

COMMISSIONS OF INQUIRY edited by A. Paul Pross, Innis Christie and John A. Yogis (Carswell, 1990) pp. 216

There are few works that offer commissioners and practitioners, whether acting as commission counsel or counsel to an interested party, practical advice on legal and procedural¹ issues that may arise in the day to day operation of an inquiry. The publication under review is a useful addition to available source material. *Commissions of Inquiry* reproduces a series of papers given at a conference called Commissions of Inquiry: Lawyers' Values and Public Policy Makers' Values. Although an interdisciplinary work of interest to lawyers and to students of public administration, the book contains several papers dealing with legal and procedural aspects of inquiries. Offered in a conference called to discuss the conflict between lawyers' values and policy makers' values, those papers identify some procedures dictated by lawyers' values and therefore serve not only the scholars in analyzing the value conflict, but also practitioners searching for source material on the day to day operation of an inquiry. Those papers, which are the focus of this review, do not provide all the answers or even all the approaches to a particular problem, but certainly offer much food for thought for the practitioner or commissioner considering how to manage an inquiry.

Several matters could arise: should the commission communicate with the news media and if so, how, when, and on what topics; the order in which witnesses will be examined; whether the evidence of major participants is led by commission counsel or their own counsel and for this purpose how a major participant is defined; the right to call witnesses, how it is exercised and when; standing, and whether there will be different classes with different procedural rights; document production; how and when parties receive notice of allegations against them and, if by formal notice, whether it will be made a part of the public record; and the role of commission counsel in presenting final argument and in writing the report. Many of these issues will become pertinent early. For example, a commissioner who decides that his counsel will not assist in writing the final report may have to address early on who will assist and in what fashion, because that person's presence during presentation of evidence may be necessary. In turn, the decision on that issue may affect commission counsel's role during final argument which in turn may affect the approach to giving notice of allegations.

In practice it falls on commission counsel to advise the commissioner with respect to many of these issues. Many may pose a question of exercising discretion within legal principle; for example, a commissioner is the master of his own procedure, but what procedures should he establish? Answers to many of the questions will be found in the law reports and works such as Hallett, *Royal Commissions and Boards of Inquiry* (Melbourne: Law Book, 1982).² Those looking for a less technical overview might

¹ As distinguished from administrative issues. Those dealing with administrative matters, particularly in a federal inquiry, would do well to read H.A. Wilson, *Commissions of Inquiry, A Handbook on Operations* (Ottawa: Minister of Supply and Services Canada, 1983).

² This reviewer notes in passing that the general works on administrative law usually include citations of authorities on investigatory bodies. A recent work from Ontario, *Administrative Tribunals: A Practice Handbook for Legal Counsel* (Toronto: Canada Law Book Inc., 1989), includes a paper on

consult Anthony and Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985). The texts and law reports in some instances offer a minimum standard against which to assess decisions: for example, in the proceedings arising out of the report of the commission into the disaster at Mount Erebus,³ the question of reasonable notice to a participant is discussed; however, when it comes to determining the form of notice, or how it should be conveyed, particularly in the case of participants who have been represented by counsel from the outset of the hearings, this case and others offer little guidance.⁴

Another helpful source, in addition to texts and case reports, are commission reports themselves. Easily accessible information as to the practice of commissioners of the past will be of assistance to commissioners of the future. In many recent reports, the commissioners have chosen to outline at least some of their procedural operations, some in more detail than others.⁵ At least one commissioner raises some of these issues and describes his practice in a review;⁶ there even is a commission on commissions.⁷ Hence for the counsel or commissioner with adequate time — or access to an articling student — the practice and procedure of many commissions and similar bodies is available.

It is, perhaps, a pity that no Canadian work draws all of this information together. *Commissions of Inquiry* is a welcome addition to the body of source material. It offers descriptions of the practices and opinions of some of Canada's most prominent lawyers and jurists on the subject, including former Supreme Court of Canada Justice and

the role of legal counsel in commissions of inquiry.

3. *Mahon v. Air New Zealand*, [1984] 3 All E.R. 201 (P.C.)
4. Compare the cases on quasi-judicial bodies including *Fraternite Inter-Provinciale de Ouvriers en Electricite v. Office de la Construction du Quebec et al.* (1983), 148 D.L.R. (3d) 626 (Que. C.A.), *Crabbe v. Minister of Transport*, [1972] F.C. 863 and *Re Wilson and Law Society of B.C.* (1974), 47 D.L.R. (3d) 760 (B.C.S.C.), with cases on investigatory bodies including *Maxwell v. Department of Trade*, [1974] 2 All E.R. 122 (C.A.) and *Re FIC; Re AIC* (1988), 63 Alta. L.R. (2d) 69 (Q.B.), var. 64 Alta. L.R. (2d) 1 (C.A.). See also the ruling of the Commission of Inquiry Concerning Certain Activities of the RCMP: Second Report - Volume 2 (1981), Practice Direction dated June 20, 1980. Although most public inquiry statutes have a notice requirement, they are silent on the form of that notice. Other statutes providing for investigations and inquiries, such as business corporations legislation, are entirely silent on the question.
5. Hon. W.Z. Estey, *Report of the Inquiry Into the Collapse of the CCB and Northland Bank* (Ottawa: Minister of Supply and Services Canada, 1986), Foreword and Chapter 2; Hon. W.D. Parker, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens* (Ottawa: Minister of Supply and Services Canada, 1987), Chapter 25 and Appendix K (Rulings); W.E. Code, Q.C., *Final Report of the Inspector*, July 18, 1989, Court of Queen's Bench of Alberta, Judicial District of Edmonton, Action Nos. 8703-16333/16334 (not a commission of inquiry), Chapter II and numerous rulings of the supervising judge described in Schedule "A" to that report; Hon. C.L. Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Ottawa: Minister of Supply and Services Canada, 1990); chapter entitled "The Process"; Hon. J.H. Laycraft, *Report of a Public Inquiry: Royal American Shows Inc. and its Activities in Alberta* (1978), Part A. The commissioners in *Royal Commission on the Donald Marshall, Jr. Prosecution*, Volume 1 (Province of Nova Scotia, 1989) reproduce verbatim their rules of procedure and certain of their procedural rulings including those on funding and excluding television cameras during the testimony of certain witnesses.
6. T.R. Berger, *The Mackenzie Valley Pipeline Inquiry* (1976), 3 Queen's Law Journal 3.
7. Royal Commission on Tribunals of Inquiry (London, England: Cmnd. 3121, 1966).

three-time commissioner, Hon. W.Z. Estey. This work would be valuable reading not only for those appointed as commissioners and those saddled with the work of commission counsel, but also for those deciding whether to appoint a commission and those who must draft its terms of reference.

The book includes a chapter from David W. Scott, Q.C. who addresses broadly the rights and obligations of those subject to inquiry and of witnesses. The paper supplements material already available on this issue including the Law Reform Commission of Canada's working paper (*Commissions of Inquiry (A New Act)*, Working Paper 17, 1977) discussing the dilemma of those subject to inquiry. Their rights were also considered in certain often cited and well known cases including *Re The Ontario Crime Commission; ex parte Feeley and McDermott*, [1962] O.R. 872.

John Sopinka, Q.C., as he then was, contributes a paper on the role of commission counsel. The paper contains helpful citations of cases dealing with the role and legal status of commission counsel, followed by a practical review of the role of commission counsel at the pre-hearing and hearing stages. There is discussion on some of the most important practical questions which arise, including the order of examination of the witnesses; whether commission counsel should examine all witnesses in the first instance⁸ and the circumstances where it might not be appropriate; cross-examination; and the role of commission counsel in closing argument and in assisting in writing the report.⁹

Those involved in management of an inquiry might want to consult Part II of the book. There, one finds advice from David M. Grenville, Commission Secretary on the Ocean Ranger Inquiry, and an insightful short comment on inquiry management by J.G. Godsoe, Q.C. This will interest commissioners and counsel alike because it addresses the form of the terms of reference on the duration of the inquiry, the right of access to government documents (which an investigatory inquiry might have in any case, perhaps limited in some respects,¹⁰ but on which controversy can be usefully eliminated), and publication of research reports. The chapter on commission research will interest those involved in the advisory functions of a commission, although the research program described there (from the well-known MacDonald Commission) would usually be a little too ambitious for an investigatory inquiry in the exercise of its function in making recommendations.

The effect of the news media on the public profile of the inquiry, and food for thought with respect to how commission counsel might recommend that an inquiry be run in light of media scrutiny, is provided in a perceptive piece by Hon. Mr. Justice S.G.M. Grange.

^{8.} It is interesting to note that his opinion on this matter diverges from the practice of some recent commissions. While the Estey Commission, in which he was counsel, had major parties' counsel lead their evidence in chief, a review of the reports noted above suggests that this was not the case, for example, in the Dubin and Marshall Inquiries, nor it appears, in the Laycraft Inquiry.

^{9.} On this latter topic the authorities disclose a number of approaches. Compare Royal Commission on Tribunals of Inquiry, *supra* paras 28, 87-89; T.R. Berger, *supra*, at 14; *Re Public Accountancy Act and Stoller* (1960), 25 D.L.R. (2d) 410 (Ont.C.A.); *Doyle v. Restrictive Trade Practices Commission* (1983), 51 N.R. 223 (Fed. C.A.) at 230-232; *Re FIC; Re AIC*, unreported reasons of Berger, J., Nov. 15, 1988, Action numbers 8703-16333/16334, Alta., Q.B., J.D. Edmonton.

^{10.} *Re AIC; Re FIC* (1988), 57 Alta. L.R. (2d) 289 (C.A.).

To what extent should procedural disputes be resolved in public? What are the attributes of a good commission counsel? How should commission counsel deal with the media? In what fashion and when should counsel for interested parties respond to damaging evidence? How should they deal with commission counsel? How should the commission balance the concern with spending too much time and too much money against what Justice Grange describes as the desire that commissions be "as wide ranging as possible" lest "the media mutter darkly about coverups whenever the Commissioner declares something to be outside his terms of reference and refuses to hear evidence". Justice Grange returns to media relations in his second contribution to this book in the chapter on the Commission and its Report: Public Education, Advocacy and Lobbying. While Justice Grange does not always suggest answers to the questions he raises, certainly his advice will be valuable to a commissioner from the outset.

The Honourable W.Z. Estey has the last word in the book. Although his comments are called "The Use and Abuse of Inquiries: Do They Serve a Policy Purpose", the discussion which follows provides advice as to how a commissioner might approach his task, including comments on *in camera* hearings, role of commission counsel, funding of participants' legal costs, role of the media, and treatment of the report. He also offers the useful advice that the only time a prospective commissioner has bargaining power with the appointing authorities is prior to the appointment, and he raises the issue whether a commissioner might be able to negotiate for the public release of the final report.

This review, being for a law journal, concentrates on the chapters discussing legal and procedural aspects of investigatory inquiries, as opposed to those concerning the more policy-oriented or advisory inquiries and those within the realm of public policy administration. There is much material in this inter-disciplinary book on the latter topics as well. Although the Supreme Court of Canada has slightly narrowed the scope of provincial investigatory commissions,¹¹ it is clear that investigatory inquiries will remain with us for years to come. *Commissions of Inquiry* is not a textbook: it canvasses a wide range of topics in varying degrees of detail and depth. Although it does not always show that there are a variety of approaches to the problems that arise, it would be useful reading for commissioners, their counsel and counsel for participants.

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¹¹. *Starr v. Houlden* (1990), 68 D.L.R. (4th) 641.