
The Pros and Cons of Commissions of Inquiry

Justice John H. Gomery*

In this lecture, Justice Gomery explains the function of commissions of inquiry: to investigate, to educate, and to inform Canadian society. The commission, once appointed, has a high degree of independence and autonomy, limited only by the requirements that it restrict its activity to the investigation that it is authorized to make by the Order-in-Council.

Justice Gomery explains that public inquiries are a regular part of the political landscape in Canada, constituting what has been described by the Supreme Court of Canada as “a significant and useful part” of our democratic traditions, both in Canada and elsewhere. He reflects on five particular commissions of inquiry that were subject to judicial review in Canada. *Nelles* concerned an Ontario provincial inquiry into the death of children in a public hospital. The *Westray* case investigated the deadly underground explosion at the Westray Coal Mine in Nova Scotia. The “Somalia Inquiry” was set up to examine the violent death of a Somali civilian at the hands of Canadian soldiers sent to Somalia as part of a United Nations mission. The “Krever Inquiry” dealt with the tragedy resulting from the contamination of the national blood supply with Hepatitis C and HIV. Finally, he mentions the “Walkerton Inquiry”, which explored the reasons for the fatal contamination of the water supply in Walkerton, Ontario.

Commissions of inquiry have been criticized for several reasons: for being unfair to the persons who are the subject of unfavourable comment, made during public hearings or in the commission’s report; for costing too much; and for taking too long. Justice Gomery addresses these concerns and concludes that they are outweighed by the benefits. The recommendations arising from these commissions, coming from an independent and impartial source, will not only assist the government in taking remedial action but will tend to restore public confidence in the industry or process being reviewed.

Dans cette conférence, le juge Gomery explique la fonction des commissions d’enquête, soit celle d’enquêter, d’éduquer et d’informer la société canadienne. Une fois qu’elle est nommée, la commission jouit d’une indépendance et d’une autonomie importantes qui ne sont limitées que par l’exigence qu’elle restreigne ses activités à l’enquête autorisée par le décret l’ayant créée.

Le juge Gomery explique que les enquêtes constituent un aspect normal du paysage politique canadien, et sont devenues, d’après la Cour suprême du Canada, «un élément important et utile» de nos traditions démocratiques, au Canada et ailleurs. Il explore cinq commissions d’enquête qui furent assujetties à des procédures de révision judiciaire. La première était une enquête provinciale ontarienne traitant des décès de plusieurs enfants dans un hôpital public, dont certains aspects du rapport furent contestés dans l’affaire *Nelles*. La commission *Westray* enquêta sur l’explosion souterraine meurtrière dans la mine de charbon *Westray* en Nouvelle-Écosse. La commission d’enquête sur la Somalie fut établie pour examiner la mort violente d’un civil somalien aux mains de soldats canadiens participant à une mission de maintien de la paix des Nations Unies. L’enquête dite *Krever* traite de la tragique contamination des réserves de sang canadiennes par les virus de l’hépatite C et du SIDA. Dernièrement, il mentionne l’enquête *Walkerton* sur la contamination du réseau d’eau potable dans la ville de *Walkerton*, en Ontario.

Les commissions d’enquête sont critiquées pour plusieurs raisons: pour avoir été injustes à l’encontre d’individus qui furent visés par des commentaires défavorables exprimés lors d’audiences publiques ou dans les rapports des commissions; pour avoir engendré des coûts trop élevés; ou encore pour avoir été trop longues. Le juge Gomery aborde ces problèmes mais conclut que les bénéfices des commissions d’enquête l’emportent sur les inconvénients. Les recommandations ressortant des travaux de ces commissions, à la fois indépendantes et impartiales, non seulement aident le gouvernement à prendre des mesures palliatives, mais ont aussi l’effet de restaurer la confiance du public en l’industrie ou le processus examiné.

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When I was asked to deliver the *McGill Law Journal* annual lecture, I was enormously flattered, and found myself unable to refuse, in spite of my determination not to become a “conférencier” once my duties as a commissioner had come to an end as they have, now, come to an end. I was reminded, when the invitation was made to me, quite unnecessarily, by the current editors of the *Journal* that I am an alumnus not only of the McGill Faculty of Law but also of the *Journal*. I was on the editorial board in 1955, a year before I graduated. The *Journal* was at that time a newborn publication and it was, I think it is fair to say, much less prestigious than it is today. My participation in the success of the publication was limited to selling advertising space to Montreal law firms. I made no contribution to its editorial content but I sold quite a lot of advertising space. Nevertheless I am one of a large group of proud parents, and feel privileged to be invited to address you.

I suppose it is obvious that my recent notoriety as the Commissioner of Inquiry into the Sponsorship Program and Advertising Activities is the reason why I am here, and you are probably interested in hearing the inside story of what is most often referred to as the “Gomery Commission”. If that is so, I am sorry but I am going to disappoint you.

First, my fact-finding report,¹ which was published on November 1st last year, is the subject of no less than three pending applications for judicial review made on behalf of Messrs. Jean Chrétien, Jean Pelletier, and Alfonso Gagliano. For those of you who are not yet lawyers, and haven’t gotten into this kind of delicate question, this means that those three persons who are, it is fair to say, unhappy with the conclusions of the report. They have asked the Federal Court of Canada to set it aside, alleging that I was biased against them, that I conducted the hearings unfairly, and that I came to conclusions that were legally unfounded, unreasonable, and unsupported by the evidence. For as long as these legal proceedings, which may very well take years to be resolved, are undecided, it is both unwise and improper for me to say anything that could be construed as a defence of my report or a justification of how I acted as Commissioner. To use a Latin expression that everyone, I think, understands, even at a time when Latin has become unfashionable, the work of the Commission and the report that it produced on November 1st is *sub judice*, and should not be the subject of comments that might be interpreted as an attempt by me to influence how the Federal Court will decide the three pending cases.

I should add that the second report of the Commission,² which makes eighteen recommendations to the federal government as to how it might act to correct the problems that were the source of what is usually described as the “Sponsorship

¹ Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible?*, vol. 1 (Ottawa: Public Works and Government Services Canada, 2005) (Commissioner: John H. Gomery).

² Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability*, vol. 1 (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: John H. Gomery).

Scandal”, was deposited with the Clerk of the Privy Council on February 1, 2006, just two weeks ago, and there is still plenty of time for the same or other dissatisfied individuals to take other legal proceedings to set it aside as well. This possibility is another reason for me to decline to talk about the reports and what transpired prior to their preparation. So if you want to know anything about the Commission that just concluded that has not already been disclosed, the only thing I can suggest is to read the two reports. By the way, you can read other books, by people who think they know the inside story. There are books written by at least three journalists that have been sent to me as complimentary copies—“complimentary” in quotation marks—and there’s more to come, I believe. Everything I have to say publicly about the Sponsorship Scandal and the other matters I was given the mandate to investigate, is in the reports, which, I am sorry to say are long and at times as dry as the Gobi Desert.

I said a few minutes ago that there are two reasons why I cannot talk to you concerning the subjects that you probably came here to hear about. The second reason is that in addition to being an ex-commissioner (because my mandate came to an end with the production of my final report) I continue to be a judge, and judges are subject to severe limitations as to what they can say publicly, especially about controversial topics like politics and scandals. As a general rule, a judge speaks in public only through the judgments he or she renders, or, if the judge happens to be acting as an inquiry commissioner, through the reports he or she delivers. Of course, judges have private lives and private opinions but they are supposed to keep their personal opinions to themselves. This is particularly true with respect to political matters. Since the subject of the inquiry over which I presided was highly charged politically, with important consequences both for the politicians concerned and for the administration, often referred to as the bureaucracy, I have to be careful about what I say about political questions and political personalities. There are exceptions to these rules, and I will be trying, in what I say from now on, to fit myself into one of the exceptions, the one that permits judges to speak to academic audiences on legal topics. The legal topic I have chosen for this lecture is some differences of opinion about commissions of inquiry in general.

Over the past two years I have had to make myself familiar with the law relating to commissions of inquiry. The federal legislation that authorizes the appointment of such commissions is a statute called the *Inquiries Act*.³ It is remarkably concise, consisting of only fourteen articles, four of which deal with public inquiries of the kind just concluded. Article 2 defines when public inquiries may be commissioned, and it reads, very simply as follows:

The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected

³ R.S.C. 1985, c. I-11.

with the good government of Canada or the conduct of any part of the public business thereof.⁴

These words are so vague and all inclusive that it is fair to conclude that there is really no matter that cannot be the subject of an inquiry, *if* the government decides to create a commission.

A commission of inquiry is appointed by an Order-in-Council, which is to say a decision of the Cabinet. The Order-in-Council names the person or persons who are to act as commissioners. Almost invariably a sole commissioner is a judge, because judges are supposed to know how to preside over hearings, and are familiar with rules of evidence and procedure. Sometimes three commissioners may be appointed in cases where it is considered advisable to have commissioners who have experience in specialized areas of knowledge, or where the job is simply too much for one person, or for other reasons. The “Somalia Inquiry”⁵ is an example of a commission that had three commissioners, as did the inquiry into the circumstances of the wrongful conviction of Donald Marshall,⁶ but the current fashion, for reasons of economy or expediency, seems to be the appointment of a sole commissioner.

The Order-in-Council identifies the particular matter to be investigated and the subjects of the recommendations, if any, that are requested. It may specify a time limit for the report of the commissioner or commissioners. Time limits have been a source of difficulties over the years, because it frequently happens that circumstances make it impossible, or at least very difficult, for the report or reports to be ready on time, and the commissioner has to request an extension. If the commission has become politically unpopular (and that happens), the extension may not be forthcoming. I was fortunate that there were no time limits imposed on me to make my reports, although the Order-in-Council stipulated that I should make my reports on an urgent basis, which was a great incentive not to waste time.

Commissioners are given, by law and by the terms of the Order-in-Council, broad powers to incur expenses necessary to their investigations, and they are entitled to summon and hear witnesses and to require the production of documents. The commission, once appointed, has a high degree of independence and autonomy, limited only by the requirements that it restrict its activity to the investigation that it is authorized to make, (in other words, it cannot exceed its jurisdiction), and that it act fairly.

Public inquiries are a regular part of the political landscape in Canada. There have been over four hundred of them since Confederation in 1867, if you include

⁴ *Ibid.*

⁵ Canada, *Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Minister of Public Works and Government Services Canada, 1997) (Chair: Gilles Létourneau).

⁶ Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Commissioner's Report* (Halifax: Province of Nova Scotia, 1989) (Chair: Chief Justice T. Alexander Hickman).

provincial commissions of inquiry (because I think every province, or almost every province, has its own *Inquiries Act*, which authorizes commissions of inquiry). But I think that the authorities and the jurisprudence deal with both provincial and federal commissions of inquiry without making distinctions between them. They constitute what has been described by the Supreme Court of Canada as “a significant and useful part” of our democratic traditions, both in Canada and elsewhere.⁷

As I remarked in the Preface to my fact finding report,⁸ it is truly extraordinary that a government would appoint a commission of inquiry to investigate allegations of scandal and misconduct, which tended to affect public confidence in the government itself and the public administration for which it was responsible, and it is, I suggest, equally extraordinary that the government appointing the inquiry should be itself obliged to acquiesce to the demands for information and documentation made by the commissioner and his or her attorneys. In Canada we tend to take this for granted, but very few nations subject their governments to this kind of independent and public scrutiny. It is remarkable that senior officials and politicians at every level can be subpoenaed by a public inquiry to testify, and to produce for public examination their personal records such as their agendas and their credit card accounts, for example.

In the Sponsorship Inquiry, subpoenas were issued to many witnesses who were clearly reluctant to testify, while others, including the sitting Prime Minister, his predecessor, and many cabinet ministers, appeared voluntarily. Other witnesses included a number of deputy ministers, the present and former Clerks of the Privy Council, and senior officers of several Crown Corporations. In effect, all of these powerful people were obliged to answer questions about their actions and involvement in a controversial government program whether they wanted to or not. They were expected to explain their actions, and to account for the manner in which they had discharged their public responsibilities, to an independent body carrying out its investigation in public, in the full glare of television coverage.

Most people today believe that the secretiveness that characterized government administration in the past is no longer appropriate or acceptable, and that greater transparency is necessary. In fact, “transparency” has become something of a buzzword, and some commentators emphasize the danger that excessive exposure of the advice that should be given to politicians by their senior advisors might make it unlikely that that advice will be as frank and honest as it should be. Be that as it may, the genie is out of the bottle and I don't think it is probable that the secrecy that characterized public administration in the past can be rehabilitated. Judging by the comments received on the website of the just completed Commission, the Canadian public overwhelmingly favours greater transparency, and seems to approve of commissions of inquiry and the exposure that they provide of the inner workings of

⁷ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, 151 D.L.R. at para. 29 [*Blood System* (SCC) cited to S.C.R.].

⁸ *Supra* note 2.

government. We had a website and we got over five thousand comments, which was, I think, an indication of the intense interest that the Canadian public had for what we were doing. Why then, do I make reference in the title of this lecture, to the negative aspects of commissions of inquiry? What criticisms are made about their usefulness and fairness?

From time to time arguments are raised to the effect that inquiry commissions should be abolished entirely, or at least resorted to much less frequently. The critics making these arguments suggest that inquiry commissions are fundamentally unfair to the persons who are the subject of unfavourable comment, made either during public hearings or in the commission's report. In fact, merely being summoned to appear to testify before a commission of inquiry such as the one just completed can be damaging to the witness' reputation, since at least some members of the public and some journalists take it for granted that if a witness is being compelled to testify, he or she must have something to hide. This sort of assumption is obviously unfair and I think that these criticisms are serious. As an example, Edward Greenspan, Q.C., a very distinguished criminal defence lawyer, wrote an article published in the *St. Catherine's Standard* on November 18, 2005,⁹ just after the publication of the first report, and which made some very critical comments about the Gomery Commission. He summarized the arguments against commissions of inquiry in general with the following paragraphs, which I will quote verbatim:

We also try people in Canada by strict rules of evidence that have been developed over hundreds of years that are meant to ensure fairness by excluding questionable evidence and unreliable sources of information, such as hearsay, speculation or opinions by non-experts.

Commissions of inquiry are bound by no rules of evidence. Anything goes. At public inquiries, witnesses are able to tarnish the reputation of others before a nationwide television audience. Trials, because of their solemnity, are not televised in Canada. And rightly so.

Criminal trials require proof beyond a reasonable doubt. Civil trials require proof on the balance of probabilities. Commissions of inquiry don't seem to have any standard of proof. This type of investigation has no respect for individual civil liberties, contravenes our notions of fundamental justice, is grossly improper and should be banished forever like the Star Chamber.

And Mr. Greenspan finishes his article with this conclusion:

I believe we should abolish commissions of inquiry that have nothing to do with public policy issues. Commissions of inquiry that are set up for the sole purpose of blaming particular people for wrongdoing, resulting in the destruction of reputations and standing in the community, have no place in our country. We already have a civil and criminal justice system. That is where justice truly lies.

⁹ Edward L. Greenspan, "Inquiries Are Not Like Courts of Law" *The [St. Catherines] Standard* (18 November 2005) A6.

That is strong language, but it should be said immediately that all of the arguments mentioned by Mr. Greenspan have been raised at one time or another before the courts. The Supreme Court of Canada has generally rejected his point of view and concluded that commissions of inquiry, if conducted fairly, are an acceptable and useful means of investigating factual situations and obtaining policy recommendations from an independent and impartial source. I thought it would be interesting to this audience to review a few of these Supreme Court decisions and the principles that they establish.

I will talk about five—I won't talk about all four hundred—highly publicized public inquiries, which have occurred over the past twenty years or so because they illustrate, I believe, the pros and cons of the institution.

The first was the investigation authorized by the Government of Ontario following thirty-four suspicious deaths of infants in the cardiac ward at the Hospital for Sick Children in Toronto. It had been discovered that at least some of them did not die of natural causes, but because of the administration of excessive quantities of a drug. Criminal charges of murder laid against a nurse named Susan Nelles were dismissed at her preliminary inquiry on the basis of insufficient evidence that she might have been the guilty party. Under heavy public pressure to get to the bottom of the mystery, the whole question of these suspicious deaths was referred in 1983 to an inquiry commission over which presided Mr. Justice Sam Grange.

A question was raised at a fairly early stage of the inquiry as to whether its purpose was a thinly disguised police investigation to find out, to put it bluntly, who killed the children, and whether it would be proper for the commissioner, in his report, to express an opinion upon whether the death of any child was a result of the actions, accidental or deliberate, of any named person or persons. The Court of Appeal of Ontario came to the conclusion that the inquiry should not be permitted to express any conclusion regarding the civil or criminal responsibility of anyone, and that this could be achieved only if it was prohibited from naming the person or persons who administered the fatal doses of drugs.¹⁰ In other words, Mr. Justice Grange was given the task of reporting upon the evidence and making recommendations without naming any individual as being responsible. The court noted that carrying out this mandate would be, and I am quoting, “extremely difficult, at times approaching the impossible,”¹¹ and the limitations to which the commissioner was subjected was the course that would best protect the civil rights of the person which they were designed to protect.

Although this case did not go to the Supreme Court of Canada, the decision of the Ontario Court of Appeal in 1984 in what is called the *Nelles* case¹² has often been

¹⁰ *Re Nelles et al. and Grange et al.* [1984], 46 O.R. (2d) 210 (C.A.); 9 D.L.R. (4th) 79 [*Nelles* cited to O.R.].

¹¹ *Ibid.* at 221.

¹² *Ibid.*

cited as a severe limitation to the utility of commissions of inquiry. It was based upon the court's opinion that any finding or conclusion stated by the commissioner would be considered by the public, no matter how carefully worded, as a determination of civil or criminal responsibility, and would be seriously prejudicial if a person named by the commissioner were to face trial in later proceedings. It also put emphasis on the fact that a person found responsible by the commissioner would have no recourse to clear his or her name, or to repair the damage caused to his or her reputation.

A second case in which the courts had to deal with the problems associated with a commission of inquiry, came about ten years later and is usually referred to as the *Westray* case.¹³ There had been a mine explosion causing a number of fatalities in the Westray mine in Nova Scotia, and the government of that province appointed a commission of inquiry to report on the cause of the explosion and to recommend measures to prevent such incidents in the future. At the same time the Attorney General of the province laid criminal charges of manslaughter against the company and two of its mine managers on the grounds that safety measures had been negligently disregarded. The accused managers asked that the inquiry be suspended until they had had their trial, and an injunction to that effect was issued on the grounds that the evidence presented at the inquiry, which was of course being intensively covered by the media, especially in Nova Scotia, would make it impossible to empanel an unprejudiced jury.

The decision to issue an injunction was appealed by the Crown and the case wound its way through the courts up to the Supreme Court of Canada. By that time years had gone by and the mine managers had decided to opt for trial by a judge alone, rather than by a court composed of a judge and jury, so the issue of a prejudiced jury had become moot. On this basis a majority of the judges of the Supreme Court came to the conclusion that there was really nothing for them to decide and that the inquiry could proceed, but one of the dissenting judges, Mr. Justice Peter Cory, wrote a fairly lengthy opinion dealing with the issue of self-incrimination, contrary to section 7 of the *Charter of Rights and Freedoms*,¹⁴ and which may occur when persons are obliged to testify before an inquiry on matters that may subsequently be the subject of a criminal trial. He also dealt with the problem of how to deal with prejudicial publicity and publication bans. Both of these issues arose during the Sponsorship Inquiry and I was grateful for the guidance provided by Mr. Justice Cory's opinion. It was apparent that the whole question of the problems, which might arise as a result of the appointment of a commission of inquiry was a matter of great interest to Mr. Justice Cory, who, as we shall see, came back to the subject in later decisions.

¹³ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

The “Somalia Inquiry” is of interest and is reported as *Beno v. Canada*.¹⁵ The Commission was appointed as a result of the violent death of a Somali civilian at the hands of Canadian soldiers sent to Somalia as part of a United Nations mission. The inquiry was vigorously opposed by attorneys representing the senior military personnel who had been in charge of the mission, and ultimately the Canadian government shut down the inquiry before it could complete its work and make a final report. The inquiry simply ran out of time. There was a lot of litigation surrounding this inquiry, which gave the courts many issues to deal with such as allegations of bias against the presiding judge, and the admissibility of evidence that might not be permitted in a trial before the courts.

On the issue of the usefulness of commissions of inquiry, Mr. Justice Cory, writing this time for the majority, considers the *Beno* decision in the context of the “Krever Inquiry”.¹⁶ The Krever Inquiry dealt with the tragedy resulting from the contamination of the supply of blood, a contamination that caused hundreds, perhaps thousands of deaths from AIDS and hepatitis to the recipients of blood transfusions. The inquiry lasted nearly five years and was, it is fair to say, vigorously opposed by the Canadian Red Cross and certain pharmaceutical companies, which were facing civil suits in the hundreds of millions of dollars based on allegations of negligence. There were many issues raised before the courts concerning the propriety of the inquiry itself and the manner in which it was conducted. It was alleged, for example, that the section 13 notices were sent out at too late a date to permit the parties concerned to defend themselves. It was also alleged that counsel for the commission should be prohibited from any participation in the preparation of Mr. Justice Krever’s report, on the grounds of bias. The Supreme Court ultimately decided that Mr. Justice Krever and commission counsel had handled these issues correctly. The decision makes it clear that no matter what damage may be incidentally caused to reputations in public inquiries, the greater concern has to be the prevention of future tragedies. However, care must be taken to act fairly and to avoid damage to reputations to the extent that this is possible.

Justice Cory cites what he had said in the earlier *Westray* case, and it is worth quoting parts of his reasons for judgment, because they show how far judicial thinking had progressed since the decision in the *Nelles* case some thirteen years earlier. He starts by stating that commissions of inquiry are created because of a need for an investigation by an independent body, acknowledging that it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice. He might have added to the list allegations of administrative mismanagement and political scandal. He goes on to

¹⁵ *Beno v. Canada*, (Commission of Inquiry into the Deployment of Canadian Forces to Somalia), [1997] 2 F.C. 527, (1997) 146 D.L.R. (4th) 708 [*Beno*].

¹⁶ *Blood System* (SCC), *supra* note 7.

review the most important functions of commissions of inquiry, and I am going to quote him because I can't possibly say it as well as he did:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.¹⁷

To summarize, the three functions of an inquiry, to investigate, to educate and to inform, are of benefit to Canadian society. To these benefits should be added the benefits deriving from recommendations for change designed to prevent a recurrence in the future of the errors or faults being investigated. Such recommendations, coming from an independent and impartial source, free from political bias, will not only assist the government in taking remedial action but will tend to restore public confidence in the industry or process being reviewed.

The usual rules of evidence do not apply to inquiries. The justification for this is that there are no legal consequences attached to the determinations of a commissioner, whose conclusions do not bind courts considering the same subject matter. A public inquiry is not a trial but rather an investigation, to determine the facts and to make recommendations. If, along the way, reputations are harmed, Mr. Justice Cory admits that that is unfortunate, but he states clearly in the decision concerning the Krever Inquiry that greater importance must be given to the successful completion of the inquiry.

Section 13 of the *Inquiries Act*¹⁸ requires that the commissioner give notice to any person who may be the subject of criticism or unfavourable comment in the eventual report of this possibility, so as to permit the person to be represented at the inquiry and to make representations and submissions to set the record straight. Section 13 is an attempt by the law to be fair to a person whose reputation may be damaged by being mentioned in the report. A further attempt to be fair is found in the requirement

¹⁷ *Ibid.* at para. 31.

¹⁸ *Supra* note 3.

that the notices sent by the commissioner must be kept confidential, since it may happen that notices are sent to persons who are, ultimately, not subject to blame or criticism.

The notion that the report of the inquiry should not name names or attribute blame is dealt with in the following passage from his decision in the Krever Inquiry case, written by Mr. Justice Décary of the Federal Court of Appeal,¹⁹ which is expressly endorsed by Mr. Justice Cory in the Supreme Court decision.²⁰ So this is Mr. Justice Décary speaking, but it's quoted in the Supreme Court decision. He says:

... a public inquiry into a tragedy would be quite pointless if it did not lead to identification of the causes and players for fear of harming reputations and because of the danger that certain findings of fact might be invoked in civil or criminal proceedings. It is almost inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning the responsibility borne by certain individuals. I doubt that it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.²¹

I suggest that the opinion of Mr. Justice Décary, endorsed by Mr. Justice Cory speaking for the entire Supreme Court, is a complete contradiction of the arguments of Mr. Greenspan that I quoted earlier.

Finally, I will mention the “Walkerton Inquiry”,²² set up in the year 2000 to investigate the reasons for the contamination of the water supply in Walkerton, Ontario, which resulted in a number of deaths and enormous apprehension about the quality of water supplied to Canadian citizens by their municipalities. This commission over which presided Mr. Justice Dennis O'Connor who, incidentally, is today acting as commissioner of the “Arar Inquiry”,²³ is usually cited as a model of how public inquiries should be handled. It is noteworthy in that it has not been the subject of legal proceedings, and has generally satisfied the public desire to know what happened and how to correct the errors and mismanagement that led to the contamination. The skill, wisdom and tact of Judge O'Connor have set a high standard for other commissions to live up to. I was fortunate to be able to use many of the precedents created in the Walkerton Inquiry as guides as to how to handle problems in the Sponsorship Inquiry, for matters such as Rules of Practice and Procedure, the granting of standing, and requests for funding recommendations.

¹⁹ *Canada (Attorney General) v. Canada (Commission of the Inquiry on the Blood System)*, [1997] 2 F.C. 36, 142 D.L.R. (4th) 237 [*Blood System* (FCA) cited to F.C.].

²⁰ *Supra* note 7.

²¹ *Blood System* (FCA), *supra* note 19 at para. 35. See also *Blood System* (SCC), *ibid.* at para. 39.

²² Ontario, *Report of the Walkerton Inquiry* (Toronto: Queen's Printer, 2002) (Chair: The Honourable Dennis R. O'Connor).

²³ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, online: <<http://www.ararcommission.ca>>.

Commissions of inquiry are sometimes criticized for the reason that they take too long and they cost too much. The time factor is explained by the necessity to create a commission from nothing more than the Order-in-Council which appoints it. The commissioner, armed only with this document, must engage personnel, locate premises, purchase or rent office furniture and equipment, and generally see to the formation of an administrative structure where nothing existed previously. Even with the assistance of an experienced administrative director, this takes at least several months. At the same time the commissioner must recruit a team of lawyers to handle the analysis of the evidence and to present witnesses at public hearings.

There is a difficulty in finding good lawyers who are prepared to leave or disrupt their busy offices for a prolonged period of time to devote themselves to a commission of inquiry. If, after several years, they return to their previous practice, they may find that their clients have gone elsewhere, and that their partners are not particularly attracted by the prospect of reintegrating a lawyer without files into the partnership, which may have evolved considerably in the interval. This difficulty is aggravated by the problem of conflicts of interest, especially when the inquiry involves a large number of parties and witnesses, many of whom will have had contacts and relationships with the lawyers that the commissioner would like to engage. People who criticize commissions of inquiry for start-up delay and the high cost of legal help may not have taken these factors into account.

The commissioner must, at the beginning of his or her mandate, formulate rules of practice and procedure, and deal with matters such as applications for funding and standing. What needs to be understood is that the commissioner and counsel for the inquiry start with nothing or at best, a minimal understanding of the particular events which are to be investigated. To prepare themselves adequately it takes time before public hearings can commence. In the case of the Sponsorship Program, we started public hearings at the beginning of September 2004 after the Commission was appointed by an Order-in-Council dated February 19, 2004. I can tell you that no time was wasted, and that the employees of the Commission had to work very hard throughout the intervening months to be ready for the start of the hearings in Ottawa in September.

A second reason why commissions of inquiry have a tendency to be slow is due to the legitimate desire of attorneys representing interested parties to ensure that the rights of their clients are fully protected. This can give rise to interventions and delays of various kinds. For example, our hearings were interrupted by the need to decide certain issues relating to parliamentary immunity. The decision I made on that question is still being litigated before the Federal Court of Appeal. One of the reasons the Krever Inquiry took so long to conclude was that Mr. Justice Krever did not consider that he could write his report as long as questions about the propriety of the proceedings remained unresolved. As I mentioned earlier, those proceedings ended up in the Supreme Court of Canada after years of delay.

The criticism that commissions cost too much is valid if one takes the position that a price can be put upon the search for truth and justice, but I think that it is

generally believed that in a society governed by the rule of law, citizens accept that whatever the cost, it is desirable that the legal requirements of the justice system be observed. This being said, the services of top lawyers and forensic accountants are very expensive, and sometimes the total costs incurred by a commission are dismaying. Only the commissioner's services are a bargain, since a judge is not paid anything other than his or her judicial salary for acting as a commissioner.

For students who would like to know more about commissions of inquiry in general, I can recommend an excellent book entitled *Commissions of Inquiry: Praise or Reappraise?*,²⁴ published in 2003, which you must surely have in your library here, and which presents a variety of points of view for your consideration.

Thank you very much for your attention.

Question 1:

Audience Member:

If you don't mind me asking this, it's about the impartiality of commissions of inquiry. Commissions of inquiry are appointed by the government and sometimes they have to investigate the government, the same government by which they were appointed. How do they deal with this?

Justice Gomery:

I think the reason that judges are almost invariably appointed as commissioners or as the presiding commissioner of a commission of inquiry is because judges are generally reputed to be non-political, apolitical. Some judges may have had political activities in their past, for example when they were working as lawyers, but judges very deliberately turn off their political activity when they become judges. I think the only political activity that a judge takes part in is to vote in an election and I don't think that anybody knows the way a judge votes, at least I can't imagine a judge ever disclosing that.

But you're right, there's a danger that a judge who's presiding over a commission of inquiry will be perceived as having a political role to play and the only way he can avoid that is by acting as judges are supposed to act, which is impartially and without bias, without disclosing any preference for any side of the various arguments that are presented to him. In the Sponsorship Commission, the mandate was very precise: we were asked to investigate the mismanagement of the Sponsorship Program; we were not asked, and we did not look into, the validity or the wisdom of the political decisions, which were made. I don't think that you will find anywhere in the records of the Commission or in the reports, any indication of, for example, how I felt about

²⁴ Allan Manson & David Mullan, eds. (Toronto: Irwin Law, 2003).

the Sponsorship Program as a program, for its political aims and so on. I think that the report had to do with the manner in which it was conducted, and political decisions are left up to politicians.

Question 2:

Audience Member:

It seems that sometimes commissions are created after a trial goes not the way the public wanted it, in terms of the Air India bombing or now the blood tainted trial. It seems that criminal and civil trials seem to accomplish one thing and commissions of inquiry accomplish a different thing: commissions of inquiry are much more public and try to satisfy truth and justice in a very collective and public way while trials seem to do it by punishing the individual perpetrators. Do you think it's unfortunate that we need two forms to resolve something that maybe should be resolved in one form?

Justice Gomery:

Well, you put your finger on a difficulty, which is, commissions of inquiry are not supposed to be determining civil guilt or civil responsibility or criminal guilt, they are supposed to be fact-finding investigations leading to recommendations. But in the minds of the public I can tell you that there is confusion on this issue, a confusion that I try very hard to dispel by saying over and over again, I think I said it today again, that the objective of a commission of inquiry is to report upon the facts, to investigate and report upon the facts, and not to determine guilt. But I have to tell you that the public just doesn't really understand that, or many members of the public don't. I can tell you that we got a tremendous amount of feedback from individual members of the public and the general theme was "when are you going to stop listening to witnesses and start putting people in jail." I mean, that's what they wanted me to do, and of course that was not my role at all. But I think those expressions represent some of the frustrations that occur and perhaps still exist. The best way to deal with that frustration I felt, was by having a public inquiry and exposing the facts, and I've used the expression a few times that I thought one of the roles that a commission of inquiry has is cathartic. We allow people to express or live their indignation and hopefully get over it and get back to being contented citizens, or reasonably contented citizens. There was a tremendous amount of bad feeling about the Canadian government and as I've also said, the evidence that I hear indicated to me that the vast majority of government programs are properly and adequately administered. We didn't find systematic defect, but of course, having one program badly administered is in itself a systematic defect, but it wasn't generalized, I don't think.

But you're right, commissions of inquiry have one objective, the justice system has another objective and the two shouldn't be confused but I'm sorry to say that they are confused.

Question 3:***Audience Member:***

When you were first approached to chair this Commission, did you have any initial misgivings and did you anticipate in any way the magnitude and the complexity and the scope of the work that awaited you?

Justice Gomery:

I didn't have the slightest idea of what I was getting into. I knew that it was a major task and I thought it would take about two years, which is what it did take, but I had no idea that I would uncover, or that the inquiry would uncover some of the facts that were uncovered. I thought we were dealing with poor administration of a government program within government, and people were interested in where the money went and our inquiry pursued that line of questioning. But we certainly had not anticipated, I don't think anybody anticipated, that we'd be hearing stories about wads of money in brown envelopes being passed in bars and things like that. So, I was not prepared for that and I had not anticipated either the intense media coverage that occurred, which was in itself a source of concern.

Question 4:***Audience Member:***

Given that it's a fact-finding trial and given this confusion between criminal and civil trials on the one hand and commission of inquiries on the other hand, are there any other reasons besides the perceived and actual impartiality of judges that a judge would have to head a commission of inquiry?

Justice Gomery:

The confusion exists in the mind of the public, but there wasn't any confusion in my mind. But I can't see any alternative to having a judge preside over a commission of inquiry. First of all, he comes cloaked with a certain expected autonomy, independence, impartiality, and these things all go together. And I can't think of anybody else in our society that has that privileged position—they don't have to worry about the consequences of their decisions, you can't get fired, no matter how unpopular your decision might be or how much it offends, for example, the government in power. So judges are ideally suited to fulfill this role. But the trouble is that even if a judge is acting as a commissioner, people say, "gee that guy's a judge" and they think of judges as dispensing judgments and frankly in a commission of inquiry you're not dispensing justice, you're doing an investigative role and then making some recommendations. So, I guess the confusion is inevitable and all that you can do, all that I can do, is to keep on emphasizing that my reports are not judgments, my reports are not findings of fault, well, not civil fault, they may be

findings of blameworthy conduct, but it's not fault in the sense that the word fault is used in our *Civil Code* or in the *Criminal Code*.
