



The Use and Abuse of Inquiries

by Alan Wyatt

At a public hearing of the Royal Commission On Electric Power Planning, George Meek, an independent intervenor, wondered aloud whether Julius Caesar would have crossed the Rubicon "had he held a public hearing on the north side of the river." Nearer, in both time and space, one can speculate that if Sir John A. Macdonald had to go through the full inquiry/environmental assessment process to build a transcontinental railroad from Toronto to Vancouver, he would be lucky to have progressed beyond the city limits of Toronto by the end of the century.

Why Inquiries?

What are some of the basic purposes of inquiries? Do they satisfy the expectations of those with an interest in their outcome and, if so, how? There is nothing new in the concept of parliamentary committees or Royal Commissions conducting inquiries; they are an integral part of our system of democracy. Inquiries can be of two main forms — *continuing* or *ad hoc*. The continuing forms are best exemplified by Standing Committees of the Legislature and by permanent regulatory boards, such as the National Energy Board, the Atomic Energy Control Board and the Canadian Transport Commission. The *ad hoc* forms are exemplified by Select Committees of the Legislature and by Royal Commissions and Commissions of Inquiry. These latter are normally set up under The Public Inquiries Act, which not only permits them wide discretion in determining the form and procedure of their own inquiry, but also gives them the power to subpoena witnesses and documents.

The continuing process, as exemplified by the regulatory board, has the ability to build up its own staff of independent experts. However, if the industry or activity being regulated is unique, then it is very likely that the regulatory staff will have obtained their background experience from employment within the industry at an earlier stage of their careers. Many of the extreme intervenors at regulatory hearings use this to impute bias and seem unable, or unwilling, to grasp the concept of professional responsibility to the public good.

In the ad hoc inquiry, it is easier to utilise a wider variety of expertise, on a consultancy basis, even though the knowledge of the experts used may not be as great in the specific area as that of ex-industry personnel. It is likely that new people with different ideas will be brought in as commissioners. Since the appointments are on a non-continuing basis, judges can be used as commissioners. This is of great advantage when it comes to weighing evidence and assessing the credibility of witnesses. To encourage members of the general public to

come forward and express their views, many *ad hoc* hearings are conducted with little legal formality. This is commendable but it is open to abuse. Unscrupulous and irresponsible intervenors can use the opportunity, while not under oath, of giving evidence that is hearsay and couched in inflammatory terms. Such people can also use the hearings as a forum for generalised attacks on the professional competence and even the personal integrity of both public and elected officials. Public officials, because they are civil servants, cannot easily protect themselves against this type of attack — a fact of which this sort of person is well aware.

An experienced judge is not taken in by these tactics and Mr. Justice Parker, in his final Windscale Inquiry report, commented about the type of derogatory evidence submitted by anti-nuclear groups. In Ontario many people, particularly in the professional engineering community, are looking to the final Report of the Royal Commission on Electric Power Planning to determine how best to

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respond to this type of evidence from some of the more vocal and irresponsible anti-nuclear groups.

A major advantage of the ad hoc process is that it is easier to select and appoint commissioners who can appear to the public to be free of direct responsibility to any governmental interest. Most members of the general public do not differentiate between government departments, Crown corporations and permanent regulatory boards. All appear to be part of "big government" and hence equally suspect.

Fairness must be present throughout the entire inquiry. It is normal practice for the Commissioners to establish the rules of procedure, by whatever means they judge appropriate, at the beginning before briefs are solicited. The establishment of these rules may also involve public hearings with all the interested parties.

Establishing the rules is one thing; applying them impartially to all who participate, throughout protracted hearings, is another. Failure to do so undermines the credibility of the final recommendations and constitutes a waste of people's time and public and private money.

A normal external restraint on all inquiries is imposed by the terms of reference for the inquiry. They can be very specific, as is often the case for a legal inquiry into a specified wrongdoing by an individual or organization. They can also be very broad; often the case where public policy is involved such as for long-term planning issues or matters of general societal concern.

Expectations

Different groups in society have widely differing expectations of what the inquiry will achieve, either for themselves or for others. Since many of these expectations are mutually contradictory, it is scarcely surprising that the results of inquiries are never universally and equally acclaimed on all sides.

The general public expected enlightenment but ended up more confused than before. Portions of the media expected exciting confrontations but instead found the proceedings monumentally dull. The government that set up the inquiry hoped the topic would sink under a load of inertia, paper and indifference but found instead that the issue captured the public imagination. The political opposition hoped for ammunition to use against the government but found only duds or blanks. The extremist expected a platform from which to launch himself and his views but found a quicksand of disinterest. The educator hoped that it would lead to the spread of knowledge and wisdom but found that the entire proceedings were largely ignored. Each of the above is posed in terms of extremes. Hopefully, for most groups, the actuality is somewhere in-between.

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The inquiry may bring to light facts and a range of opinion on what those facts mean so that the decisions then made by others will be wiser and more in the public interest than if the inquiry had never been held.

If some of the recommendations are unsound, ignoring them could, on occasion, be in the public interest. It is rare that an inquiry does not leave some questions unanswered, either by accident or design. A broad-scope inquiry could be considered successful if it was able to narrow the areas of dispute to the point where some reasonable specific recommendations can be made.

Possible Abuses

The abuses of the inquiry process may well be inherent in the process. Where one side, particularly if that side is the proponent of the proposals under review, feels that it has a strong factual case it will obviously tend to make its case on the factual level. The other side may feel that its best strategy is to wage a guerilla war and concentrate on an emotional appeal. The emotional attack can be very effective in getting electronic media attention. Facts are dull and take time to present. Emotional appeals can be couched in a few sentences. If these efforts are allowed to succeed, there is danger of the inquiry being held on two different levels for different audiences; the factual side inside the hearing room and the emotion-laden media show outside. This is not bad if both sides can be persuaded, are able, and do receive equal treatment outside as well as inside the hearing room.

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Another very common abuse is called "playing to the gallery". This arises from a lax application of the rules of procedure. Some of it is inevitable since any special interest group, of whatever persuasion, can use its briefs to demonstrate that it is articulating their concerns and is worthy of continued support. Abuse occurs when the content of the briefs is extended to cover areas outside the terms of reference of the inquiry and is couched in the form of a personalised attack on the professional competence and personal integrity of unnamed people or groups on the other side.

Inquiries that accept briefs of this type, without any comment on their appropriateness or propriety encourage the escalation and proliferation of this type of submission. Even if the side under attack does not retaliate, feelings of frustration and suppressed hostility may be engendered. This is a difficult area, because in a democratic society, people have the right to express themselves openly at a public inquiry. However, like all other freedoms, the exercise of this priceless right should carry with it a self-imposed sense of responsibility.

Further abuse becomes evident when the effect of an inquiry is to delay the making of a much-needed decision. The decision may pose political difficulties, but to put all the participants in an inquiry through a meaningless charade is a disservice to all.

Coverage by the media

Often the media is a driving force in initiating inquiries because it can

perform very effectively in the accusatory role. But, once an inquiry has been set up media interest can vary considerably. Narrow scope inquiries or those involving specific allegations against well-known public figures are more likely to get regular media coverage than broad-scope inquiries. The ad hoc inquiry with a new cast of principals is more likely to receive media attention than the hearings of a regulatory board that has a regular roster of hearings. A broad-scope inquiry often has to spend time assembling data, conducting research studies and identifying issues. This process does not make for good headlines or visual impact.

The ad hoc hearing into a local matter will probably receive good coverage by the local media. Matters of provincial interest rarely will receive much coverage outside that province. The education and public information role of broad inquiries is difficult to achieve in the face of media indifference. On balance, media indifference is preferable to consistently one-sided media coverage which can rapidly degenerate into "trial by media". This danger seems to occur primarily in inquiries into the actions of unpopular public figures or causes.

Future Prospects

Is the current proliferation of inquiries likely to continue? Very likely. There is always a plentiful supply of topics — labour disputes, utility rate increases, alleged misdemeanours of public figures, social issues, rezoning applications, energy policies, new industrial or

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commercial projects (or lack of them) and health allegations. Almost anything could serve as a subject of inquiry.

With higher levels of general education, instant communications and increased leisure, more people can articulate their concerns. As society becomes ever more crowded and complex, distrust of all institutions has been fostered. The tactics of confrontation and polarisation have been honed by individuals and groups with their own rigid perceptions of how today's society should be changed. The public inquiry serves all these needs.

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If it does not work well, it may be due to the ill-advised actions of some individuals in the process; a reflection of the shortcomings in our democratic system. The challenge is there for all of us to make it work. Failure to do so would be a step towards a totalitarian society.

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