

THE LAW OF PUBLIC INQUIRIES IN CANADA

Simon Ruel, B.Sc. (Université Laval), LL.B. (Université de Montréal)
Member of the Barreau du Québec and of the
Law Society of Upper Canada

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Status and Role of Commission Counsel

point commission counsel to assist with and carry any duty that is within the terms of reference of an inquiry.¹⁰ Commission counsel must act in the public interest and have no case to win or lose; the role of commission counsel is to assist and enlighten the commissioner in the fulfillment of his mandate.¹¹ To the public and to inquiry participants, commission counsel may appear to have an independent status. However, it is essential to remember that commission counsel is and remains at all times subject to the direction of the commissioner.¹² Commission counsel has no authority independent of the commissioner.¹³ The flip side is that the actions of commission counsel in fulfilling his mandate will be attributable to and reflect on the commissioner and his inquiry.¹⁴

All the legal principles and constraints applicable to commissioners of inquiry will therefore also be applicable to commission counsel. This includes the duty to act fairly and impartially, as per the applicable legal standards. Therefore, the actions of commission counsel will often be subject to judicial review as if they were those of the commissioner.¹⁵

Comparisons have been made between commission counsel and Crown prosecutors, particularly with respect to evidentiary responsibilities. However, there are fundamental differences between those functions. Contrary to a prosecutor, commission counsel is an agent of the commissioner, confers with him on a regular basis and is privy to the commissioner's inner working process. Commission counsel is not an agent of the state in the sense of prosecuting offences and does not have an adversarial position.¹⁶ As acting for the "decision-maker," it has been said that greater impartiality would be required on the part of commission counsel than it would for a Crown prosecutor.¹⁷

In selecting commission counsel, commissioners should apply rigorous standards. Again, since commission counsel personifies the commissioner, the latter must ensure that his mandate will not be tainted by allegations of conflicts of inter-

Toronto Computer Leasing Inquiry Commissioner (2004), [2004] O.J. No. 648, 2004 CarswellOnt 664 at para. 38 (Ont. Div. Ct.) [*Lyons*].

¹⁰ *Supra* note 5.

¹¹ John Sopinka, "The Role of Commission Counsel" (1990) Dal. L.J. 75; Yves Ouellette, "Les commissions d'enquête quasi-policieres : problèmes de procédure et de preuve" in *Développements récents sur les commissions d'enquête* (Les Éditions Yvon Blais, 1998) page 66 [Ouellette].

¹² *Supra* note 5.

¹³ The Problems Faced by Modern-Day Commissions of Inquiry, Gilles Létourneau, J.C.A., Address at the 13th Conference of Government Jurists, Quebec City, April 3, 1998, page 7.

¹⁴ *Supra* note 5; O'Connor, The role of commission counsel in a public inquiry, *supra* note 7 at para. 14.

¹⁵ Alberta Law Reform Institute, *supra* note 9 at page 93.

¹⁶ *Lyons*, *supra* note 9 at para. 39.

¹⁷ *Supra* note 5 at page 78; see also Alberta Law Reform Institute, *supra* note 9; O'Connor, The role of commission counsel in a public inquiry, *supra* note 7 at para. 13.

Chapter 3 — Structure: Roles and Responsibilities

As the masters of their inquiries, commissioners could theoretically conduct their inquiries alone, but it would be unrealistic and unadvisable for them to do so.⁵ Practically and to avoid legal pitfalls, commissioners must delegate some of their functions. However, they will remain accountable for all decisions made and all actions of their delegates in the course of their inquiries.

B. Status and Role of Commission Counsel (with the cooperation of Marie Cossette)

Public inquiries are called to review complex and sensitive matters and commissioners cannot be expected to carry the preliminary investigations that must take place before the evidence is formally called before them. They will need the assistance of investigative staff and counsel.

In the conduct of their inquiries, commissioners will be bound to apply the rules of procedural fairness and will often have to rule on legal or technical objections. Legal advice will therefore be essential.⁶ To ensure the efficiency of the inquiry and to preserve their impartiality, commissioners will also need to delegate the task of calling evidence at the inquiry to commission counsel. Finally, commissioners may require assistance and advice with respect to the preparation of their final reports.

The overall responsibilities of commission counsel in the unfolding of the inquiry will be to assure the credibility, integrity, impartiality and efficiency of the inquiry process.⁷ One of the key functions of public inquiries is to restore public confidence. Being involved, most often in all aspects of an inquiry, and being constantly on the front lines and in the limelight, the work of commission counsel is essential to achieve that goal and to ensure the success of an inquiry.⁸

1. Appointment of Commission Counsel

Commission counsel is appointed at the sole discretion of the commissioner. He is the commissioner's counsel and acts as his *alter ego*.⁹ A commissioner may ap-

Canadian Forces to Somalia) [1997] 2 F.C. 527 at para. 29 (Fed. C.A.); leave to appeal refused; (1997), (sub nom. *Beno v. Létourneau*) 224 N.R. 395 (note) (S.C.C.).

⁵ John Sopinka, "The Role of Commission Counsel," Pross, Christie & Yogis, eds., in *Commissions of Inquiry* (Toronto: Carswell, 1998) page 77.

⁶ See Anthony & Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Butterworths, 1985) pages 23, 24.

⁷ *Ibid.* at page 24; Justice Dennis O'Connor, "The role of commission counsel in a public inquiry" (2003) 22 *Advocates' Soc. J.* 9-11 at para. 10 [O'Connor, The role of commission counsel in a public inquiry].

⁸ O'Connor, The role of commission counsel in a public inquiry, *ibid.* at paras. 9, 10.

⁹ Proposals for the Reform of the *Public Inquiries Act*, Alberta Law Reform Institute, Report No. 62, November 1992, page 92 [Alberta Law Reform Institute]; *supra* note 5; O'Connor, The role of commission counsel in a public inquiry, *ibid.* at para. 11; *Lyons v.*

est or bias. It would not be enough that commission counsel has not acted for a person or organization under scrutiny in the same or related matters. Commission counsel should appear to be free from conflicts of interest and from any allegation of bias with respect to the issues under review and persons involved in an inquiry.¹⁸

2. Advisory Role of Commission Counsel

Commission counsel may be called to provide advice to commissioners concerning their roles and responsibilities; on the scope of the terms of reference; on the inquiry process; evidentiary issues and on measures necessary to ensure the impartiality and fairness of the inquiry.¹⁹ For example, commission counsel will typically draft the rules of procedure for the commissioner's approval and advise the commissioner on procedural issues and rulings, such as applications for standing, funding, to clarify the scope of the terms of reference or for the issuance of confidentiality measures.²⁰ Although the preparation of notices of alleged misconduct is closely linked with report writing, which is primarily a responsibility of commissioners, commission counsel will often be tasked to prepare the notices for the commissioner's review and to issue them on his behalf.

3. Preliminary Investigations

Commission counsel will have the overall responsibility over preliminary investigations, such as the production of documents to the commission; the preparation of summonses; the review and organization of documents; the interview of potential witnesses; the preparation of summaries or statements of anticipated evidence or will says, etc.²¹ As acting *as alter ego of the commissioner*, commission counsel may communicate the result of those investigations to the commissioner, unless the commissioner establishes a different rule.²²

4. Communications

In all inquiries, commission counsel would also be delegated the task of maintaining open lines of communications with the parties with standing and their coun-

¹⁸ Alberta Law Reform Institute, *supra* note 9; Report of the Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, Volume 3, Inquiry Process, The Honourable Denise E. Bellamy, Commissioner, pages 44, 45 [Bellamy].

¹⁹ *Supra* note 6 at page 24; O'Connor, The role of commission counsel in a public inquiry, *supra* note 7 at para. 17.

²⁰ *Supra* note 5 at pages 79, 80.

²¹ *Ibid.* at page 79; O'Connor, The role of commission counsel in a public inquiry, *supra* note 7 at paras. 18, 19.

²² François Doyon, "Quelques aspects de l'impartialité et de l'indépendance" in *Développements récents sur les commissions d'enquête* (Les Éditions Yvon Blais, 1998) page 35.