The Objectives of a Commission of Inquiry

It is appropriate that I reiterate the comments I made at the opening of the Inquiry hearings. It is essential that the proceedings of an Inquiry be as fair and balanced as possible, mindful of the interests of the parties. It is also essential that the public have as much information about the proceedings as possible, commensurate with the proper conduct of the hearings and the interests of the parties involved. The role of the media is important. In matters of this sort there must be transparency and accountability.

It is helpful to review the comments made by the Ontario Court of Appeal in *Re The Children's Aid Society of the County of York*.[4] I refer particularly to the following quotations. Firstly to those of Mr. Justice Mulock who said:

> "…in answering the questions submitted it might be advisable to point out the nature of the inquiry in question. It is one to bring to light evidence or information touching matters referred to the Commissioner…where useful documents or other evidence could be obtained, it would seem reasonable that he avail himself of such a source of information… It is for the Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him. …"[5]

And the comments of Mr. Justice Riddell:

> "… A Royal Commission is not for the purpose of trying a case or a charge against any one, any person or any institution – but for the purpose of informing the people concerning the facts of the matter to be inquired into. Information should be sought in every quarter available.
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> …
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> Everyone able to bring relevant facts before the Commission should be encouraged, should be urged, to do so.
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> **Nor are the strict rules of evidence to be enforced; much that could not be admitted on a trial in Court may be of the utmost assistance to the Commission…"**[6] (Emphasis added)

And finally the comments of Mr. Justice Middleton:

> "… **It is an inquiry not governed by the same rules as are applicable to the trial of an accused person.** The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.

[4] [1934] O.W.N. 418
[5] *Ibid.* at 419
[6] *Ibid.* at 420

> **This is a matter in which the fullest inquiry should be permitted.** All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed. …"[7] (Emphasis added)

The Standard for a Commission of Inquiry

The principle is well established that a Commission of Inquiry may not draw conclusions, or make recommendations regarding the civil or criminal responsibility of any person or organization. This proposition is expressly contained in the Terms of Reference for this Commission of Inquiry, which are reproduced above.

In beginning my analysis of this qualifying language I refer to the comments which appear in the report of the *Commission of Inquiry into the Niagara Regional Police Force.* The Commissioner in that matter made the following observations in the forward to his Report.

> "By my terms of reference, and by judicial precedent, I am prohibited from making any findings of criminal or civil responsibility, and no such finding should be inferred from any of my remarks. Such a prohibition is necessary because a commission may admit evidence not given under oath, and the ordinary rules of evidence which provide protection against such matters as hearsay do not apply to public inquiries. I am interested in improper conduct only if it had some detrimental effect upon the operation or administration of the Force or contributed to a loss of confidence in the Force on the part of the public."[8]

That question has been addressed many times by Canadian courts. Before I proceed further with my Report, it is important that I set down my understanding of the law in this respect.

The question was addressed in the Report of *The Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters.*[9] The Ontario Court of Appeal in *Re Nelles et al. and Grange et al.*[10] had to decide if the Commissioner had exceeded his jurisdiction in expressing an opinion as to whether the death of any child was the result of the action, accidental or otherwise, of any named person or persons. The Commissioner had decided that he was not so constrained and the Ontario Trial Division agreed. The Court of Appeal did not, holding that even without the precise legal requirements of finding that a named person intentionally or accidentally caused the death of another, any such finding would amount to a conclusion of law. The relevant passages of the Court of Appeal's decision are these:

> **"What is important is that a finding or conclusion stated by the commissioner would be considered by the public as a determination and might well be seriously prejudicial if a person named by the commissioner as responsible for the deaths in the circumstances were to face such**

[7] *Ibid.* at 421

[8] Ontario, *Commission of Inquiry into the Niagara Regional Police Force, Final Report* (Queen's Printer of Ontario, 1993) at xvi

[9] Ontario, The Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters (Ontario Ministry of the Attorney General, 1984)

[10] (1984) 46 O.R. (2d) 210 [*"Nelles"*]

> **accusations in further proceedings.** Of equal importance, if no charge is subsequently laid, a person found responsible by the commissioner would have no recourse to clear his or her name.
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> …This case is unique. There was an extensive police investigation and a prosecution that failed. The Attorney-General for the province has clearly stated and it is a fact 'that there is no precedent for an inquiry of this nature into deaths thought to have been the result of deliberate criminal acts.' In our opinion the specific limitation imposed on the commission by the Order in Council in the circumstances was imposed out of concern for those persons who might become involved in other proceedings or be called upon to stand their trial. This concern for fairness is traditionally our way and so what we regard as a clear direction to the commissioner in the Order in Council was struck accordingly and the cases referred to are of little help.
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> …
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> To be clear, it is our opinions that if there is a finding of non-accidental administration of a lethal overdose of digoxin, thereby causing death, the commissioner is prohibited from naming the person responsible for to do so would amount to stating a conclusion of civil or criminal responsibility. In addition, if the act of administration of a lethal dose of digoxin by a member of the staff of the hospital to a patient was "accidental", naming the person administering it would in the circumstances of this case also amount to a conclusion of civil or criminal responsibility and is prohibited. The commissioner is obliged to hear all of the evidence which tended to show that one or more of them died as a result of unlawful or negligent acts. While the commissioner must not identify an individual as being legally responsible for a death, he should analyze and report upon all of the evidence with respect to the circumstances of each death and if he can, make recommendations with respect to that evidence.
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> It was probably inherent in the terms of the Order in Council that the task of meeting the "need of the parents and the public as a whole to be informed of all available evidence" by "full examination" of the matters to be inquired into and "to ensure full public knowledge of the completeness of the matters referred to", but to do so "without expressing any conclusion of law regarding civil or criminal responsibility", was one of extreme difficulty, at times approaching the impossible. Where such an impasse arises it should be resolved, in our opinion, by a course that best protects the civil rights of the persons the limitation was designed to protect.
>
> The task of the commission is thus a delicate and difficult one, but the limitation imposed by the Order in Council must be obeyed."[11] (Emphasis added)

Thus, in *Nelles* it was held that the particular finding made by the Commissioner was beyond his jurisdiction not because it was a determination of law in a strict sense but rather because the finding would be perceived by the public to be a determination of law.

[11] *Ibid.* at 220-221

The matter was addressed again in *Canada (Attorney General) v. Canada, Commission of Inquiry on the Blood System.*[12] In that case, the Supreme Court of Canada had to decide if certain misconduct notices issued by the Commission of Inquiry constituted an excess of jurisdiction on the part of the Commission. The contention of the applicants was that the notices contained findings of criminal and/or civil liability. In developing their argument, the applicants claimed a commissioner exceeds his jurisdiction if he makes a finding that would be considered by a reasonably informed member of the public to be a determination of criminal and/or civil liability. They relied on *Nelles.*

Mr. Justice Cory, writing for a unanimous court, stated that while the public perception standard may be appropriate for certain types of Commissions, it is not a rule of universal application. He stated that such a standard would be appropriate when a Commission is investigating a particular crime but would not be appropriate for a commission engaged in a wider investigation, such as an investigation into the contamination of Canada's blood system.

Mr. Justice Cory stated that the purpose behind most Commissions is the restoration of public confidence and that Commissions of Inquiry achieve that purpose by educating the public on why a particular tragedy or social problem occurred and by making recommendations to improve the situation or to prevent a future occurrence. He also held that in order to achieve this general purpose, a Commission must not be unduly restrained. Naming those responsible for the event or situation may be an important element in educating the public. Further, it may be that in order for recommendations to make sense, the whole story, including names, must first be related.[13] Mr. Justice Cory summarized his position by quoting from the Federal Court of Appeals decision on the *Tainted Blood Case:*

> "… 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."[14]

The court held that the narrow public perception test was too restrictive to be universally applicable and, in fact, was only applicable to specific types of Commissions. The court stated that for most Commissions, the broad standard would be applicable. It is also clear from the decision of Mr. Justice Cory, that the purpose or focus of a Commission should not be the determination of individual blame. Rather, the purpose or focus should be on what information is needed to educate the public and to give context in justification to the recommendations. With that principle in mind, he wrote,

[12] [1997] 3 S.C.R. 440 [*"Tainted Blood Case"*]
[13] *Ibid.* at 463
[14] *Ibid.* at 463

> "Findings of misconduct should not be the principle focus of this kind of public inquiry. Rather, they should only be made in those circumstances where they are required to carry out the mandate of the inquiry."[15]

An example of a Commission which determined that naming names was not needed in order to fulfill the mandate of the Commission is the *Commission of Inquiry into Certain Events at The Prison for Women in Kingston.* In the Commission's Report, Commissioner Louise Arbour wrote:

> "During the entire process of this inquiry, and in particular in the writing of this report, I have concluded that it would not be fair for me to embark upon personal attribution of responsibility, for many reasons. Many persons were not called to testify and had therefore no opportunity to address allegations that might have been made against them. The witnesses who were called were not meant to be singled out as blameworthy, but were called for the sake of expediency, as the ones who had the most to contribute to the unfolding of the narrative. Many individuals who, by their own account, made errors, or whose actions I found did not meet a legal or policy standard or expectation, are otherwise persons greatly committed to correctional ideals for women prisoners. They were part of a prison culture which did not value individual rights. **Attribution of personal blame would suggest personal, rather than systemic shortcomings and justifiably demoralize the staff, while offering neither redress nor hope for a better system in the future.**"[16] (Emphasis added)

Thus, Commissioner Arbour, having concluded that problem at the Kingston prison was systemic, decided that naming names would serve no purpose and would hinder the process of improving that system.

An example of a Commission that determined that it was necessary to name names in order to fulfill its mandate is the *Commission of Inquiry into the Deployment of Canadian Forces to Somalia:*

> "The Governor in Council has made this section of our report necessary by entrusting us with a mandate that specifically obliged us to investigate individual misconduct, in addition to probing policy issues. A section on individual misconduct was also necessary by our being asked to inquire into and report on a great many matters that should, at least in some measure, involve an assessment of individual conduct, including the effectiveness of decisions and actions taken by leaders in relation to a variety of important matter; operational, disciplinary, and administrative problems and the effectiveness of the reporting of and response to these problems; the manner in which the mission was conducted; allegations of cover-up and destruction of evidence; the attitude of all the ranks towards the lawful conduct of operations; and the understanding, interpretation, and application of the rules of engagement."[17]

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[15] *Ibid.* at 470

[16] Canada, *Commission of Inquiry into Certain Events at The Prison for Women in Kingston* (Public Works and Government Services Canada, 1996) at xiii

[17] Canada, *Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Dishonoured Legacy: The Lessons of the Somalia Affair, Final Report, vol. 4* (Canadian Government Publishing, 1997) at 951-952

Commissioners Desbrats and Rutherford held that naming names was necessary to fulfill the Commission's mandate not only because they were directly specified to do so, but also because reporting on individual conduct was an inherent element in many of the issues their mandate directed them to.

In the Supreme Court of Canada case of *Starr v. Houlden,* Mr. Justice Lamer (as he then was) made the following comments:

> "My interpretation of the interplay between provincial inquiries and investigation of specific crimes has more recently been supported by the Ontario Court of Appeal in *Re Nelles* and *Grange, supra.* Although the constitutional validity of the Order in Council was not in issue, **the interpretive limitations which were imposed by the court were designed to ensure that it stayed within the provincial jurisdiction**…"[18] (Emphasis added)

Starr supports the position that the public perception test is applicable when a Commission will be focusing its investigation on particular crimes of particular individuals. Mr. Justice Lamer made it clear that this interpretive limitation was in place because the unique nature of the inquiry.[19] Indeed, the Court in *Nelles* stated as much when they wrote, "This case is unique. There was an extensive police investigation and a prosecution that failed. The Attorney-General for the province had clearly stated that if further evidence should be found there will be further prosecutions."[20]

While the inquiry in *Nelles* may have had the provincial purpose of ensuring public confidence in the administration of hospitals, the court had determined that its focus was directed at a particular crime of a particular person. Thus, to name that person would be a pure declaration of guilt, and as Mr. Justice Lamer stated would be an entrenchment on federal jurisdiction over criminal liability. Persons named would lack the protections accorded an accused in a criminal trial. In the *Tainted Blood Case,* Mr. Justice Cory recognized that Public Inquiries cannot overshadow individuals' rights, when he wrote:

> "The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Decary J.A. when he stated at para. 32 '[t]he search for truth does not excuse the violation of the rights of the individuals being investigated'. This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.[21]

I would observe also that while rebutting the applicants' view of *Nelles*, Mr. Justice Cory in the *Tainted Blood Case* outlined the factors to be considered when determining whether a Commission is of narrow or broad scope. The main factor to be considered is the nature of the Commission's purpose. Is the Commission invested with a broad purpose, such as an investigation into the contamination of Canada's blood system? Or is the Commission's purpose narrow, such as the determination of who committed the specific crime of killing

[18] [1990] 1 S.C.R. 1366 [*"Starr"*]
[19] *Ibid.* at 1402
[20] *Nelles, supra* note 9 at 220
[21] *Tainted Blood Case, supra* note 11 at 458

several babies? However, he noted that a Commissioner may appear to have a narrow purpose when, in actuality, the purpose is broad. Mr. Justice Cory further illustrated this point by citing the case of *O'Hara v. British Columbia*[22] when he wrote:

> "In *O'Hara, supra*, an inquiry was upheld in circumstances where the commissioner was to report on whether a prisoner sustained injuries while detained in police custody, and if so, the extent of the injuries, the person or persons who inflicted them, and the reasons they were inflicted. The court made a distinction between inquires aimed at answering broad policy questions and those with a predominantly criminal law purpose. **The inquiry was upheld, despite the fact that it would inevitably lead to findings of misconduct against particular individuals, because it was not aimed at investigating a specific crime, but rather at the broad goal of ensuring the proper treatment by police officers of persons in custody.**"[23] (Emphasis added)

It is clear from the above that a Commission may have as its investigative focus the possible criminal conduct of particular individuals during a specific event without being restrained by the public perception test. However, in order for the public perception test not to be applicable, the Commission's overall purpose must be broad in nature, such as the proper treatment by police officers of persons in custody.

The *Tainted Blood Case* decision also established that the circumstances surrounding an Inquiry can be a factor in determining whether a Commission is broad or narrow in scope. This factor includes background facts leading up to the Inquiry. It would seem the purpose of this factor is twofold. First, it is intended to aid in the determination of the Inquiry's true purpose. Second, it is intended to aid in determining what purpose the public will attribute to the Inquiry. Mr. Justice Cory articulated this factor, while he was in the process of distinguishing *Nelles* and *Starr*, when he wrote:

> "The decision in *Nelles* and *Starr* are distinguishable from the case at bar. In *Nelles*, the court found that the purpose of the inquiry was to discover who had committed the specific crime of killing several babies at the Hospital for Sick Children in Toronto. By the time the case reached the Court of Appeal, one criminal prosecution for the deaths had failed and an extensive police investigation into the deaths was still continuing. When it established the commission, the government described it as an inquiry into deaths thought to have been the result of deliberate criminal acts. Further, the Attorney General had stated that if further evidence became available which would warrant the laying of additional charges, they would be laid and the parties vigorously prosecuted. The court clearly viewed the proceeding as tantamount to a preliminary inquiry into a specific crime. For the commissioner to have named the persons he considered responsible would, in those circumstances, have amounted to a clear attribution of criminal responsibility.
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> …
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> Clearly, those two inquiries were unique. They dealt with specific incidents and individuals, during the course of criminal investigation. Their findings would

[22] [1987] 2 S.C.R. 591 [*"O'Hara"*]

[23] *Tainted Blood Case, supra* note 11 at 468

> inevitably reflect adversely on individuals or parties and could well be interpreted as findings of liability by some members of the public. **In those circumstances, it was appropriate to adopt a strict test to protect those who might be the subject of criminal investigation.**"[24] (Emphasis added)

Circumstances surrounding an Inquiry are not the determinative factor in deciding whether a Commission is broad or narrow. However, in the above passage, the learned judge articulated that they can aid in uncovering the true nature and scope of a Commission.

The court, after determining that there were differing standards applicable to broad based commissions as opposed to narrow based commissions, then went on to describe the standard applicable to broad commissions. In particular it stated that a Commissioner invested with a broad mandate should not be overly concerned with whether the public would view his findings as indicative of legal liability. Rather, the Commissioner should only be concerned that his or her findings and conclusions are, to the greatest extent possible, free of legal terminology and words with inherent legal meaning. In laying out the broad test applicable to commissions with wide mandate, Mr. Justice Cory stated the following:

> "…However, the conclusions of a commissioner should not duplicate the wording of the *Code* defining of a specific offence. If this were done it could be taken that a commissioner was finding a person guilty of a crime. This might well indicate that the commission was, in reality, a criminal investigation carried out under the guise of a commission of inquiry. Similarly, commissioners should endeavor to avoid making evaluations of their findings of fact in terms that are the same as those used by courts to express findings of civil liability. As well, efforts should be made to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability. **Despite these words of caution, however, commissioners should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.**"[25] (Emphasis added)

Along the same lines, he stated that words contained in a Commission report such as "responsible for" or "failed to" could not be interpreted as determination of legal liability. Such conclusions do not imply a conclusion of law as they could easily be interpreted to be based on any number of normative standards. The point was articulated as follows:

> "Further, while many of the notices come close to alleging all necessary elements of civil liability, none of them appears to exceed the Commissioner's jurisdiction. For example, if his factual findings led him to conclude that the Red Cross and its doctors failed to supervise adequately the Blood Transfusion Service and Blood Donor Recruitment, it would be appropriate and within his mandate to reach that conclusion. Some of the appellants object to the use of the word "failure" in the notices; I do not share their concern. As the Court of Appeal pointed out, there are many different types of normative standards, including moral, scientific and professional-ethical. **To state that a person 'failed' to do something that should have been done does not necessarily mean that the person breached a criminal or civil standard of conduct. The same is true of the**

[24] *Ibid.* at 466 and 468
[25] *Ibid.* at 469-470

> **word 'responsible'.** (Emphasis added) Unless there is something more to indicate that the recipient of the notice is **legally responsible** (Emphasis in original), there is no reason why this should be presumed. It was noted in *Rocois Construction Inc. v. Quebec Ready Mix Inc.,* [1990] 2 S.C.R. 440, at p. 455:
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> > A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot because; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes…[I]t is by the intellectual exercise of characterization, of the linking of the fact and law, that the cause is revealed.
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> While the Court in *Rocois* was concerned only with facts, I believe the same principle can be applied to conclusions of fault based on standard of conduct. Unless there is something to show that the standard applied is a legal one, no conclusion of law can be said to have been reached."[26]

However, the judgment reiterated the caution that a Commissioner should avoid words with inherent legal implications. In developing this point, Mr. Justice Cory stated that certain terms or phrases denote the application of a legal standard and, therefore, do impute a conclusion of law:

> "**There are phrases which, if used, might indicate a legal standard has been applied such as a finding that someone 'breached a duty of care', engaged in a 'conspiracy', or was guilty of 'criminal negligence'.** (Emphasis added) None of these words has been used by the Commissioner. The potential findings as set out in the notices may **imply** (Emphasis in original) civil liability, but the Commissioner has stated that he will not make a finding of legal liability, and I am sure he will not."[27]

Having examined the law at some length, I am satisfied that the findings set out hereafter fall within the ambit described by the Supreme Court of Canada. These injunctions have been before me constantly as I proceeded with the preparation of the Report and the summary of my findings.

[26] *Ibid.* at 475-476
[27] *Ibid.* at 476