suggests that a high degree of fairness is owed.

3) *The importance of the decision to those affected*: The potential impact on a person's reputation may be serious and, as the Supreme Court sated in *Krever*, a good reputation may be a person's "most highly prized attribute." Here, Commissioner Gomery acknowledged that, for this reason, the inquiry's process had to be "scrupulously fair." This factor also warrants a high degree of procedural fairness.
4) *The legitimate expectations of the parties*: Chrétien had a legitimate expectation arising out of the Opening Statement assuring a "scrupulously fair" process. A similar expectation arose that the commissioner would comply with all of his rules of procedure and practice. This justified a strong expectation of a fair process.
5) *The tribunal's choices of procedure*: Here the commissioner is authorized to adopt whatever procedures "that he may consider expedient." This broad discretionary authority regarding procedure suggests the requirement of a lower standard of procedure. Again, this conclusion may not recognize the reality that such a broad authorization is subordinate to the requirements of the principle of fairness when reputation is at stake.

Justice Teitlebaum concluded that, considering all of these factors, Chrétien was entitled to a "high level of procedural fairness." This was not the same level as required at a judicial trial. However, it fell within the upper end of the spectrum required for administrative tribunals. This appears to be an appropriate assessment applicable to most investigative commissions of inquiry and, as suggested, an even higher standard may be justified when findings of misconduct involving reputation may be made.

One way of looking at the procedures required for a commission of inquiry to satisfy the principle of fairness is to start with the most complete protection possible. That then can be scrutinized by asking what is the underlying purpose of that protection. The great procedural flexibility of commissions of inquiry then permits a further exploration. How can that underlying purpose be achieved in the most simple, direct, and

be assessed and the findings that should be made. If there is any ambiguity as to notice of potential adverse findings, they should be explained to the party so that further submissions and even the calling of further evidence may be directed to these.

At the post-hearing stage, the emphasis is on a *fair result*. A party is entitled to a report within a reasonable time, as an aspect of the "result." But this aspect of fairness also has implications for how the evidence is assessed and expressed, including the sufficiency of reasons and remaining within jurisdiction.[62]

E. RULES OF PROCEDURE

The rules of practice and procedure[63] are not legally binding but may best be described as having the status of a "policy" adopted by a commission of inquiry to assist in carrying out its work. An important purpose is to explain in greater detail how it will satisfy the legal requirements imposed by the principle of fairness. These rules of procedure could generate increased legal requirements under the principle of fairness by creating a "legitimate expectation."[64]

In *Krever*, the Supreme Court of Canada described the procedural protections under the rules of that inquiry to be "extensive and exemplary." The Court provided the following examples of their "commendably wide range of protections":[65]

> all parties with standing and all witnesses appearing before the Inquiry had the right to counsel, both at the Inquiry and during their pre-testimony interviews;
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> each party had the right to have its counsel cross-examine any witness who testified, and counsel for a witness who did not have standing was afforded the right to examine that witness;
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> all parties had the right to apply to the Commissioner to have any witness called whom Commission counsel had elected not to call;

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62 These aspects are discussed in Chapter 9, Sections A(3) and D(2).

63 Introduced in Chapter 5, Section C(4).

64 See the discussion of *Chrétien*, above note 18, in the previous section.

65 Above note 44 at para. 67.