

In the matter of the Public Inquiries Act, R.S.O. 1990, c. P.41

*And in the matter of Order-in-Council 826/2007 and the Commission issued effective April 25, 2007,
appointing the Honourable Stephen Goudge as a Commissioner*

In the matter of a motion brought by Dr. Smith for the right to lead his initial testimony by his own counsel

FACTUM OF COMMISSION COUNSEL

**INQUIRY INTO PEDIATRIC FORENSIC
PATHOLOGY IN ONTARIO
180 Dundas Street West, 22nd Floor
Toronto, ON M5G 1Z8**

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Part I. Overview

1. Commission counsel oppose Dr. Smith's request that his own counsel examine him first when he gives evidence before the Commission commencing the week of January 28, 2008.

Part II. Facts

2. On April 25, 2007, pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41 the province of Ontario appointed the Honourable Stephen T. Goudge, to conduct a commission of inquiry in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings (the "Commission" and the "Commissioner"). Specifically, the Commissioner is to conduct a systemic review and assessment and report on:

- (a) the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings;
- (b) the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 to 2001; and
- (c) any changes to the items referenced in the above two paragraphs, subsequent to 2001.

3. Commission counsel served a summons to witness upon Dr. Smith that requires him to attend as a witness during the week of January 28, 2008.

4. Commission counsel asked to interview Dr. Smith prior to his testimony. Dr. Smith has refused to be interviewed by Commission counsel. He has offered to respond to written questions posed to him by Commission counsel. Dr. Smith takes the position that if his counsel is permitted to examine him first, “there is no need for Commission counsel to meet with Dr. Smith in advance of his testimony.”¹

5. The Commission has adopted Rules of Procedure that make clear that the procedure to be followed during the hearing is under the control and discretion of the Commissioner, and that in the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry:

2. Subject to the Act and the Terms of Reference, the conduct of and procedure to be followed at the Inquiry is under the control and discretion of The Honourable Stephen Goudge (the “Commissioner”).

32. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Except as otherwise directed by the Commissioner, Commission counsel is entitled to adduce evidence by way of both leading and non-leading questions.

33. Parties will have an opportunity to cross-examine the witness, to the extent of their interest. The Commissioner will determine the order of cross-examinations.

34. Counsel for a party may apply to the Commissioner to examine a particular witness in chief. If counsel is granted the right to do so, examination will be confined to the normal rules governing the examination of one’s own witness.

36. Counsel for a witness, regardless of whether or not counsel is also representing a party, will examine after the other parties have concluded their cross-examinations, unless he or she has adduced the evidence of the witness in chief, in which case there will be a right by that counsel to re-examine the witness. In the event, however, that counsel for the witness intends to adduce evidence in chief not adduced by Commission counsel, counsel for the witness will examine the witness immediately following Commission counsel, and then will have a right to re-examine the witness following the cross-examinations by the other parties.

¹ Dr. Smith’s motion record, Tab 10.

Part III. Submissions

6. Commission counsel oppose Dr. Smith's request that his own counsel examine him first when he gives evidence before the Commission. They do so for two reasons:

- (a) it is the fundamental role of Commission counsel to elicit all evidence in a full, fair and complete fashion; and
- (b) this is a systemic inquiry, not an inquiry into narrow allegations of criminal wrongdoing by an individual.

A. *Role of Commission counsel*

7. In 2003, Justice Dennis O'Connor wrote an important article titled "The role of commission counsel in a public inquiry," in which he reflected on his experiences as Commissioner of the Walkerton Commission.² Justice O'Connor made three important points in the article.

8. First, he emphasized that commission counsel act as the alter ego of the commissioner. Commission counsel must therefore investigate and lead evidence in a thorough, impartial and balanced manner. This ensures that the commissioner hears all of the relevant facts unvarnished by the perspective of someone with an interest in a particular outcome:

11. ...The commissioner appoints his or her counsel, and it is often said, aptly I think, that a commission counsel becomes the alter ego of the commissioner. It is with the assistance of commission counsel that the commissioner carries out his or her mandate, investigating the subject matter of the inquiry and leading evidence at the hearings. Throughout, commission counsel act on behalf and under the instructions of the commissioner.

12. As a result, commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but also completely impartial and balanced, manner. In this way, the commissioner will have the benefit of hearing all of the relevant facts or evidence unvarnished by the perspective of someone with an interest in a particular outcome.

² The Advocates Society Journal (Summer 2003) 22 Advocates' Soc. J. No. 1, pp. 9 – 11 ("O'Connor Article"), Appendix A to the Factum of Commission Counsel.

9. Second, Justice O'Connor highlighted that while commission counsel must remain impartial, it is important that they get to the bottom of what happened without being deflected by witnesses who have a particular interest in the outcome:

14. Because of the coincidence of roles, the manner in which commission counsel carries out the role will likely be attributed to the commissioner, and the tone and approach adopted by commission counsel will reflect on the commissioner and the inquiry itself. A perceived lack of impartiality or independence on the part of commission counsel could seriously impair the credibility of the whole exercise.

15. While it is essential that commission counsel maintain an impartial posture, it is nonetheless necessary that they get to the bottom of what happened and why, and that they not be deflected by witnesses or their counsel who have a particular interest in the outcome. The balance that must be struck between impartiality and firmness is delicate but absolutely necessary to the success of the inquiry.

10. Third, Justice O'Connor emphasized that it is the role of commission counsel to call the evidence and to explore all of the issues in a probing manner. Justice O'Connor felt that having commission counsel call the evidence promoted fairness and efficiency in the hearing process:

21. The fourth task of the commission counsel is calling evidence in the hearing. The evidence must be lead in a thorough and even-handed manner so that the commissioner gets the benefit of all of the facts. In Walkerton, our rules provided that absent a specific ruling to the contrary, commission counsel would examine all witnesses first. Parties were asked to indicate to commission counsel the names of witnesses they wished called, and commission counsel then led the evidence. In this way, I believe commission counsel kept greater control over the proceedings, and I think in the end we were able to move more quickly. We heard 114 witnesses in just over a hundred days of evidence, albeit some gave their evidence on panels of three.

22. The cross-examination of witnesses were surprisingly but happily brief, I think this was a direct result of the fair and thorough way the commission counsel examined the witnesses in the first instance. There were usually at least ten cross-examinations, sometimes more. Normally, the cross-examinations in total took no more time than did an examination by commission counsel and often far less time. That is quite remarkable, and I think that all counsel were content that the process explored the issues in a satisfactory manner. That simply would not have happened if some or all of the parties had felt that their ox was being unduly gored by commission counsel.

11. Commission counsel are entirely capable of discharging the functions described above. Dr. Smith has not asserted that Commission counsel have treated him unfairly.

12. Moreover, the fact that Dr. Smith will be an important witness at the Inquiry is all the more reason why Commission counsel should examine him fully and thoroughly. The

Commissioner should first hear Dr. Smith's evidence "unvarnished by the perspective of someone with an interest in a particular outcome" of this inquiry.

13. The fact that Dr. Smith has been the subject of media attention outside of the hearing room does not mean that Commission counsel should not examine him first at the Inquiry. The media attention received to date is, in fact, one reason why Commission counsel should fairly and thoroughly examine Dr. Smith before his counsel does. In doing so, Commission counsel will demonstrate the thoroughness and fairness of this inquiry.

14. Finally, the fact that Dr. Smith has declined to be interviewed by Commission counsel is no reason to permit him to be examined first by his own counsel. Pre-hearing interviews are an important investigative tool available to Commission counsel. They ensure that the hearing is conducted expeditiously and promote fairness to other witnesses. The Commission should not create incentives for parties to decline requests for pre-hearing interviews. However, Commission counsel will be able to conduct a fair, thorough and probing examination of Dr. Smith notwithstanding his decision not to be interviewed. It may, regrettably, take longer to call his evidence than it would have taken if he had agreed to be interviewed.

B. The nature of this inquiry

15. The terms of reference make it clear that this Inquiry is systemic in nature. It is not focused on allegations of misdeeds of any particular person. The Commissioner is to conduct a commission of inquiry in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

16. This inquiry is not at all like the inquiry that was the subject of the *Re Public Inquiries Act and Shulman* case, which the Court of Appeal described as follows:

The object of the inquiry directed to the learned Commissioner is in essence, if not altogether, concerned with allegations of misconduct in office on the part of certain senior Government officials, allegations made by one Dr. Shulman, formerly a Chief Coroner of the Province in Metropolitan Toronto.

...

In our view, the present inquiry is decidedly of the type with which the Court was called upon to deal in *Re Children's Aid Society of the County of York*, [1934] O.W.N. 418, and again in *Re Ontario Crime Commission, ex p. Feeley and McDermott*, [1962] O.R. 872..., and a type of inquiry, therefore, to be distinguished from an inquiry directed to the gathering of information for the purposes of reporting, for example, to a government department as to the desirability or otherwise of enacting legislation upon a given subject or to other corrective measures.


17. This systemic inquiry is an inquiry to gather information for the purposes of reporting to the government on the desirability of taking corrective measures to restore public confidence in pediatric forensic pathology pediatric forensic pathology in Ontario. It therefore falls outside the statements made in *Shulman* regarding the necessity of a witness being first examined by his own counsel.

18. Introducing adversarial notions into a systemic inquiry runs the risk of compromising its systemic nature.

Part IV. ORDER SOUGHT

19. Commission counsel requests that the Commissioner dismiss the motion brought by Dr. Smith without prejudice to the ability of Dr. Smith to bring a similar motion before the Commissioner at a later date.

All of which is respectfully submitted, November 6, 2007



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Appendix A

TITLE: The role of commission counsel in a public inquiry
AUTHOR: Justice Dennis O'Connor
SOURCE: The Advocates' Society Journal
CITED: (Summer 2003) 22 Advocates' Soc. J. No. 1, 9 - 11
SECTION: Feature

¶ 1 I made what I think turned out to be the most important decision in the Walkerton Inquiry within the first week after my appointment. I selected commission counsel.

¶ 2 For the first part of the inquiry, relating to what happened in Walkerton and the causes, I appointed three counsel, Paul Cavalluzzo, Brian Gover, and Freya Kristjanson, each of whom as events unfolded did an outstanding job. Paul was the senior; however, the arrangement was that the three would each call evidence and that they would do so sequentially so that while one counsel was leading evidence in the hearing room, the other two were preparing. This approach required great co-operation, and the three worked extremely well together. Importantly, by calling the evidence in this fashion, we avoided a good deal of delay and were able to keep the hearings running on more or less a continuous basis.

¶ 3 While in practice, I had been involved in several inquiries. I had represented parties who were granted standing on a number of occasions and had served as commission counsel on one inquiry. However, viewed from the perspective of a commissioner, I have a new appreciation of the importance of good commission counsel to the success of a public inquiry. And there is no question that the role of commission counsel is a difficult one. What makes the role so challenging is that a successful commission counsel must not only use most of the skills of a good litigator, but he or she must use those skills in a manner and with an approach that is fundamentally different from that employed in normal litigation.

The public inquiry

¶ 4 Let me start with a brief overview of the public inquiry process. Public inquiries or royal commissions -- they are essentially the same thing -- have a long history in our system of government. In the middle ages, kings, using the royal prerogative, periodically established commissions to gather data and information to assist in making decisions of public importance. Today, public inquiries have become an accepted part of public governance, although they are generally used only for extraordinary events and therefore somewhat sporadically. In modern times, public inquiries are conducted within the ambit of specific legislation. There is a federal Public Inquiries Act and there are similar statutes in each of the provinces. Under this kind of legislation, a commissioner is given extensive compulsory powers to conduct the inquiry and a very broad discretion to determine the procedure that will be followed.

¶ 5 In general terms, there are two types of public inquiries. First, there is the investigative or post-mortem inquiry established to look into and report on a specific occurrence or series of events. Investigative inquiries are frequently established in the wake of a tragedy or a political scandal where the public is shocked and disillusioned by what has happened. Often there has been a significant loss of confidence in public institutions that calls for a thorough, independent, and open review of what went wrong and what can be done to avoid a similar occurrence in the future. Examples of the fact-finding type of inquiry include the inquiries into the Ocean Ranger disaster, the Westray mine tragedy in Nova Scotia, and the deaths at Sick Children's Hospital in

Toronto.

¶ 6 The second type of inquiry is one aimed at assisting the government with the development of public policy. When there are serious issues of public concern, not necessarily arising from a specific tragedy or event, the government may choose to establish an inquiry to look into the issues, to consult with the public, and to make recommendations about the future course of action. Examples of this type of inquiry include the Hall Commission on Health Services, the Royal Commission on Bilingualism and Biculturalism, and the recent Romanow Commission on Health Care.

¶ 7 Some inquiries, like Walkerton, have both an investigative and a policy development role. The mandate of the Walkerton Inquiry involved two quite distinct aspects. The first directed me to investigate and report on what had happened in Walkerton and the causes, including the effect of government policies on those events. The second required me to make recommendations to ensure the safety of drinking water across the province. The second part of the mandate was primarily policy based, and a large majority of what was involved in the province-wide review had little to do with the problems in Walkerton. Because of the different nature of the two parts of the mandate, we divided the inquiry into two distinct parts, and we developed two separate processes that proceeded simultaneously. In the end, I issued two separate reports.

¶ 8 The role that legal counsel plays in a public inquiry is much more critical to the first type - the investigative fact-finding type of inquiry. The process in these types of inquiries is typically evidentiary in nature -- witnesses are examined and cross-examined. During the hearings, the commissioner assumes a role that resembles that of a judge. In this type of inquiry, commission counsel play a central role, and it is that role to which my comments will be directed.

Public confidence

¶ 9 One of the essential goals of any public inquiry looking into a tragedy like Walkerton is to restore public confidence, to the extent possible, by bringing to light all of the facts about what went wrong and why, and by doing so in an open, independent, and credible manner. The process followed in conducting an inquiry is crucial in obtaining the public's confidence. It is not enough to simply deliver a good report or even an excellent report. It is important that the public view the process itself as being thorough -- a process that turns over all the necessary stones; as being efficient -- a process that is completed before the public loses interest and issues become irrelevant or are overtaken by other events; and, finally, as being fair -- a process that treats everyone involved impartially and even-handedly. The task of obtaining public confidence in the process is not always easy. Frequently, it is necessary to conduct the inquiry at a time when the public is skeptical or suspicious about what has happened and when public opinion is divided on the very issues that underlie the inquiry.

¶ 10 And this is where commission counsel play such an important role. Commission counsel are on the very front line of doing much of what is necessary to gain the public confidence about the process and about the integrity and impartiality of the inquiry itself.

Role of commission counsel

¶ 11 The role of commission counsel is quite different from that of a lawyer in most other

legal proceedings. Perhaps the role of coroner's counsel at an inquest is the closest analogy. The difference stems from the relationship between commissioner and commission counsel. That relationship is altogether different from that between a judge and a lawyer. The commissioner appoints his or her counsel, and it is often said, aptly I think, that a commission counsel becomes the alter ego of the commissioner. It is with the assistance of commission counsel that the commissioner carries out his or her mandate, investigating the subject matter of the inquiry and leading evidence at the hearings. Throughout, commission counsel act on behalf and under the instructions of the commissioner.

¶ 12 As a result, commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but also completely impartial and balanced, manner. In this way, the commissioner will have the benefit of hearing all of the relevant facts or evidence unvarnished by the perspective of someone with an interest in a particular outcome.

¶ 13 Some commentators have suggested that a commission counsel's role is akin to that of a prosecutor in a criminal trial. I disagree. I think greater impartiality is required of commission counsel. A prosecutor is not an agent of the judge. A commission counsel is. Throughout the inquiry process, there is a coincidence of roles between commissioner and his or her counsel that is far different from that of judge and prosecutor.

¶ 14 Because of the coincidence of roles, the manner in which commission counsel carries out the role will likely be attributed to the commissioner, and the tone and approach adopted by commission counsel will reflect on the commissioner and the inquiry itself. A perceived lack of impartiality or independence on the part of commission counsel could seriously impair the credibility of the whole exercise.

¶ 15 While it is essential that commission counsel maintain an impartial posture, it is nonetheless necessary that they get to the bottom of what happened and why, and that they not be deflected by witnesses or their counsel who have a particular interest in the outcome. The balance that must be struck between impartiality and firmness is delicate but absolutely necessary to the success of the inquiry.

Duties of commission counsel

¶ 16 Broadly speaking, I would divide what commission counsel actually do into six different areas. In discussing these functions, I will make some reference to how the commission counsel in Walkerton carried out their role.

¶ 17 The first function of commission counsel is to provide advice to the commissioner throughout the commission process. Commission counsel advise about the procedures to be followed. In the case of Walkerton they helped prepare the detailed rules that governed the process. They also gave advice on issues of relevancy, standing for affected parties, and a host of other decisions that had to be made throughout the inquiry. Commission counsel are there to be a sounding board for the commissioner and to provide whatever guidance is needed.

¶ 18 Next, commission counsel conduct or at least supervise the investigation that leads to the evidentiary hearings. They prepare the evidence that is to be introduced at the inquiry. They obtain and review the necessary documentary records and interview the prospective witnesses.

They prepare witness statements for those who are to be called. Although the investigation is carried out under the overall supervision of the commissioner, the actual work and detail is typically done by counsel on the commissioner's behalf. Pausing here, I observe that there is a huge advantage to having commission counsel thoroughly interview the witnesses and prepare very detailed witness statements for two reasons. First, there should be no surprises to others who are involved in the process. The proceeding is entirely investigatory and not adversarial. Nothing is gained by surprise, and there is a danger of unfairness if witnesses are examined on areas in the evidence for the first time in the midst of the public hearing. Because of the media attention that often accompanies a public inquiry, the potential for unfairly damaging a witness's reputation must always be kept in mind.

¶ 19 The second reason that witnesses should be thoroughly interviewed and detailed witness statements prepared is that doing so will likely significantly shorten the time taken in the actual hearings. When it is understood in advance what a witness's evidence is likely to be, the examinations of commission counsel and the cross-examiners tend to get to the point much more quickly.

¶ 20 The third function of commission counsel is to maintain open and continuous communication with all the parties who may be affected by the process and with those who have an interest in the issues raised by the inquiry. It is extremely important that there be regular communication about what the inquiry is doing and where it is headed and that the views of those affected be fully considered. For example, draft rules and procedures, when developed, should be circulated for comment. So should a draft outline of the intended evidence. It is best to have an exchange of views before problems arise. Although disagreement about some issues may ultimately have to be decided by the commissioner, a significant amount of time and effort can be saved and ill will avoided if commission counsel develop a co-operative, open, and even-handed approach to discussing the many issues that arise with all of those who are involved.

¶ 21 The fourth task of the commission counsel is calling evidence in the hearing. The evidence must be led in a thorough and even-handed manner so that the commissioner gets the benefit of all of the facts. In Walkerton, our rules provided that absent a specific ruling to the contrary, commission counsel would examine all witnesses first. Parties were asked to indicate to commission counsel the names of witnesses they wished called, and commission counsel then led the evidence. In this way, I believe commission counsel kept greater control over the proceedings, and I think in the end we were able to move more quickly. We heard 114 witnesses in just over a hundred days of evidence, albeit some gave their evidence on panels of three.

¶ 22 The cross-examinations of witnesses were surprisingly but happily brief. I think this was a direct result of the fair and thorough way the commission counsel examined the witnesses in the first instance. There were usually at least ten cross-examinations, sometimes more. Normally, the cross-examinations in total took no more time than did an examination by commission counsel and often far less time. That is quite remarkable, and I think that all counsel were content that the process explored the issues in a satisfactory manner. That simply would not have happened if some or all of the parties had felt that their ox was being unduly gored by commission counsel.

¶ 23 The next role for commission counsel is to help the commissioner write the report. This used to be a somewhat controversial subject, but the decision of the Supreme Court in the

Westray case makes it clear that it is permissible for commission counsel to assist in this way. The extent to which different commissioners use counsel in this regard will no doubt vary from inquiry to inquiry. The one comment that I would make about this role, however, is that commission counsel's assistance in writing the report feels much more comfortable when commission counsel has conducted himself or herself throughout the inquiry in the impartial and even-handed way that I have suggested.

¶ 24 The last role filled by commission counsel will often be to serve as the spokesperson for the inquiry to the media. Public inquiries generally attract a huge amount of media attention. It is important to the success of an inquiry that the proceedings be completely open and transparent. The media and public should be fully informed about what is happening. Someone needs to be available to speak to the media, often on a daily basis. It is a very bad idea for the commissioner, who is generally a judge, to do so. Many lawyers are not accustomed to or comfortable in facing media scrums; however, it is necessary to have someone familiar with the inquiry process and the evidence who can handle the reasonable inquiries that regularly arise. Commission counsel are the logical choice to assume this role.

Summary

¶ 25 Some of the problems that have arisen over the years in conducting public inquiries are not things that the commissioner or commission counsel can avoid. Public inquiries have been criticized for taking too long, for being too costly, and for getting bogged down in judicial reviews. There is a good deal of luck involved in completing an inquiry in relatively short order without being sidetracked by court proceedings. However, my experience in Walkerton tells me that in addition to good luck, good commission counsel -- in my case, outstanding commission counsel -- play an important role in getting the job done and getting it done on time and fairly.

¶ 26 Finally, the very civil and professional manner in which the Walkerton commission counsel conducted themselves was common to all of the counsel in the hearing room. Although many of the issues were hotly contested and were being played out in the public limelight, often under great time pressure and considerable stress, there was absolutely none of the rancorous or uncivil behaviour that sometimes creeps into the litigation process. As I viewed the process, the many counsel who appeared represented their clients interests very well, and I thought that their conduct brought credit to the legal profession in a proceeding that was followed closely by the media and the public.

* * *

RE AUTHOR:-- Justice Dennis O'Connor, Associate Chief Justice of Ontario.

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