Commission of Inquiry on Hormone Receptor Testing

COMMISSIONER CAMERON'S RULING ON AN APPLICATION BY HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

The applicant, Her Majesty the Queen in Right of Newfoundland and Labrador, seeks "clarification of the Rules of Procedure and Practice ... of the Commission of Inquiry on Hormone Receptor Testing as they relate to the cross-examination of witnesses by Commission Counsel."

Briefly stated, the position of the applicant is that the **Rules of Procedure and Practice** do not permit Commission counsel to cross-examine a witness. The applicant acknowledges that if its position is correct "at times it may be necessary for Commission counsel to cross examine in order to thoroughly fulfill the mandate of the Commissioner." However, the applicant argues that such cross-examination should only occur in accordance with evidentiary rules and with the leave of the Commissioner.

Six other parties with standing and Commission counsel filed reply briefs. The positions taken in the replies can be placed at various sites along a continuum from full agreement with the applicant to the proposition that Commission counsel are free to use leading questions as they wish. On May 20, 2008, the applicant filed a reply brief in which it is submitted that "procedural fairness dictates that a witness should know whether he or she is given evidence in chief or by way of cross- examination."

Cross-examination has been defined as follows[1]:

> The questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions ... .

It is clear that the concern of the applicant is not the right of Commission counsel to ask questions of a witness but the manner in which such questions are to be put, specifically, whether Commission counsel may ask leading questions.

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[1] **Black's Law Dictionary** 17th ed. (West Group, 1999)

Contextual Background

Rules of evidence regulate what matters are, or are not, admissible before a court and the method by which admissible facts are placed before it[2]. These rules, however, do not necessarily apply, or apply in the same way, to quasi judicial, administrative or other bodies.

Leading questions either suggest the answer desired or assume a fact or facts which are in dispute.

In **R. v. Clancey**, [1992] O.J. No. 3968 (Ont. C.J., Gen. Div.), Watt J., at para. 12, said of the rule against leading questions during examination-in-chief:

> The rationale which underlies the rule would appear to be that it may generally be presumed that a witness will be biased in favour of the summoning party, hence disposed to testify [to] anything that he or she thinks will serve the interests of such party. A leading question, in effect, suggests to the witness the answer that he or she is desired to give. It thereby invites misrepresentation, as much perhaps from indolence and compliance, than from any unworthy motive, because the witness may be too much disposed to assent to the proposition of counsel and answer as suggested, rather than upon reflection and an exertion of the witness' own and true memory. The danger of such response far exceeds the cases where a corrupt intention is attributed either to counsel or the witness.

At para 23,Watt J. added:

> Cross-examination of an opponent's witness typifies the situation in which, generally speaking, a witness' presumable bias removes all danger of acquiescence in improper suggestion. Cross-examination seeks to sift the witness' testimony, to weaken its force, put otherwise, to discredit the testimony given in-chief.

On this basis, as a general rule, leading questions are permitted on cross-examination.

However, even in the context of a criminal trial, the presiding judge has discretion to relax the general rule prohibiting leading questions during examination-in-chief. This discretion exists apart from any statutory provisions. As Watt J. put it at para. 29 of **Clancey**:

> The discretion may become engaged when the rationale which underlies the rule ceases to apply, as for example, in cases where the witness being examined is indisposed to favour the cause of the party summoning by accepting suggestions of desired testimony.

Colin Tapper, **Cross on Evidence**[3], notes that leading questions are objectionable because of the danger of collusion between the person asking them and the witness.

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[2] Sopinka, Lederman and Bryant: **The Law of Evidence in Canada,** 2nd ed. (Butterworths, 1999), p.3.

[3] 17th ed. (Butterworths, 1990), p. 270

Rules of Procedure and Practice

Rules of Procedure and Practice which are relevant to this application include the following:

2. Commission counsel, who will assist the Commissioner throughout the Inquiry and are to ensure the orderly conduct of the Inquiry, have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all interests that bear on the public interest are brought to the Commissioner's attention.

13. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commissioner as she sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.

16. Subject to the Public Inquiries Act, 2006, the conduct of and the procedure to be followed on the Inquiry are under the control and discretion of the Commissioner.

18. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness' evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness.

19. The Commission is entitled to receive any relevant evidence at the Inquiry which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.

29. The order of examination of any witness will be as follows:

    (a) subject to Rule 18, Commission counsel will adduce the evidence from the witness;

    (b) parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by the parties having standing, and should they be unable to reach agreement, by the Commissioner;

    (c) counsel for a witness, regardless of whether or not counsel is also representing a party, will examine last, unless he or she has adduced the evidence of that witness in chief, in which case there will be a right to re-examine the witness; and

    (d) Commission counsel will have the right to re-examine.

Analysis

Two of the primary functions of a public inquiry are fact-finding and investigation.

In **Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)**, [1997] 3 S.C.R. 440, para. 34, Cory J. said:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:
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> > A public inquiry is not equivalent to a civil or criminal trial .... In a trial, the judge sits as an adjudicator and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfill their investigative mandate... . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire' and "report"... . Judges may impose monitory or penal sanctions; the only potential consequence of an adverse finding ... is that reputations could be tarnished.

In **Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)**, [1995] 2 S.C.R. 97, paras. 73-75, Cory J. emphasized the role of inquiries as a vehicle for informing the public, thereby enabling people to form their own opinions.

In **Toronto Computer Leasing Inquiry** and **Toronto External Contracts Inquiry Report**[4], Justice Bellamy contrasted trials and public inquiries as follows:

> In our common law system, trials follow investigations. Parties are pitted against each other, and examinations and cross-examinations are the thrust and parry to test the evidence and arrive at the truth. In a public inquiry, the investigation is part of the process; indeed, the whole purpose is to investigate and make public the results.

These differences between the role of a court and that of an inquiry inform the interpretation of the **Rules of Procedure and Practice**.

The unique nature of the role of Commission counsel is also relevant to the interpretation of the **Rules of Procedure and Practice**. Commission counsel represent the public interest. They do not represent any particular interest or point of view, and their role is neither adversarial nor partisan[5]. However, as Justice Bellamy stated in her Report, p. 43:

> While it is not the role of Commission counsel to advance any particular point of view, it does not follow that they should not be vigorous and thorough in their investigation, which includes the examination of witnesses. Commission counsel assist the commissioner in trying to discover the truth. They must be prepared to ask probing questions, especially when a witness's evidence is inconsistent or evasive. Commission counsel cannot accept each statement or explanation at face value. When there is no party adverse in interest to the witness, Commission

[4] Volume 3: Inquiry Process, p. 41

[5] Justice D. R. O'Connor, **Report of the Walkerton Inquiry**, Part 1, 14.3.5

> counsel have a special duty to examine the witness particularly thoroughly. They are not advocates for a party, but they are advocates for the truth. They must investigate, test, and verify.

The applicant submits that the **Rules of Procedure and Practice** support its view. It maintains that by specifically granting to parties with standing the right to "cross-examine" and by the failure of the **Rules** to specifically state that Commission counsel have the right to ask leading questions, the **Rules** signify that it was intended that no such right be given to Commission counsel.

I am not persuaded to the applicant's position. **Rule 18**, which addresses who may call and question witnesses, provides that ordinarily Commission counsel will call witnesses. However, if counsel for a party with standing has persuaded the Commissioner that he or she ought to be permitted to lead a witness' evidence-in-chief, that evidence is presented in the normal way, i.e., consistent with the way evidence would be presented in a trial. The contrast in the two situations is clear. The latter situation is akin to that in a trial where a witness is likely to be favorable to the party presenting him or her. Commission counsel, on the other hand, represent the public interest. Here, the witnesses being called by Commission counsel will likely include persons whose actions are directly addressed by the Terms of Reference. The applicant has not suggested that there is any danger of collusion between Commission counsel and employees, or former employees of the Government of Newfoundland and Labrador, nor between Commission counsel and Ministers or former Ministers. The rationale for the rule against leading questions has no application where witnesses are called by Commission counsel.

It is also argued that **Rule 29**, which addresses the order of examination, supports the applicant's view. The applicant maintains that the granting of the right of cross-examination to parties with standing coupled with the failure to expressly state, as some other inquires have done[6], that Commission counsel may ask leading questions indicates an intention to limit the method of examination of Commission counsel to that provided at a trial. For the reasons already stated, in the absence of an express limit on the right of examination of Commission counsel and in the absence of the rationale for the rule against leading questions, no such limitation has been, nor should it be, placed on Commission counsel.

It should also be noted that even in examination-in-chief during a trial leading questions are not only allowed but encouraged for the presentation of certain kinds of evidence: for example, introductory matters; questions of identity of persons or things; refreshing memory. In addition, a court has discretion, not open to review, to relax the rule against leading questions whenever it considers necessary in the interests of justice[7]. Contrary to the position of the applicant, leading questions save time. In this Inquiry, which covers events from 1997 to the present, it is to be expected that some witnesses may not be able to recall all of the details of events. Even if the general rules prohibited the use of leading questions by Commission counsel, this would be a circumstance for the

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[6] Eg. Rule 12(2) of the Rules of Procedure for the Lamer Inquiry
Rule 19 of the Rules of Procedure and Practice for the Walkerton Inquiry

[7] **R. v. Coffin**, [1956] S.C.R. 191

exercise of the discretion to relax the rule without the necessity of seeking leave from the Commissioner on every occasion. If it were necessary to go through a formal procedure of an application for leave to ask leading questions with all counsel making submissions on the point for every question or line of questioning, it would add greatly to the time required to complete the evidence of the witnesses.

Two of the parties with standing, Canadian Cancer Society, Newfoundland and Labrador Division, and members of the Breast Cancer Testing Class Action, have also raised the potential for unfairness if Commission counsel were, after 20 witnesses had been heard, required to change the manner of examination of witnesses. The witnesses who are to be called during the Inquiry will primarily be representatives of one of the "responsible authorities" referred to in the Terms of Reference. If Commission counsel were unable for the balance of the Inquiry to ask leading questions, the burden of cross-examination of those witnesses would fall primarily to those two parties, who would be in a less advantageous position to perform the task, thereby making the process less efficient and raising the specter of an inquiry which looks adversarial.

I agree with the applicant that all witnesses have a right to be treated fairly, with dignity and respect. However, I am unable to conclude that the use of leading questions in the examination of witnesses by Commission counsel undermines that right. The applicant argues that if Commission counsel are permitted to ask leading questions the presence of counsel for a witness cannot protect procedural fairness because "the witness' counsel has no basis to object to the questioning and procedural fairness is denied." This is patently incorrect.

In my opening remarks at the hearings for standing and funding I affirmed that the principles of natural justice would be observed by the Commission. Natural justice is generally understood to encompass certain basic legal principles that are fundamental and to be applied universally, thereby not needing to be enacted into law. The principles of natural justice include the concept of procedural fairness. Two rules of natural justice are:

- *audi alteram partem* (hear the other side); and
- *nemo debet esse judex in propria sua causa* (No one shall be judged in his own case/a decision maker must be unbiased)

As Tucker L.J. observed in **Russell v. Duke of Norfolk**, at p. 118:

> There are … no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.[8]

The applicant has been granted standing before a Commission which is unbiased. Like all parties with standing, it has received notice of and participated in all aspects of

[8] [1949] 1 All E.R. 109 (C.A.).

the Inquiry to date. Parties with standing have been granted disclosure of documents, the right to make representations to the Commission, and the right to cross-examine witnesses. All parties with standing have been represented by counsel who may raise objections if the questioning of a witness is repetitious, aggressive or confrontational.

Conclusion

For the reasons given above, Commission counsel are entitled to adduce evidence by way of both leading and non-leading questions.

Released: May 22, 2008

Margaret Cameron

Margaret A. Cameron
Commissioner