

Conduct of Canadian Public Inquiries and the Cohen Commission

by Brad M. Caldwell

Introduction

In a report entitled *Commissions of Inquiry in Canada: Lessons Learned from Recent Experience*, it was noted that:

Launching a royal commission of inquiry is a risky process – a bit like sending a ship out to sea. You don't know where it will go, how long it will take, how much it will cost or what it will bring back. And trying to relocate a ship lost at sea and bring it back to port can be a costly experience (especially if the captain is not in a hurry to come home).¹

Despite these high risks, on November 6, 2009 Prime Minister Harper announced the appointment of the Honourable Bruce Cohen, a judge from the British Columbia Supreme Court, as commissioner of an inquiry into the decline of sockeye salmon in the Fraser River (the “Cohen Commission”).

During the inquiry, the Cohen Commission will likely be considering the conduct of various parties who impact the Fraser River sockeye resource such as fish farmers, mine operators, forestry operators, the Department of Fisheries and Oceans (“DFO”), commercial fishers, sport fishers, and First Nations. Accordingly, many persons may be interested in seeking standing to appear at the inquiry to present evidence and make submissions.

Since at the time of writing little is known about how the Cohen Commission will operate, this article will provide some general information about the operations of commissions of inquiry with specific reference to the Cohen Commission where possible.

¹ As quoted in Ed Ratushny, *The Conduct of Public Inquiries* (Toronto: Irwin Law Inc., 2009).

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Nature and Purpose of Commissions of Inquiry

A commission of inquiry is a body created by a government under the federal *Inquiries Act* or under similar provincial legislation for the purpose of making inquiries and reporting back to government on the findings from these inquiries with recommendations for change. In the past, there have been a number of inquiries dealing with Pacific coast maritime matters including: (1) West Coast Oil Ports Inquiry (1978) conducted by Andrew R. Thompson, (2) Commission on Pacific Fisheries Policy (1982) conducted by Peter Pearse and (3) the Inquiry into the Disappearance of 1.3 million sockeye salmon in 2004 conducted by Judge Bryan Williams.

Public inquiries have many functions, but can generally be categorized as either policy advisory inquiries or investigatory inquiries. This article will focus on investigatory inquiries. While there are often multiple purposes for investigatory inquiries, probably the most important purpose of investigative inquiries is to restore public confidence in government.

Terms of Reference

Terms of reference are created for all inquiries. While they perform many functions, the most important function is to determine the jurisdiction of the commission and set out the boundaries of what the commission can and cannot do. In some cases terms of reference can be quite narrow, severely limiting the scope of the inquiry to avoid overlap with other proceedings or to avoid matters that are potentially embarrassing for the government. In other cases, they are broad with an open-ended clause giving almost unlimited scope to the inquiry.

The terms of reference for the Cohen Commission are available for viewing on the Internet at www.cohencommission.ca. While the Cohen Commission terms of reference are not open ended, they are quite broad in directing the Commission to consider the

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policies and practices of DFO and investigate “the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environment changes . . . marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors . . . [emphasis added]”

The terms of reference for most commissions of inquiry direct the commission to perform its duties without expressing any conclusion on civil or criminal liability. The Cohen Commission terms of reference includes these standard terms and go one step further by directing that the inquiry be conducted “without seeking to find fault . . .”.

Role of Commissioner and Counsel

One important role of a commissioner is to determine whether or not an interested party will be granted “standing” to participate. A related issue is the question of funding for participants. Often a commissioner has the ability to recommend that funding be provided to a participant. This is specifically provided for in the terms of reference of the Cohen Commission.

Another important role of a commissioner is to establish its own rules and procedures for conduct of its hearings. This is also specifically provided for in the terms of reference of the Cohen Commission.

With respect to the role of counsel acting for a commission, lead commission counsel usually acts as the operation control centre, performing a wide variety of tasks. Lead counsel will generally take charge of collecting and organizing all of the evidence (including documentary disclosure to participants and witnesses) and organizing the presentation of evidence at the hearing. For inquiries where it is likely that commission counsel will have to take an adversarial role cross-examining witnesses on their credibility, some commissions divide the commission counsel function with one counsel acting as advisory counsel to assist act a sounding board for the commissioner and assist with the writing of the report leaving all other functions to a hearings counsel. The Cohen Commission has appointed Brian Wallace, Q.C. as lead counsel. It has also appointed

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Keith Hamilton, Q.C. as policy counsel. At this stage, it is not clear what the role of policy counsel will be.

Both witnesses and participants granted standing would in most cases also be entitled to their own legal counsel. This is particularly important when there is a possibility that a commission may make a finding of misconduct against a party.

Legal Framework

Since inquiries can be ordered by both the federal government and provincial governments, it is not always clear whether or not a commission has constitutional authority over the subject matter of the inquiry. In some cases, such as the Inquiry into the sinking of the “Ocean Ranger” in 1982, a joint provincial/federal commission was created.

The *Charter of Rights* provisions giving witnesses protection against having their commission evidence used against them in future criminal proceedings are applicable to both provincial and federal commissions. However, it is not clear whether or not derivative evidence (evidence later discovered as a result of testimony) could be used.

The administrative law requirement of fairness (“Fairness”) is required at commission hearings. This often involves the right to counsel, as noted above, along with procedural protections such as the right to disclosure of adverse evidence, the right to cross-examine persons presenting adverse evidence and the right to make submissions regarding inferences to be drawn from such evidence. The greater the potential for an adverse finding with respect to a party’s conduct, the greater the requirements of Fairness. Although not a finding of civil or criminal liability, a finding of misconduct can severely affect a person’s reputation.

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The conduct of commission hearings as well as a commission's final report is subject to being reviewed by a court by way of an application for judicial review. If Fairness is denied, any related findings of fact could be declared a nullity by way of judicial review.

The federal *Inquiries Act* and its provincial counterparts include rights to compel testimony and production of documents.

Conduct of the Hearing

Generally speaking, it is up to a commissioner to control the conduct of the proceedings at his or her inquiry. Although many of the strict rules of evidence do not apply to inquiry hearings, they are often treated as a framework for guiding the commissioner for assessing Fairness in a particular situation. For example at a trial in a regular court, the rule in *Browne v. Dunne* applies requiring a party cross examining a witness to put any evidence that contradicts that witness to the witness while in the witness box if the cross examining party wishes to refer to the contradictory evidence in final argument. A similar approach should also be taken at an inquiry to satisfy the requirements of the administrative law principle of fairness. Rulings on the admissibility of evidence at inquiry hearings are governed by the principle of relevance. If a commission refuses to hear evidence that is relevant to its terms of reference, this would be ground for judicial review as a jurisdictional error (to be determined by a standard deferring to the commissioner's discretion).

The law of privilege also applies at inquiries. This is a very technical area of the law that prohibits the admission of a broad range of evidence that originated in confidence that it would not be disclosed. It includes: (1) solicitor-client privilege, (2) litigation privilege, and (3) public interest immunity of governments for items such as cabinet minutes and national security. Since many investigative inquiries involve investigation of government activities, it most often arises in the context of claims of public interest immunity by governments and solicitor-client privilege of government legal advisors. In some cases, government can be persuaded to waive its privilege.

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Final Report

Often when writing a report, a commission has to walk a fine line between not making any findings of criminal or civil liability, which it is prohibited from doing, and making findings of fact on the matter being investigated. Since inquiries are often called as a consequence of public discontent, it is not uncommon for findings of fact to include some finding of misconduct on the part of individual persons or entities. Section 13 of the *Inquiries Act* provides that:

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

Since providing notice to a person after the report has been drafted is akin to “closing the barn door after the horse has escaped”, in order to satisfy the requirements of Fairness, most commissions give informal notice to persons at risk of an adverse finding of misconduct during the entire course of the hearing. Such notice would ordinarily include the disclosure of any documents that have the potential to adversely reflect upon that person.

Once a report has been finalized and delivered to the government that commissioned it, there is no requirement that it be made public. However, in practice a report is almost always released. In some cases, such as when parallel criminal proceedings before a jury are taking place, the release of a report will be delayed.

Conclusion

It is hoped that this general overview of the practice and procedure of investigatory inquiries will be of assistance in understanding the procedures and practices to be adopted by the Cohen Commission in investigating the decline in sockeye salmon in the

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Fraser River. For a more in-depth review of the matters discussed in the article, a very useful source of information (relied upon by the author for this paper) is a recently published book by Ed Ratushny, entitled: *The Conduct of Public Inquiries* (Toronto: Irwin Law Inc., 2009).

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