*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*
*And in the matter of a summons to witness issued by the Commission to the Registrar of the College of Physicians and Surgeons of Ontario on September 17, 2007*

# BOOK OF AUTHORITIES OF COMMISSION COUNSEL
# (MOTION FOR DIRECTIONS RETURNABLE OCTOBER 4, 2007)

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

**Linda Rothstein**
**Robert A. Centa**

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[COURT OF APPEAL]

## Re Bortolotti et al. and Ministry of Housing et al.

ESTEY, C.J.O., HOULDEN AND HOWLAND, JJ.A. 1ST APRIL 1977.

**Administrative law — Judicial review — Scope — Power of Divisional Court to review decisions of commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49 — Considerations.**

The power of the Ontario Divisional Court to review the decisions of a commission appointed under the *Public Inquiries Act*, 1971 (Ont.), c. 49, is limited by s. 6(1) of the Act. The Court's power is supervisory only, *i.e.*, to ensure that the commission does not exceed its jurisdiction.

[*Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113, 64 D.L.R. (3d) 477, 27 C.C.C. (2d) 31, folld; *Re Ontario Crime Com'n, Ex p. Feeley and McDermott*, [1962] O.R. 872, 34 D.L.R. (2d) 451, 133 C.C.C. 116, distd]

**Administrative law — Commission of inquiry — Admissibility of evidence — Public Inquiries Act, 1971 (Ont.), c. 49.**

**Evidence — Admissibility — Commission appointed under Public Inquiries Act, 1971 (Ont.), c. 49.**

A commission of inquiry appointed under the *Public Inquiries Act*, 1971 (Ont.), c. 49, has a different function to perform from that of a Court, arbitrator or administrative tribunal. It has a duty to consider, recommend and report. Accordingly, any evidence is admissible before it if the evidence is reasonably relevant to the subject-matter of the commission, and the only exclusionary rule that is applicable is that respecting privilege as required by s. 11 of the Act. In determining what is "reasonably relevant" the subject-matter of the inquiry must be scrutinized carefully.

[*Re Ontario Crime Com'n*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418; *R. v. Gaich or Gajic*, [1956] O.W.N. 616, 116 C.C.C. 34, 24 C.R. 196; *Re Huston* (1922), 52 O.L.R. 444, folld]

**Administrative law — Procedure — Power of majority of commissioners of inquiry to bind minority on rulings relating to admissibility of evidence — Public Inquiries Act, 1971 (Ont.), c. 49 — Interpretation Act, R.S.O. 1970, c. 225, s. 27(c).**

Although the *Public Inquiries Act*, 1971 (Ont.), c. 49, is silent as to the power of the majority of commissioners on a commission to make rulings as to the admissibility of evidence, the majority does have that power. Section 27(*c*) of the *Interpretation Act*, R.S.O. 1970, c. 225, indicates that that is the case and to hold otherwise would result in a multiplicity of records.

[*Grindley et al. v. Barker et al.* (1798), 1 Bos. & Pul. 229, 126 E.R. 875; *Atkinson v. Brown*, [1963] N.Z.L.R. 755; *Picea Holdings Ltd. v. London Rent Assessment Panel*, [1971] 2 Q.B. 216, apld; *Re Schabas et al. and Caput of University of Toronto et al.* (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, refd to]

APPEAL from an order of the Divisional Court given on a case stated by Commissioners appointed under the *Public Inquiries Act, 1971*.

*J. W. Sopinka*, Q.C., and *R. W. Cosman*, for appellants.
*Robert P. Armstrong*, for respondent, Ministry of Housing.

*Ian G. Scott*, Q.C., *John Collins* and *Chris G. Paliare*, for respondents, Terrence and Heather Lynn Dinsmore and other complainants.

The judgment of the Court was delivered by

HOWLAND, J.A.:—This is an appeal, pursuant to leave granted by this Court, from an order of the Divisional Court answering questions in a case stated by the Honourable J. F. Donnelly, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners appointed by the Lieutenant-Governor in Council under the *Public Inquiries Act*, 1971 (Ont.), c. 49, to conduct an inquiry into certain matters respecting land acquisitions in the North Pickering Project. The appeal raises important questions as to the admissibility of certain oral and documentary evidence which has been tendered by the respondents Terrence Dinsmore and Heather Lynn Dinsmore to the Commission, and as to the power of a majority of the Commissioners to make binding rulings respecting the admissibility of evidence.

On March 2, 1972, the Treasurer of Ontario announced in the Legislature the plans of the Government of Ontario for a satellite city called Cedarwood to be developed on 25,000 acres to the south of an airport which the federal Government simultaneously announced was to be built by it in the Township of Pickering. The land for this city was to be acquired by the Government of Ontario either voluntarily or under the *Expropriations Act*, R.S.O. 1970, c. 154. The entire project of the federal and provincial Governments was known as the North Pickering Project. With the assistance of land acquisition agents, some of whom are the appellants in this appeal, a number of residential properties were acquired by the Government of Ontario including that of the respondents Terrence and Heather Lynn Dinsmore.

Following complaints about the manner of land acquisition, an investigation was made by the Ombudsman for the Province of Ontario. He reported to the Minister of Housing with his recommendations on June 22, 1976. On July 15, 1976, a select committee of the Legislature, known as the Select Committee on the Ombudsman, was appointed to review the various reports made by the Ombudsman including his report on the North Pickering Project. While the Select Committee was reviewing the report of the Ombudsman on the North Pickering Project an agreement was reached between the Minister of Housing and the Ombudsman, concerning the disposition of the contested claims respecting the North Pickering Project. This agreement, with some modifications, was approved by the Select Committee. Under its terms some 28 complaints respecting claims placed in dispute by the reply of the Minister of Housing dated August 31, 1976, and claims handled by

the appellants, were to be submitted by Order in Council to a commission appointed under the *Public Inquiries Act, 1971*, and certain proceedings which had been instituted by the appellants before the Divisional Court were to be discontinued. The merits of the remaining complaints were to be investigated by the Ombudsman, and the Minister of Housing undertook to accept the Ombudsman's recommendation with respect to those complaints and, where appropriate, to refer any such cases to the Land Compensation Board.

In order to implement the agreement, it was provided by Order in Council 2959/76, dated October 26, 1976, as amended by Order in Council 3545/76, dated December 22, 1976, that a commission be issued under the *Public Inquiries Act, 1971*, appointing the Honourable J. F. Donnelly Chairman, R. M. Grant, Q.C., and David G. Humphrey, Q.C., Commissioners "to consider, recommend and report in relation to":

(I) the overall merits of claims for additional compensation of

(a) cases placed in dispute by the reply of the Minister of Housing of the 31st day of August, 1976, to the report of the Ombudsman on the North Pickering Project;

(b) any other cases handled by any of the five agents, Applicants [the appellants in this appeal] in the motion instituted before the Divisional Court relative to allegations of misconduct contained in the said report of the Ombudsman;

such merits of claims shall include but not so as to limit the generality of the foregoing, all circumstances of each particular case including any misleading statements inadequate appraisals or misunderstandings based upon reasonable grounds in the circumstances of the particular case.

(II) where entitlement to additional compensation has been recommended in the discretion of the Commission, to determine the amount, if any, of such additional compensation, having regard for such merits and taking into account any benefit or profit derived from the use of compensation paid on the original sale between the date of such sale and the date hereof.

(III) The Commission shall also enquire into, consider and report in relation to what allegations of misconduct are made against

Terry Bortolotti
James Gilhespie
William Thompson
Joseph Kuzik
J. E. Spafford

in the report of the Ombudsman and as to whether or not such allegations, if any, are justified.

Order in Council 2959/76 also provided:

All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature. The Ministry of Housing, former land owners, present and former agents and officials of what now forms part of the Ministry of Housing will be entitled to be represented by counsel who shall be paid by the Ministry of Housing. The reasonable costs of counsel and of any appraisals required for the former land owners, shall be borne by the Ministry of Housing. Counsel for the former land owners will be appointed by the Ombudsman.

In addition Part III of the *Public Inquiries Act, 1971* was declared to apply to the inquiry.

On January 25, 1977, the Commission commenced to hear the claim of the respondents Terrence Dinsmore and Heather Lynn Dinsmore. Counsel for these respondents introduced as exhibits certain documents from the files of the Ministry of Housing which had been furnished to him by the Select Committee on the Ombudsman. One of these documents purported to be a memorandum dated April 18, 1975, from J. L. Forster, Director to Mr. W. Wronski, Assistant Deputy Minister, to which was attached several pages of a report said to have been prepared by Mr. W. R. Kellough, an appraiser. This document is ex. C to the stated case hereafter referred to. The majority of the Commission ruled (Commissioner Humphrey dissenting) that these documents could not be filed in evidence unless Mr. Kellough was called to give evidence.

A further document which counsel sought to introduce was a file copy of a memorandum dated June 13, 1975, entitled "Property Acquisition for the North Pickering Project" but bearing no indication as to its author. This document is ex. D to the stated case. The majority of the Commission (Commissioner Humphrey dissenting) ruled that this document was not admissible in the absence of evidence as to its authorship.

The respondents, Mr. and Mrs. Dinsmore, had dealt with a land acquisition agent, Mr. Bowles, in connection with the sale of their property. Their neighbours, Mr. and Mrs. Bayes, had dealt with the appellant Joseph Kuzik as land acquisition agent in connection with the sale of their property. The majority of the Commission (Commissioner Humphrey dissenting) ruled that Mrs. Dinsmore could not testify as to statements made to her by Mr. and Mrs. Bayes before the agreement of sale of the Dinsmore property was made, nor could Mrs. Bayes testify as to what she had told Mrs. Dinsmore concerning an alleged conversation between Mrs. Bayes and Mr. Kuzik. Commissioner Humphrey considered that the evidence which Mrs. Dinsmore wished to give, considered in the light of the evidence that Mrs. Bayes was to give, was evidence as to a fact, namely, a representation made by a Government agent to another person in similar circumstances pursuant to a common plan of acquisition, and hence was not hearsay.

On January 31, 1977, at the request of counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore, the Commission stated a case for the Divisional Court pursuant to s. 6 of the *Public Inquiries Act, 1971* upon the following questions:

*Question 1*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry

of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "C" was inadmissible in evidence?

*Question 2*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that a document obtained from the files of the Ministry of Housing and tendered as an exhibit by Counsel for the claimant and marked hereto as Exhibit "D" was admissible in evidence?

*Question 3*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him?

*Question 4*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him?

*Question 5*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that no questions could be put to the witness Dinsmore or elicit statements made to her by her neighbours, Mr. and Mrs. Bayes, prior to the execution by Dinsmore of the Agreement of Purchase and Sale wherein the Dinsmore property was sold to the Crown in right of Ontario?

*Question 6*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in refusing to permit counsel for the claimant to lead evidence as to what was said by Mrs. Bayes to Mrs. Dinsmore regarding a conversation between Kuzik and Mrs. Bayes?

*Question 7*

Did the Commission of Enquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the matters referred to in Questions 5 and 6 were inadmissible, notwithstanding the conclusion of Commissioner Humphrey that the evidence was, in fact, admissible and he would have received the evidence?

By its order dated February 10, 1977, the Divisional Court answered the questions as follows:

*Question 1*: Subject to the answer given to Question 3, the Commission of Inquiry properly exercised its jurisdiction.

*Question 2*: Subject to the answer given to Question 4, the Commission of Inquiry properly exercised its jurisdiction.

*Question 3*: The Commission of Inquiry declined jurisdiction.

*Question 4*: The Commission of Inquiry declined jurisdiction.

*Question 5*: The Commission of Inquiry declined jurisdiction.

*Question 6*: The Commission of Inquiry declined jurisdiction.

*Question 7*: The Commission of Inquiry declined jurisdiction.

Southey, J., who delivered the judgment of himself and Rutherford, J., in the Divisional Court, considered that the admissibility of the evidence in question was a matter which properly fell within the discretion of the Commission. In his opinion the docu-

ments referred to in Qq. 1 and 2 would not be acceptable in evidence at a trial unless tendered through a witness who would prove them in accordance with the rules of evidence. On the other hand he did not consider that the testimony referred to in Qq. 5 and 6 violated the rule as to hearsay evidence. As to the remaining questions, he felt that the Commission should admit any evidence which any of the Commissioners regarded as admissible and relevant to the matters to be considered so long as it did not result in the Commission exceeding its jurisdiction.

Reid, J., on the other hand considered that the admissibility of evidence should be determined by whether it was relevant to the inquiry, and not whether it offended the rules of evidence followed by the Courts. Accordingly, he concluded that the answers to Qq. 1, 2, 5 and 6 should be that the Commission declined jurisdiction in refusing to inquire into relevant matters, facts or circumstances. However, he was of the opinion that the Chairman of the Commission was entitled and authorized to govern the proceedings of the Commission even if the other two members were opposed to his views: hence the rulings of the Chairman would decide the admissibility of evidence before the Commission.

The issues in this appeal are as follows:

1. To what extent, if any, are the rulings of the Commission reviewable by the Divisional Court on the stated case in question?
2. Are the rulings which were made by the majority of the Commissioners as to the admissibility of evidence binding on the remaining Commissioner?
3. Should the Commission have admitted the testimony referred to in Qq. 5 and 6?

The appellants are not appealing from the answers of the Divisional Court to Qq. 1 and 2 as to the inadmissibility of the documents referred to in these questions and there is no cross-appeal as to the answers to these questions. Accordingly, the answers to these questions are not in issue in this Court, except in so far as they are affected by the answers to Qq. 3 and 4.

*Power of review by the Divisional Court*

The first matter requiring consideration is the power of the Divisional Court to review the rulings of the Commission. The statutory basis of this power is to be found in s. 6 of the *Public Inquiries Act, 1971*, which provides in part as follows:

> 6(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material

facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

(2) If the commission refuses to state a case under subsection 1, the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

The jurisdiction conferred on the Court under s. 6(1) is much narrower than the jurisdiction conferred by its predecessor, s. 5(1) of the *Public Inquiries Act*, R.S.O. 1970, c. 379, which provided:

5(1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

Section 5(1) conferred both an appellate and a supervisory jurisdiction upon the Court. It permitted the Court to review decisions, orders or directions made in the exercise of the Commissioner's discretion and to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction was called into question: *Re Ontario Crime Com'n, Ex p. Feeley and McDermott*, [1962] O.R. 872 at p. 895, 34 D.L.R. (2d) 451 at p. 474, 133 C.C.C. 116.

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that the statutory powers of the Court are now "supervisory only, *i.e.*, confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the *Public Inquiries Act, 1971*, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission and whether the Commission has the power to reject evidence by the application of exclusionary rules of evidence.

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties: *Re Ontario*

*Crime Com'n*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117. It is quite clear that a commission appointed under the *Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* at p. 124 O.R., p. 488 D.L.R.; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418 at p. 420. It may admit evidence which is not given under oath or affirmation (s. 10).

The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry.

As Cross points out in his text on *Evidence*, 4th ed., at p. 24:

> The admissibility of evidence . . . depends first on the concept of relevancy of a sufficiently high degree, and secondly on the fact that the evidence tendered does not infringe any of the exclusionary rules that may be applicable to it.

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*. The requirement that the evidence be reasonably relevant was applied by this Court in *R. v. Gaich or Gajic*, [1956] O.W.N. 616 at p. 617, 116 C.C.C. 34, 24 C.R. 196. Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in *McCormick on Evidence*, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value . . .". A similar test was applied by this Court in *Re Huston* (1922), 52 O.L.R. 444. There a Commissioner appointed to hold an inquiry under the *Public Inquiries Act*, R.S.O. 1914, c. 18, as amended, decided to admit certain telegrams, and refused to state a case as to their admissibility. After examining and considering the telegrams, the Court was not prepared to say that the Commissioner erred in admitting them as relevant since he considered that they would be of assistance to him in reaching a

conclusion as to the matters which were specifically referred to him.

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document. The subject-matter of the inquiry is broad and somewhat unusual in its nature. It comprises:

> (a) the overall merits of certain specified claims for additional compensation, including all circumstances of each particular case, which will embrace any misleading statements, inadequate appraisals or misunderstandings based upon reasonable grounds;
>
> (b) a determination of the amount of additional compensation which the Commission is prepared to recommend;
>
> (c) a report as to whether certain allegations of misconduct against the appellants are justified.

Its role is not only investigatory but requires a determination of the additional compensation that it sees fit to recommend.

The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendations and report.

If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts, other than the rule as to privilege which is made expressly applicable by s. 11 of the *Public Inquiries Act, 1971*. If this were not so, it would be possible, as Morden, J., points out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra*, at p. 121 O.R., p. 485 D.L.R., for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. If the Commission has refused to admit evidence which is reasonably relevant to the subject-matter of the inquiry, and is not expressly excluded by the *Public Inquiries Act, 1971*, or has admitted evidence which is not reasonably relevant to the inquiry, then the Commission is subject to the supervisory role of the Divisional Court on a stated case under s. 6(1) on the ground that the Commission has declined or exceeded its substantive jurisdiction.

An error of jurisdiction might also arise by reason of the denial of a statutory right. Under s. 5(1) of the *Public Inquiries Act, 1971* a person who satisfies the Commission that he has a substantial and direct interest in the subject-matter of the inquiry is entitled to give evidence and to call and cross-examine witnesses relevant to his interest. The exclusion of such evidence by the Commission

would be a denial of a statutory right amounting to an error of jurisdiction. The admission of evidence which is privileged under the law of evidence would fall within the same category by reason of s. 11 of the *Public Inquiries Act, 1971*.

There may also be procedural practices amounting to a denial of natural justice which raise a jurisdictional issue: see *Royal Com'n into Metropolitan Toronto Police Practices and Ashton*, at p. 121 O.R., p. 485 D.L.R. However, it is not necessary in this appeal to consider whether such procedural practices would be reviewable by the Divisional Court on a stated case under s. 6(1) of the *Public Inquiries Act, 1971*.

Apart from the supervisory role of the Divisional Court in respect of errors of jurisdiction, the Commission has very broad powers under s. 3 of the *Public Inquiries Act, 1971*, as qualified by ss. 4 and 5, to control and direct the procedure to be followed on the inquiry. The Commission has a wide discretion, which it can exercise within the framework of the jurisdiction of the Commission. However, it cannot, as I have stated, exercise its discretion so as to narrow or enlarge that jurisdiction.

*Power of the majority of the Commissioners to make binding rulings*

The next issue for consideration is the power of the majority of the Commissioners to make rulings which are binding on the remaining Commissioner. While the supervisory powers of the Divisional Court on a stated case are limited to determining whether there has been an error of jurisdiction, the ruling or proposed ruling of the Commission as to the admissibility of evidence must necessarily precede the request for a stated case. It is the authority of the Commission to make the ruling which is called in question in the stated case. Accordingly, it is necessary to determine whether such rulings can be made by a majority of the Commission.

It is submitted by counsel for the respondents Terrence Dinsmore and Heather Lynn Dinsmore that as each Commissioner is required to make his recommendations and report, he should be entitled to determine the evidence upon which his conclusions are to be based. As has been pointed out, this submission was accepted by the majority in the Divisional Court.

The term "commission" as defined in s. 1(*a*) of the *Public Inquiries Act, 1971* means "the one or more persons appointed to conduct an inquiry under this Act". In my opinion it is significant that the Act draws a distinction between acts to be performed by the body called a Commission, and acts which may be performed by one of the Commissioners.

Under s. 3 the conduct of and the procedure to be followed on an inquiry is under the control and direction of the Commission. Sec-

tion 4 gives the Commission the power in certain circumstances to hold the hearing *in camera*. Under s. 5 it is the Commission that is to accord to a person who has a substantial or direct interest in the subject-matter of the inquiry an opportunity to give evidence and to examine and cross-examine witnesses. It is the Commission which may state a case under ss. 6 and 8. The power to admit evidence not under oath or affirmation (s. 10) and the power to appoint a person to make an investigation (s. 17) are also given to the Commission.

On the other hand s. 14 provides:

> 14. Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by section 7, 12 or 13.

It was contended on the hearing of the appeal that s. 7 contemplates one Commissioner requiring the admission of evidence which he considers to be relevant.

Section 7 provides:

> 7(1) A commission may require any person by summons,
>
> (*a*) to give evidence on oath or affirmation at an inquiry; or
>
> (*b*) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.
>
> (2) A summons issued under subsection 1 shall be in Form 1 and shall be served personally on the person summoned and he shall be paid at the time of service the like fees and allowances for his attendance as a witness before the commission as are paid for the attendance of a witness summoned to attend before the Supreme Court.

In my opinion, s. 7 only empowers one of the Commissioners to perform the administrative function of issuing the necessary summons to a witness whose oral or documentary evidence is required. Similarly one Commissioner is authorized under s. 12 to release documents produced in evidence and under s. 13 to administer oaths and affirmations and to require evidence to be given under oath or affirmation. Section 7 does not authorize one Commissioner to require evidence to be admitted for his benefit which the majority has ruled to be inadmissible. Such rulings as to admissibility properly fall within the powers of the Commission under s. 3 as part of the conduct of the inquiry.

The provision in Order in Council 2959/76 that "All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature" is also of significance. An "adversary proceeding" is defined in Black's Law Dictionary, 4th ed. (1968), as "one having opposing parties". While the report of the Commission does not have to be a unanimous one, the fact that there is not only to be a hearing but a determination in proceedings of an adversarial nature contemplates, in my judgment, that if

there is not a unanimous report, there will at least be a majority and a minority report on the subject-matter of the inquiry. In my opinion the evidence which is admitted by the Commission is admitted for the benefit of all the Commissioners. It is obvious that there is to be only one hearing or series of hearings and from these proceedings will come one record. There is one body of evidence on which the Commissioners should make their recommendations and report. They may, of course, attach different weight to the various items of evidence. It would greatly complicate the task of the Government if it had to assess the recommendations and reports of the Commission based on the admission of different evidence by each Commissioner. It would also render the position of counsel submitting argument to the Commission virtually impossible as there could be an infinite multiplicity of records.

In the absence of any express statutory provisions in the *Public Inquiries Act, 1971* giving the majority of the Commissioners power to bind the minority, one must look to other relevant statutory provisions and to the decisions of the Courts.

Section 27(c) of the *Interpretation Act*, R.S.O. 1970, c. 225, provides that:

> 27. In every Act, unless the contrary intention appears,
>
> . . . . .
>
> (c) where an act or thing is required to be done by more than two persons, a majority of them may do it;

There is no express provision in the *Public Inquiries Act, 1971* which *requires* the Commission to rule on the admissibility of evidence. Its power to make such rulings is implicit in s. 3 which places the conduct of and the procedure to be followed on an inquiry under its control and direction. Unlike s. 5 which requires the Commission to accord certain rights to interested persons, s. 3 does not make the giving of rulings on the admissibility of evidence mandatory. Section 27(c) of the *Interpretation Act* does not, therefore, determine the matter before us.

As to the decisions of the Courts it may be regarded as having been established since *Grindley et al. v. Barker et al.* (1798), 1 Bos. & Pul. 229, 126 E.R. 875, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general (that is, public) nature, and all of them are regularly assembled, the act of the majority will bind the minority. Eyre, C.J., was, however, careful to point out in that case that this general rule of law would have to give way if a contrary intent could be ascertained from the particular statute in question. *Grindley v. Barker* was approved by the Judicial Committee of the Privy Council in its report respecting the questions raised with reference to the "Irish Boundary Commission", 59 L.J. 517 (1924). Their Lordships stated:

> (b) If three Commissioners had once been appointed, then, although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern. This was settled so long ago as 1798 in the case of *Grindley v. Baker* . . . [*sic*]. This case was followed by Lord Chancellor Cairns, Lord Selborne, and several other members of the Judicial Committee in the matter of an Arbitration between the Province of Ontario and the Province of Quebec, where the matter was referred by his Majesty to the Judicial Committee. The case is reported in 4 Cartwright's Cases on the British North America Act, p. 712. The case had to do with section 142 of the British North America Act, where a certain matter was to be referred to the arbitrament of three arbitrators, one appointed by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada. One of the arbitrators had retired. Lord Selborne says "the view which prevails that unanimity is necessary when power is given to three persons does not depend on anything peculiar to arbitrations, it surely would be a general view subject to control either by something expressed in the instrument or by something to be collected from the nature of the power and the duty to be performed under it." And then he puts the question, "Is not one reason for the distinction that in the public interest it is necessary that the thing should be decided?"; and their Lordships' answers were given in accordance with this view. These authorities seem to their Lordships conclusive. *They have no doubt that this is a matter of public interest, and not a matter of merely private concern between the parties concerned, and they, therefore, answer that though in accordance with their answer to Question 1 if no appointment is made the Commission cannot go on, yet if once the three appointments had been made, a majority would rule.*

(Emphasis added.)

The same general rule of law was applied by the Court of Appeal of New Zealand in *Atkinson v. Brown,* [1963] N.Z.L.R. 755, and by the Divisional Court in England in *Picea Holdings Ltd. v. London Rent Assessment Panel,* [1971] 2 Q.B. 216.

A careful perusal of the *Public Inquiries Act, 1971* does not disclose any contrary intention that the decision of the majority of the Commissioners should not bind the minority. I can see no reason why this general rule should not be applicable to a commission of inquiry under that Act. The powers of the Commissioners in question were of a public nature and were being exercised at a hearing where all three Commissioners were present. In my opinion, the rulings made by the majority of the Commissioners as to the admissibility of evidence were binding on the minority.

In the Divisional Court, Reid, J., in his dissenting judgment concluded that the Chairman had the power to govern the proceedings even if the other two Commissioners were opposed to his views. He relied on the decision of the Divisional Court in *Re Schabas et al. and Caput of University of Toronto et al.* (1974), 6 O.R. (2d) 271, 52 D.L.R. (3d) 495, where the chairman of the University of Toronto Caput indicated his intention to make rulings on grounds of law. It should, however, be noted that in the *Schabas* case the Court considered that the silence of the remainder of the members of Caput was tantamount to their approval of the actions of the chairman. The Chairman of the Commission in this appeal, however, acts

merely as the spokesman through which the rulings of the Commission are made known. He has no special powers to make rulings which are binding on the other Commissioners.

*Rejection of testimony in Qq. 5 and 6*

The remaining issue is whether the Commission properly refused to permit the admission of the testimony referred to in Qq. 5 and 6. In discussing the role of the Divisional Court respecting errors of jurisdiction, I have already pointed out that evidence should be admitted if it is reasonably relevant to the subject-matter of the inquiry. I have also pointed out that apart from the exclusionary rule as to privilege, the Commission is not bound by the rules of evidence including the hearsay rule. Accordingly, it is not necessary, as the majority of the Divisional Court did, to consider whether the evidence in question would have constituted a violation of the rule respecting hearsay evidence.

The Commission was required to consider all the circumstances of each particular case including any misleading statements or misunderstandings based upon reasonable grounds in the circumstances of that case. In my opinion the testimony referred to in Qq. 5 and 6 was reasonably relevant in the sense that it would advance the inquiry. The fact that Mr. Kuzik, the land acquisition agent with whom Mr. and Mrs. Bayes had their dealings, made the same statement to them as Mr. Bowles made to the respondents Terrence Dinsmore and Heather Lynn Dinsmore, namely, that he could not see how they would receive any more money if they awaited expropriation, would be relevant in determining whether the Dinsmores acted on a misunderstanding based upon reasonable grounds. If the Dinsmores believed what Mrs. Bayes told them, it would be an additional consideration which the Dinsmores weighed in reaching a decision to sell their property. I have already referred to the conclusion of Commissioner Humphrey that the testimony was admissible. In my opinion the Commission declined jurisdiction in not admitting the testimony referred to in Qq. 5 and 6.

Accordingly, the appeal should be allowed in part and the order of the Divisional Court should be varied by deleting the answers to Qq. 3 and 4 and substituting the following:

*Question 3*: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 1 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him;

*Question 4*: The Commission of Inquiry properly exercised its jurisdiction in deciding that the document referred to in Question 2 would not be admitted and marked as an exhibit notwithstanding the conclusion of Commissioner Humphrey that the document was in fact admissible and would have been received by him.

I would make no order as to the costs of this appeal or of the application for leave to appeal.

*Judgment accordingly.*

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[HIGH COURT OF JUSTICE]

## Hanser v. Hanser

EVANS, C.J.H.C. 5TH MAY 1977.

**Practice — Divorce — Petition — Application for amendment to include ground for divorce occurring after presentation of petition — Whether amendment to be allowed.**

A petitioner is not entitled to an amendment alleging grounds for divorce which occurred or crystallized after presentation of the petition. Where adultery is alleged in the original petition, evidence of after-occurring acts may be allowed, but this is to be distinguished from the situation where petitioner seeks to base the entire claim on such after-occurring acts.

[*Blasco v. Blasco* (1968), 2 R.F.L. 79; *Goodman v. Goodman*, [1973] 2 O.R. 38, 32 D.L.R. (3d) 688, 9 R.F.L. 261; *Van Zant v. Van Zant* (1975), 24 R.F.L. 281, folld; *Johnson v. Johnson* (1975), 23 R.F.L. 293; *Eaton v. Eaton* (1972), 8 R.F.L. 399, distd; *Sandler v. Sandler*, [1934] P. 149; *Borham v. Borham et al.* (1870), L.R. 2 P. & D. 192, refd to]

APPLICATION for leave to amend a petition for divorce.

*M. Greenglass*, for petitioner, applicant.
*B. G. Freesman*, for respondent.

EVANS, C.J.H.C.:—On February 3, 1976, the petitioner issued a petition for divorce against the above-named respondent. The grounds for divorce are physical and mental cruelty under s. 3(*d*) of the *Divorce Act*, R.S.C. 1970, c. D-8. In para. 10 of Part B, the petitioner alleges that:

> The Respondent has engaged in a close relationship with another woman for many years, abandoning the consortium and demonstrating a greater commitment to that woman than to the petitioner and children.

Apparently this allegation forms part of the alleged physical and mental cruelty. There is no specific claim on the grounds of adultery and no co-respondent is named.

In the answer, the respondent, in para. 2(h), states that:

> The Respondent has engaged in no relationship with another woman; such allegations are a figment of the imagination of the Petitioner which the Petitioner has constantly tried to use as a wedge between herself and the Respondent.

By notice of motion dated April 25, 1977, the petitioner seeks leave to amend the petition by adding adultery as a ground for divorce under para. 1A (s. 3(*a*), *Divorce Act*). The particulars of the alleged adultery are:

> On or about the 13th, 14th, 15th and 16th days of March, 1977, at the MGM