THE PUBLIC INQUIRY: TWO SUGGESTIONS FOR REFORM

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Commissions of inquiry have the potential to damage individual reputations and destroy careers, yet they are, for the most part, completely devoid of any rules of practice or of evidence. In the past, Royal Commissions have depended upon the appointment of judges as commissioners who were of such high standing in the legal community and whose sense of fairness was such that at the end of the inquiry the interested parties and the public were left with the sense that justice was done. Some would argue that public inquiries as they are presently constituted are in no need of change. If the right judge is appointed as commissioner of the inquiry then the proper result will be achieved. They further argue that to formalize commissions of inquiry with rigid procedural rules will reduce their effectiveness by destroying their flexibility. Though these arguments may have merit, I would argue that the time has arrived for Parliament and the provincial legislatures to give serious consideration to providing at least a rudimentary structure to the procedure of inquiries which investigate the conduct of individuals, corporations and others.

Proper Notice

One of the key areas that needs immediate attention is the notice provision of the various inquiries acts as they relate to findings of misconduct. Section 13 of the federal *Inquiries Act*[1] provides:

> No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.

The provincial acts take different approaches. The Ontario *Public Inquiries Act*[2] contains a provision similar to the federal *Act*:

> No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.[3]

The relevant statutes in Alberta, British Columbia, Prince Edward Island and the Northwest Territories afford roughly similar protection to the federal and

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[1]R.S.C., c. I-13.

[2]R.S.O., 1990. c. P-41.

[3]*Ibid.* at s. 5(2).

Ontario acts. The statutes of New Brunswick, Newfoundland, Nova Scotia, Quebec, Saskatchewan and the Yukon territories do not contain provisions for notice of allegations of misconduct. Manitoba does not yet have a separate inquiries act. Part V of the *Manitoba Evidence Act*[4] relates to public inquiries but there is no notice provision.

In those statutes that do provide for "notice", there is no specific indication of when the notice is to be given other than before the report of the commission of inquiry is delivered. There is not even a requirement that the notice be in writing. The Ontario Law Reform Commission has commented on the inadequacies of the notice provision in the Ontario *Public Inquiries Act*:

> Section 5(2) governs when an inquiry is required to give a person notice of alleged misconduct and an opportunity to respond. It refers only to findings of misconduct in the report of a commission, not to allegations that may arise during public hearings. It has been interpreted to apply to a narrower range of people than those who, under section 5(1), have a substantial and direct interest in the subject matter of an inquiry. Moreover, section 5(2) does not address the crucial issue of when notice of misconduct must be received. All that the section would appear to require is that notice be given some time before the report is written and that the person who is found to have engaged in misconduct be "allowed full opportunity to be heard in person or by counsel." Thus, the act does not provide explicitly that a person must have an opportunity to know and meet the case against him.[5]

The practice of commissions with respect to notice has varied over the years. Some commissions have provided notice to an individual before he or she testifies at the hearings of the inquiry while others have given notice only after all the evidence is in and the report is about to be written. It seems to me that it is essentially unfair to wait until the end of an inquiry to tell a person that the report of the commissioner may contain a finding of misconduct against him or her. The argument in favour of waiting until the end of the inquiry is that the commissioner and commission counsel do not know what the findings are likely to be until all of the evidence is in. However, this is not an acceptable reason for failure to give timely notice of allegations of misconduct that may have serious consequences on an individual's character, reputation and career.

Today's commissions of inquiry have sophisticated investigative staffs and experienced counsel. Evidence should not be called until they have done a thorough investigation. The commission is, in fact, in the identical position of a lawyer who drafts a statement of claim to commence a civil action or a crown attorney who advises the police in the drafting of an indictment in a criminal case.

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[4]R.S.M., 1987, c. E-150.

[5]Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Queen's Printer, 1992) at 43 [hereinafter OLRC].

In both these cases the lawyer or the crown attorney, based upon the information derived from an appropriate investigation, is able to draft a document which gives the defendant or the accused the kind of notice that he or she needs to defend the allegations. Parliament and the legislatures should require that no individual should be the subject of findings of misconduct unless he or she has received timely notice of the allegations of misconduct. For the purpose of an inquiry, timely notice is notice delivered before any person has been required to testify at the inquiry, unless it can be clearly demonstrated that it was not possible to give such notice.

There will be situations when evidence becomes known for the first time during the course of an inquiry after the person affected by the evidence has testified. However, if there has been a thorough investigation prior to the commencement of the hearing, such situations should be the exception rather than the rule. In these cases, provision can be made for appropriate cross-examination by the affected person's counsel and the person can be recalled to testify in respect of the new information. If necessary, both counsel for the commission *and* the commissioner should be required to demonstrate to the satisfaction of the court by way of a stated case or an application for directions, that evidence led "against" a person after he or she has testified is essential to the mandate of the commission and that appropriate steps have been taken to safeguard the rights of the individual concerned.

The Rules of Evidence

Commissions of inquiry traditionally receive evidence without regard to the rules of evidence and in particular without regard to the rule against the receipt of hearsay evidence. This creates a problem in investigative inquiries. Dubin C.J.O., in the opening session of the *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* stated the problem in the following manner:

> The rules of evidence that govern proceedings in court do not apply to Royal Commissions and hearsay evidence is in a general sense admissible. I realize, however, that reputations may sometimes be unfairly destroyed, and I will do all that I can to see that any evidence which is completely unfounded will not be introduced to destroy the reputation of any person.[6]

In most situations it is reasonable for a Royal Commission or inquiry to proceed without regard to the rules of evidence. Public inquiries would be time consuming and expensive if they had to adhere to the rigid structure imposed by

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[6]The Honourable C.L. Dubin, Commissioner, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*, Opening Session, 15 November 1988.

the evidentiary rules at trial. However, if the commissioner in a public inquiry intends to make a finding of misconduct against an individual, the commission should base such findings only on evidence that would ordinarily be admissible in a court of law. These rules have served a useful purpose in protecting the rights of individuals who are prosecuted for criminal offences or sued in a civil action. Such an approach would more than capture the spirit of the statement of Chief Justice Dubin.

Other Rules of Procedure?

If rules are developed in respect of the provision of notice to persons against whom findings of misconduct may be made and if rules of evidence are adopted with respect to these persons, there may be a case to be made for the development of more elaborate procedural rules. For example, rules could be adopted for disclosure and discovery of documents among the interested parties to the inquiry including commission counsel. However, I submit that this would be going too far. Traditionally, commissions of inquiry have developed their own rules of procedure relating to matters of disclosure and the production of documents. Generally these have served their purpose well and the flexibility afforded to commissions to develop their own rules to meet the particular demands related to their mandates is the most appropriate path to follow.

Conclusion

The suggestions outlined above may at first glance appear to be cumbersome. Critics will argue that commissions of inquiry do not really decide anything prejudicial and that the legal rights of individuals are not affected by them. Moreover, developing unnecessary rules requiring commissioners and commission counsel to behave more like judges and counsel at trial would destroy the flexibility that is necessary to a commission of inquiry. I do not believe that this is the case, but even if it is, it is a small price to pay to ensure that the reputations and careers of individuals who appear before commissions of inquiry are properly protected.