

Getting the Story Out: Accountability and the Law of Public Inquiries

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I. Accountability and the Public Inquiry

On December 9, 2007, a jury in New Westminster, B.C. convicted Robert William Pickton of six counts of murder with respect to women who had gone missing from Vancouver's notorious downtown eastside area over the previous several years. During the trial, the jury heard a recording in which Pickton boasted to a jailhouse informant that he had actually killed 49 women. Investigators who pored over Pickton's farm property identified the DNA of 32 missing women in all. It is widely believed that Pickton is the most prolific serial killer in Canadian history. The criminal conviction of Robert Pickton, and the appeals that upheld the conviction over the subsequent four years, closed one chapter in this tragic story.¹

The disappearance of dozens of women from the Vancouver area between 1995 and 2002 had not gone unnoticed during that time. Family members and friends of the women, many of them of aboriginal descent, pressed the Vancouver police department throughout this period to step up its efforts to find out what was happening and to treat the unprecedented phenomenon as a serious criminal matter. The police repeatedly responded that because most of the women were known to be drug addicts and sex trade workers, their disappearances represented nothing more than the comings and goings of a transient population. This continued even after an internationally known profiler on the Vancouver police force concluded that the number of women involved suggested that a serial killer was at work, and after Pickton had been charged with attempted murder of a woman in the late 1990s in circumstances similar to many of the disappearances.² As time passed, the friends and family members of the missing women became a unified and vocal advocacy group. However, it was only when the search of Pickton's farm following his arrest in 2002 on weapons charges turned up effects and remains of some of the women that it dawned on everyone, including police, that family members' worst fears had been well founded.

The criminal trial brought a degree of accountability to Robert Pickton for his acts. It was not, however, directed at making accountable the public officials and systems that appeared to have failed so badly in protecting women in Vancouver's downtown eastside. Accountability means many different things. One meaning is that persons who have harmed others by their actions will be found responsible and made to "pay for" the harm they caused, through punishment or paying compensation. The justice system is the social institution designed to achieve accountability in this sense. Legal accountability through the justice system is directed at wrongdoing defined in advance by established norms of behaviour. It involves a retrospective inquiry into past events. To the degree that legal accountability is concerned with the future, it is limited to remediating the harm caused by and between the individuals involved. The model is adversarial in that it assumes a contest between two or more parties seeking to prove different versions of facts and law. Coercive in nature, the model builds in many protections for the individual. These include strict rules for ensuring that only evidence relevant to the question of liability is received, and that the onus of proving liability is placed on the alleging party.

¹ Stevie Cameron, *On the Farm: Robert William Pickton and the Tragic Story of Vancouver's Missing Women* (Toronto: Vintage Canada, 2010).

² The charges were stayed by the Crown purportedly because of the victim's failure to appear in court (*ibid.* at 158). This matter forms part of the missing women inquiry's mandate.

What the family members of the missing women, and indeed much of the public, wanted following the Pickton trial was a different kind of accountability. They wanted answers to questions about what police, prosecution, and other officials had done before and during the missing women investigation. Had sufficient resources been devoted to the investigation in a timely way? Did the Vancouver police and the Royal Canadian Mounted Police (RCMP) communicate with each other in an effective manner and share leads? How had police responded to tips they received about Mr. Pickton well before his arrest? Did bureaucratic infighting interfere with investigative work? Were women living in the downtown eastside, especially aboriginal women, systemically devalued? And most important, what steps could be taken to reduce or eliminate the chances that something so awful could ever happen again? These questions called for accountability in the sense of “getting the story out,” of finding out who did what and when and why, and how similar events should be handled in the future. Historically, in Canada, an important mechanism for achieving accountability in this sense has been the public inquiry. Justice Cory of the Supreme Court of Canada described the difference between an inquiry and liability-based proceedings in these terms:

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.³

In September 2010, the government of British Columbia issued an order in council creating the Commission of Inquiry into the Missing Women, to be headed by retired Justice and former Attorney General Wally Oppal. The inquiry’s public hearings commenced in late 2011. Its report is scheduled to be released at the end of October 2012, just before the publication of this volume. Throughout this chapter, reference will be made to the missing women inquiry to illustrate various points.⁴

There are two principal reasons for including a discussion of public inquiries in an introductory text on administrative law. First, both administrative law and public inquiries serve the important function of making government operations transparent and responsible to the public. As a mode of accountability, however, judicial review suffers from some of the limitations of most formal legal processes. Its focus is generally directed at specific acts of governmental decision making. Remedies in judicial review are rarely systemic, and frequently go only so far as to require that decision-makers start their process over again. On the policy level, judicial review is generally silent. It is therefore worth considering public

³ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 34 [*Krever Commission*].

⁴ As you make your way through the chapter, you may find it helpful to refer to the commission’s website: Missing Women Commission of Inquiry <<http://www.missingwomeninquiry.ca>>.

inquiries as an alternative recourse to judicial review for those aggrieved by alleged government misconduct. This is explored in a general way in section I.A of this chapter, which deals with the different kinds of public inquiries known in the Canadian tradition and the problems of balancing the public interest with individual rights in the holding of an inquiry.

Second, public inquiries operate within the context of administrative law principles. Inquiries are exercises in delegated executive power and are subject to most rules of administrative law. However, because inquiries engage largely in investigative fact-finding and recommending functions, and much less in adjudicative and order-making functions, they provide a different context in which to see administrative law in operation.

A. Types of Public Inquiries

The terms “royal commission,” “judicial inquiry,” and “public inquiry” are used almost interchangeably in media accounts.⁵ Nevertheless, these terms have different shades of meaning that are worth noting. The term “royal commission” refers to the fact that inquiries used to be established by executive government pursuant to royal prerogative powers. Most inquiries are now appointed pursuant to the federal and provincial inquiry statutes that exist in each Canadian jurisdiction. The term “judicial inquiry” is a colloquial term that reflects the fact that governments frequently name current or former judges to be inquiry commissioners. This is especially true of inquiries whose main purpose is the investigation of and reporting on a series of factual events, such as the missing women inquiry. However, there is no requirement that an inquiry be headed by a judicial official. In the Canadian experience, many inquiries are led by non-judges.

This chapter uses the term “public inquiry.” It does so because of the connotations of the word “public” that assist in understanding how inquiries in this country generally work. For one thing, inquiries are largely directed at the actions of public authorities and public officials. While nothing prevents lawmakers from establishing inquiries to look into the actions of private persons, it would be questionable to spend public resources where the findings had no implications for past or future government regulation. The decision to appoint an inquiry should meet a public-interest test. The term “public inquiry” implies another important feature of inquiries in Canada: they are usually carried out in public view. It is through the public nature of inquiry proceedings that the inquiry achieves one of its most important purposes: to assure members of the public that the “full story” is finally coming out, that actions and decisions that were taken behind closed doors will be exposed to the light of day.

Two kinds of public inquiries are familiar in Canadian experience: the policy inquiry and the investigative inquiry. The policy inquiry is directed at the study of broad issues of social or regulatory concern, with the purpose of changing law and policy. The Royal Commission

⁵ For a discussion of the historical use and meaning of these terms, see Chapter 2, “Nature and Purposes of Commissions of Inquiry” in Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) 11-20. See also the Introduction by Ruel in Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010). Both books are excellent resources on all facets of the law governing public inquiries in Canada.

on Aboriginal Peoples (RCAP)⁶ in the early 1990s, and the Commission on the Future of Health Care in Canada (“the Romanow Commission”),⁷ which reported in 2002, are examples of policy inquiries.

An investigative inquiry is directed at uncovering and reporting on the facts of an event or series of events in which one or more persons were seriously harmed, or which comprised an instance of alleged public misconduct (that is, a political scandal). The Oliphant inquiry into the business relationship between former Prime Minister Brian Mulroney and Canadian-German businessman Karlheinz Schreiber is an example of an investigatory inquiry.⁸

Purely investigatory inquiries are, however, relatively infrequent in Canadian experience. Many more inquiries are combined with investigative and policy functions. The missing women inquiry is such a combined inquiry. The inquiry’s terms of reference set out both functions:

4. The terms of reference of the inquiry to be conducted by the commission are as follows:
 - (a) to conduct hearings, in or near the City of Vancouver, to inquire into and make findings of fact respecting the conduct of the missing women investigations;
 - (b) consistent with the *British Columbia (Attorney General) v. Davies*,^[9] to inquire into and make findings of fact respecting the decision of the Criminal Justice Branch on January 27, 1998, to enter a stay of proceedings on charges against Robert William Pickton of attempted murder, assault with a weapon, forcible confinement and aggravated assault;
 - (c) to recommend changes considered necessary respecting the initiation and conduct of investigations in British Columbia of missing women and suspected multiple homicides;
 - (d) to recommend changes considered necessary respecting homicide investigations in British Columbia by more than one investigating organization, including the co-ordination of those investigations; ...

Under British Columbia’s *Public Inquiry Act*,¹⁰ investigative and policy review functions are separately referred to as “hearing commissions” and “study commissions.”¹¹ In other jurisdictions, the functions have often been termed phase 1 and phase 2 processes, which reflects the common practice of commissions of inquiry with combined functions to divide their proceedings into two distinct phases, with different parties, hearing procedures, and reports. The following discussion examines how investigative or phase 1 inquiries and policy or phase 2 inquiries pursue accountability at both the individual and organizational

⁶ See *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Queen’s Printer, 1996), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100014597>>.

⁷ Health Canada, *Commission on the Future of Health Care in Canada*, online: Health Canada <<http://www.hc-sc.gc.ca/hcs-sss/com/fed/romanow/index-eng.php>>.

⁸ See the Canada Archives website for the Oliphant inquiry at <<http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/oliphant/2010-07-20/english/index.php.htm>>.

⁹ 2009 BCCA 337, B.C.L.R. (4th) 26.

¹⁰ S.B.C. 2007, c. 9.

¹¹ The missing women inquiry was designated to encompass both functions by the order in council of September 2010: “2(1) A hearing and study commission, called the Missing Women Commission of Inquiry, is established under section 2 of the Public Inquiry Act.”

levels. Section II of this chapter looks at several of the more important principles of administrative law that are applicable to public inquiries. The chapter concludes in section III by raising questions about the overall benefit of public inquiries.

B. The Policy Inquiry

Policy inquiries raise relatively few legal issues. Governments establish policy inquiries to develop new approaches to complex social policy issues. Not infrequently, governments are accused of establishing policy inquiries in order to forestall having to make decisions on complex or controversial social issues. The activity of policy inquiries is legislative in nature in the sense that it is prospective (not historical), broad-based or general in impact (not specific or individualized), and open to political/policy input (not restricted by stringent rules of relevance), the features that distinguish legislative from adjudicative decision making.

The Supreme Court has ruled that legislative decision making and “quasi-legislative” decision making do not attract fair process protections at common law,¹² even where government officials have created legitimate expectations of fair process.¹³ These principles create a lacuna in administrative law, leaving decision-makers unbounded by anything other than statutory requirements to hear the affected public when it comes to the most important of all governmental functions: law-making. The appropriate procedural right with respect to law making seems likely to be a “right to consult”—that is, a right to give one’s input to a legislative decision-maker. The public inquiry is one means of addressing this gap. Inquiries act in a consultative fashion with governments and, in turn, engage the public in this consultative activity.

The nature of a true consultative process is that the advice given in consultation should be received with respect and serious attention, even if the decision-maker decides not to accept it. Policy inquiries generally operate like formalized consultative processes. Most of them adopt public hearing processes similar to those adopted in the investigative inquiries. As a consequence, policy inquiries present an intriguing combination of formal hearing-like processes with a form of legislative function. Commissions of inquiry have also adopted a number of creative methods for obtaining public input, including public opinion surveys, online consultations, and holding public meetings at different geographic locations. An interesting question is whether a government might in certain circumstances, which include raising expectations from past practice, create a legal duty on itself to hold a policy inquiry as a form of consultation.¹⁴

¹² *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735.

¹³ See *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, per Binnie J., concurring.

¹⁴ In Ontario, a series of judicial review challenges were brought with respect to the hearings and findings of the Ontario Hospital Restructuring Commission in the mid-1990s, including its alleged failure to adequately consult with interested members of the community. See e.g. *Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 (Div. Ct.). However, the commission was a delegated decision-maker, having the power to order hospital restructuring, and so these cases are not directly applicable to the public inquiry situation.

The success of policy inquiries is often measured by whether the recommendations made by inquiry commissioners are adopted in whole or in part by governments. In this sense, the quality of an inquiry's hearings and final report will undoubtedly contribute to its success. In general, however, the degree to which recommendations are accepted turns on many other factors of a political nature—timing, context, and the inclinations of the government of the day in making the recommended changes. Reports that issue from the Phase Two process of a combined investigative and policy inquiry have an advantage in this respect. The immediacy and specificity of the issues that led to their creation can create momentum for acceptance of their recommendations.

Policy inquiries can have a significant impact on public discourse even without having their recommendations implemented. One way in which they contribute in this manner is through the generation of research. Policy commissions present an occasion for gathering the best available data and thinking on the subject at hand.¹⁵ More important, policy inquiries may serve to mobilize public participation or, more accurately, cause groups to mobilize in order to take advantage of the opportunity presented by an inquiry. The best example of this phenomenon is the Royal Commission on the Status of Women in the early 1970s, around which the coalition of women's groups formed and became the National Action Committee on the Status of Women (NAC).¹⁶

C. The Investigative Inquiry

The investigative inquiry serves to uncover the truth about events that have already happened. Cory J. commented on the value of the fact-finding function of the inquiry in *Phillips v. Nova Scotia*:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth." Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.¹⁷

¹⁵ See e.g. the "Resources/Research" link for the Romanow commission on the Health Canada website at <<http://www.collectionscanada.gc.ca/webarchives/20071115024341/www.hc-sc.gc.ca/english/care/romanow/index1.html>>.

¹⁶ See Jill Vickers, Pauline Rankin, & Christine Appelle, *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto: University of Toronto Press, 1993).

¹⁷ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 62 [Phillips].

In this regard, public inquiries share some qualities of other formal processes that have the investigation of historical incidents as their *raison d'être*. Such processes include coroner's inquests, fatality inquiries,¹⁸ and ombudsperson investigations.¹⁹ Unlike some investigative processes, however, the public inquiry is not solely concerned with ascertaining historical facts. It is also intended to bring transparency to the investigation itself by carrying the investigation out in public. Justice Samuel Grange, who headed the Ontario commission of inquiry into the unexplained deaths of children at Toronto's Hospital for Sick Children in the 1980s, experienced surprise on discovering the significance of this dual nature of the inquiry:

I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are public inquiries. ... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.²⁰

A dramatic example of this phenomenon occurred with the sponsorship (or Gomery) inquiry. The inquiry's exposure of financial improprieties in the distribution and management of federal government funds in Quebec in the post-1995 referendum period dominated headlines for weeks at a time in 2003-4. The televised hearings of the inquiry attracted massive audiences in Quebec and had a profound effect on public opinion in the province.²¹

The power of the inquiry as an instrument for accountability must be balanced against what is at stake for the individuals whose decisions, actions, and lives are at the heart of any particular investigation, which includes those, often described as "victims," who suffered harm as a consequence of government action or inaction. Take Maher Arar as an example. Mr. Arar, a Syrian-born Canadian citizen living in Ottawa with his wife and two children, was rendered to Syria by American authorities after landing in New York on a return flight to Canada from a visit to his parents in Tunisia. This occurred in October 2002, just over a year following the terrorist attack on the World Trade Center. Based in part on information received from the RCMP and Canadian Security Intelligence Service (CSIS), American of-

¹⁸ See e.g. *Fatality Inquiries Act*, R.S.A. 2000, c. F-9.

¹⁹ See e.g. *Ombudsman Act*, R.S.B.C. 1996, c. 340. See discussion of the ombudsperson complaint and investigation process as an alternative to judicial review in Cristie Ford, Chapter 3, *Dogs and Tails: Remedies in Administrative Law*. Note that ombudsperson investigations generally take place in confidence, which encourages candour in government responses to ombudsperson queries, but arguably limits the social accountability benefits of the process.

²⁰ S.G.M. Grange, "How Should Lawyers and the Legal Profession Adapt?" in A. Paul Pross, Innis Christie, & John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 154-55, and quoted by Cory J. in *Phillips*, *supra* note 17 at para. 63.

²¹ The sponsorship, or Gomery, inquiry produced two reports: *Who Is Responsible? Fact Finding Report* (Ottawa: Queen's Printer, 2005) [*Who Is Responsible?*] and *Restoring Accountability* (Ottawa: Queen's Printer, 2006). Documents prepared for website access by the sponsorship inquiry are now available online: Library and Archives Canada <<http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/default.htm>>.

ficials apparently decided Mr. Arar represented a security threat. Mr. Arar was held in a Syrian prison for over a year, during which time he was repeatedly beaten and tortured during questioning about his alleged involvement with radical Islamic organizations. Following his release and return to Canada in 2003, Mr. Arar and many other Canadians demanded that an inquiry be held into the actions of Canadian government authorities leading to and during his imprisonment in Syria. The result was the Arar inquiry, conducted by Mr. Justice Dennis O'Connor over a two-year period.²² Mr. Arar knew that his own actions would come under intense scrutiny in the course of the inquiry in addition to his physical and emotional injuries.

The second group of individuals directly affected by a public inquiry are those persons whose decisions and actions are the subject of the investigation. In the mid- to late 1990s, perceived conflict between the public interest in investigative inquiries and the interests of persons investigated caused a near-crisis in the world of Canadian public inquiries. Three inquiries into high-profile tragedies—the Krever commission into the Canadian blood system's use of tainted blood products, the Somalia inquiry into mistreatment of Somali prisoners by Canadian peacekeeping forces, and the Westray inquiry into a deadly coal mine explosion in Nova Scotia—became embroiled in lengthy litigation brought by both the subjects of investigation and witnesses. Delays caused by the many applications for judicial review in the course of the Somalia inquiry ultimately contributed to the controversial decision made by the government of Canada to terminate the inquiry before it could complete its evidence-gathering process. It seemed to many observers that public inquiries had become too expensive, time-consuming, and litigation-prone to be effective.²³

The principal opinions in *Krever Commission* and *Phillips*, both written by Justice Peter Cory, sent the message that the public interest value of investigative inquiries outweighs concerns about their potential harm to the individual interests of witnesses and subjects of investigation. Both cases addressed one of the two main interests that have been viewed as most threatened by public inquiries: (1) rights of persons who may face criminal charges for matters being inquired into, and (2) reputational interests of those whose conduct may be called into question.

1. *Balancing the Rights of Individuals Facing Criminal Charges*

In *Starr v. Houlden*,²⁴ the Supreme Court of Canada quashed an Ontario public inquiry called to inquire into the actions of an individual and a private corporation involved in political fund-raising activities. The Court confirmed that public inquiries are not permitted to make findings of civil or criminal liability against individuals. In the *Starr* case, the inquiry's

²² Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, vols. I and II (Ottawa: Queen's Printer, 2006); *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Queen's Printer, September 2006); and *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Queen's Printer, December 2006).

²³ This "crisis" of the 1990s was partly responsible for the 1999 Conference on Commissions of Inquiry at Queen's University, which produced the valuable collection of essays in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise* (Toronto: Irwin Law, 2003) [*Commissions of Inquiry*].

²⁴ [1990] 1 S.C.R. 1366 [*Starr*].

terms of reference prohibited the commissioner from making a finding of criminal liability but authorized him to state whether the individual had acted in ways that were described as a breach of an offence set out in the *Criminal Code*. The majority of the Court ruled that this effectively turned the inquiry into a substitute police investigation and prosecution without the protections of those procedures, and that this was *ultra vires* the provincial government.

Compelled testimony and document production are significant investigative tools of inquiries, giving inquiries a distinct investigative advantage in this respect over criminal trials. In the criminal setting, accused persons have the right under s. 11(c) of the Charter²⁵ not to testify. The danger from a civil liberties perspective is that governments may use inquiries and the power to compel witnesses to testify as a means to get around the right against self-incrimination. Indeed, the power of public inquiries to compel testimony from persons suspected of being responsible for an act or acts of wrongdoing has led to pointed questions about whether inquiries pose an improper threat to the rights of individuals.

The *Phillips* litigation addressed this issue in circumstances in which two mine managers summoned to testify before the provincial inquiry into the Westray mine disaster were also facing criminal prosecution with respect to the same events. The managers applied to quash the subpoenas issued by the inquiry and for an order quashing, or at least staying, the inquiry proceedings until after the criminal charges had been resolved. They argued that it would breach their Charter rights against self-incrimination to be compelled to testify at the inquiry in advance of any criminal trial and, further, that the publicity attending the hearings and findings of the inquiry would deny them a fair trial pursuant to s. 11(d) of the Charter.

By the time the matter was argued before the Supreme Court, the managers had opted to be tried by judge alone, without a jury. The criminal trial was in fact under way. In these circumstances, the majority of the Court lifted a stay of the inquiry imposed by the Nova Scotia Court of Appeal, but declined to rule on the issues of compellability or publicity, finding them to be moot. However, Justices Cory, Iacobucci, and Major gave lengthy concurring reasons addressing the compellability and fair trial questions for the sake of future cases. Cory J. concluded that witnesses should be compellable at a public inquiry, irrespective of whether they may be subject to prosecution for the same acts being investigated by the inquiry, so long as the inquiry serves a legitimate public purpose (that is, it is not intended as a substitute form of criminal investigation). Justice Cory found sufficient protection for witnesses in Charter sections 13 and 7. Section 13 prohibits the use of a person's testimony in subsequent criminal proceedings against him. Section 7 provides "derivative use immunity" as a matter of fundamental justice, barring the Crown from introducing evidence into a criminal trial that would not have been obtained "but for" the compelled testimony.

With respect to the risk that publicity attending inquiry proceedings might make a fair trial impossible, Cory J. said that governments must be allowed to take the risk of losing the power to prosecute an accused person, rather than have the judiciary adopt a blanket rule that would prevent public inquiries from going ahead where this risk exists. In short, the important role played by public inquiries justifies maintaining the general Canadian position of making witnesses compellable in all proceedings other than their own criminal

²⁵ *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [Charter].

trials, so long as their right to fair process can otherwise be preserved. Although Cory J.'s opinion represented a minority position, it remains the clearest statement of the situation in Canadian law.

2. *Balancing Reputational Interests*

Wayne MacKay and Moira McQueen note that assigning blame for things that go wrong is often what members of the public mean by accountability:

An integral part of this growing demand for accountability is the concept of blaming. When things go wrong, people want to know whom to blame for the state of affairs. ... The focus on blame is often justified by the argument that no remedial action can be effectively taken until the causes of a disaster or problem have been completely unearthed. However, this explanation is contradicted by the fact that public and media attention seems to die down fairly quickly once names have been named. ... This may suggest that what the public wants, and what public inquiries aim to achieve, is the public shaming of those found to have acted inappropriately, rather than tangible punishment.²⁶

Although public inquiries cannot directly result in penal sanctions, damage to a person's reputation may result merely from having one's name mentioned at, or being called to testify before, a public inquiry, let alone being found in an inquiry report to be responsible for misconduct. For politicians, the damage done to reputation by a public inquiry may result in a lost election, as was the case for the Liberal government of Prime Minister Paul Martin in 2006 following the sponsorship inquiry.

In the *Krever Commission* case, Commissioner Krever served notices at the conclusion of the formal hearing process on approximately 90 individuals and organizations pursuant to s. 13 of the federal *Inquiries Act*,²⁷ which reads:

No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

The notices set out the possible findings of misconduct that might be made in the final report and invited the recipients of the notices to make a response to the commission before it reached its conclusions. Dozens of the recipients of notices sought judicial review, objecting to matters such as the timing and detail of the notices. The Supreme Court confirmed in its *Krever Commission* ruling that the potential harm to reputation justified procedural protections at common law including adequate notice. This right could enhance or "fill out" rights set out in the statute. The Court concluded that Commissioner Krever had provided reasonable notice and opportunity to respond.

²⁶ A. Wayne MacKay & Moira G. McQueen, "Public Inquiries and the Legality of Blaming: Truth, Justice and the Canadian Way" in *Commissions of Inquiry*, *supra* note 23, 249-92 at 250-51. On the subject of inquiries and reputation also see Peter Doody, "Commissions of Inquiry, Fairness and Reasonable Apprehension of Bias: Protecting Unnecessary and Inappropriate Damage to Reputation" (2009) 23 Can. J. Admin. L. & Prac. 19.

²⁷ R.S.C. 1985, c. I-11.

Citing *Starr v. Houlden*, several of the recipients of notices argued that inquiries lack the constitutional authority to make individual findings of misconduct or, in other words, that Commissioner Krever could not “name names.” The Court distinguished its ruling in *Starr* by saying that it applied in the particular circumstances of an inquiry that was established solely to investigate acts of specific individuals. The Court also distinguished between an inquiry’s making findings of “misconduct,” which are permissible, and making findings of civil or criminal liability, which are not. The blood system inquiry was both a policy and an investigative inquiry and could only fulfill its broader policy purpose if it was allowed to make findings about individual responsibility for past decisions and actions. Justice Cory cautioned inquiry commissioners to avoid stating findings in terms that might convey the incorrect impression that they had found an individual to be civilly or criminally liable, but added that a commissioner “should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.”²⁸ Reputations might be harmed in the process. Although this possibility justified extending procedural fairness to the affected individuals, it should not stand, however, in the way of the inquiry’s work:

These findings of fact may well indicate those individuals and organizations which were at fault. Obviously, reputations will be affected. But damaged reputations may be the price which must be paid to ensure that if a tragedy such as that presented to the Commission in this case can be prevented, it will be.²⁹

Peter Doody has argued that some of the fears concerning the Krever commission’s fault-finding activity did indeed come true.³⁰ The commission report contributed to an RCMP investigation that resulted in charges of criminal negligence causing bodily harm against several blood system officials, all to great attendant publicity. Ten long years after the inquiry completed its work, the trial judge in the criminal matter acquitted the accused, and concluded, contrary to the inquiry’s findings, that they had acted in an exemplary fashion. Benotto J. commented: “The events here were tragic. However, to assign blame where none exists is to compound the tragedy.”³¹

II. Public Inquiries and Administrative Law Principles

Public inquiries are exercises in delegated government authority. For this reason, inquiries operate within the context of administrative law. The practice of lawyers before commissions of inquiry is an administrative law practice. The same skills that serve counsel who appear before labour boards, broadcast regulators, environmental review boards, and other tribunals also serve those who represent parties and witnesses at inquiry hearings. The same understanding of the principles governing the exercise of delegated public power will in-

²⁸ *Krever Commission*, *supra* note 3 at para. 52.

²⁹ *Ibid.* at para. 39.

³⁰ *Supra* note 26 at 24–25.

³¹ *R. v. Armour Pharmaceutical Company*, 2007 CanLII 40864, 226 CCC (3d) 448 at para. 307 (Ont. S.C.), Benotto J.

form that practice. The major principles of administrative law concern the lawful delegation of authority, issues of procedural fairness, and the substantive review of governmental decision making. The discussion in this section of the chapter tracks these principles by looking at the following three subjects:

1. Establishing public inquiries, including terms of reference, constitutional limits on the scope of an inquiry, and the role and independence of commissioners of inquiry.
2. Procedural fairness issues—that is, the rules governing the conduct of the investigative and hearing process.
3. Substantive review of the rulings and findings of a commission of inquiry.

A. Establishing an Inquiry

1. Delegation of Authority

The power to call a public inquiry into a matter of governance was long understood to be a prerogative power of the Crown. In Canada, Parliament and nine provinces have adopted inquiry statutes that formalize certain aspects of inquiry activity.³² Royal commissions and public inquiries are now appointed pursuant to the statutory provisions and clothed with the powers expressly set out by statute. In addition to general inquiry statutes, most jurisdictions make provision for inquiries to be conducted in specified areas of activity.³³ It is also not uncommon for regulatory statutes to authorize ministers of the Crown to appoint someone to investigate and report on a matter or an event, and to grant them the powers of a commissioner under the general inquiry statute.³⁴

Inquiry statutes take the following general form. First, they set out the nature of matters that may be the subject of an inquiry. The federal *Inquiries Act* authorizes two kinds of inquiries, a Part I inquiry into “any matter connected with the good government of Canada or the conduct of any part of the public business thereof,”³⁵ and a Part II departmental inquiry into “the state and management of the business, or any part of the business, of [a] department.”³⁶ The Nova Scotia statute provides for a broader mandate covering “any public matter in relation to which the Legislature may make laws,”³⁷ under which the provincial government

³² *Public Inquiries Act*, R.S.A. 2000, c. P-39; *Public Inquiry Act*, *supra* note 10; *Inquiries Act*, R.S.N.B. 1973, c. I.11 (repealed); *Public Inquiries Act, 2006*, S.N.L. 2006, c. P-38.1; *Public Inquiries Act*, R.S.N.S. 1989, c. 372; *Public Inquiries Act, 2009*, S.O. 2009, c. 33, sched. 6; *Public Inquiries Act*, R.S.P.E.I. 1988, c. P-31; *An Act respecting public inquiry commissions*, R.S.Q., c. C-37; *Public Inquiries Act*, R.S.S. 1978, c. P.38. Manitoba does not have a public inquiries statute, but authorizes inquiries under other statutory instruments, including stand-alone statutes establishing individual inquiries and their terms of reference.

³³ See e.g. in Ontario the *Hospitals and Charitable Institutions Inquiries Act*, R.S.O. 1990, c. H.15.

³⁴ See e.g. the federal *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.), s. 40(2), with respect to investigations into railway accidents.

³⁵ *Supra* note 27, s. 2.

³⁶ *Ibid.*, s. 6.

³⁷ *Public Inquiries Act*, *supra* note 32, s. 2.

authorized the Westray inquiry into the operations of a private company (in addition to the regulation of mining activities).

Second, the statutes grant powers of compulsion to commissioners authorizing them to summon witnesses, place witnesses under oath, and cite for contempt, as well as to order production of documentary evidence. These are important investigatory powers that can only be granted by statute. Third, the statutes extend procedural protections to persons being investigated or persons who may be subject to adverse findings of fact in an inquiry report. These statutory procedural rights should be viewed as minimum protections that do not exclude additional protections provided by the common law of administrative law.

Governments in Canada usually initiate public inquiries by an order in council issued under the authority of an inquiry statute. This is not necessarily the case. However, a government that establishes an inquiry outside the authority of its inquiry statute may encounter questions about why it is doing so. This happened in Quebec in the fall of 2011. For two years media stories about corruption in the construction industry and its influence on local politics had swirled about. In October 2011 Premier Charest announced that his government would appoint Quebec Superior Court Justice France Charbonneau to head an inquiry into corruption in the construction industry. Premier Charest said that the government did not believe it necessary to establish the inquiry under Quebec's *Act Respecting Public Inquiry Commissions*³⁸ and clothe it with all the powers granted by that statute. Critics quickly raised doubts about the government's good faith. When Justice Charbonneau herself said that she needed the powers of the statute to adequately perform the task assigned to her, the government changed course. Premier Charest designated the inquiry by order under the statute, expanded its resources, and appointed two new commissioners to form an inquiry panel with Justice Charbonneau.

2. *Appointing an Inquiry Commissioner*

Governments can appoint whomever they wish to conduct public inquiries, subject to objections going to an alleged apprehension of bias (see below under the heading II.A.5, "Reasonable Apprehension of Bias"). With respect to investigative and combined inquiries, it is a common practice to appoint sitting or retired justices of a superior court. Nevertheless, inquiries are executive government functions. Justice David McDonald, who chaired the commission of inquiry into RCMP activities in the late 1970s, described the status of a sitting justice acting as an inquiry commissioner in these terms:

The Commission is not a Court. It is not a branch of the judiciary. It fulfils Executive or administrative functions. ... Very often a Judge is the sole commissioner or chairman of a group of commissioners. One reason a Judge is chosen is that his livelihood is secure in that he can be removed from office only by joint address of the Houses of Parliament. This fact, which lies at the root of the cherished independence of the judiciary, increases the likelihood that the inquiry will not be influenced by considerations to which ordinary segments of the Executive are

³⁸ R.S.Q., c. C-37.

susceptible. Putting it another way, it ensures that the inquiry will be conducted at arm's length from the Executive.³⁹

Dickson C.J. pointed out in *Re Residential Tenancies Act, 1979*⁴⁰ that because Canada does not operate on a strict separation of powers basis, members of the judiciary can carry out executive functions. This does not happen in the United States, for instance, where it would be unconstitutional for a federal judge to conduct an inquiry into governmental affairs.

In response to the common practice of sitting justices being named to conduct public inquiries, the Canadian Judicial Council (CJC) has developed a Protocol on the Appointment of Judges to Commissions of Inquiry.⁴¹ The protocol seeks to assist judges who may be approached about taking on a commissioner's role and their chief justices with respect to the appropriate considerations for making the decision to accept. According to the CJC, such requests should always be made by a government first to the chief justice, not the individual judge. Relevant considerations are said to include the time the judge would be taken away from judicial duties and the terms of reference being proposed for the inquiry. This raises an interesting question: To what extent should a prospective commissioner of inquiry engage in discussions or negotiations with the government over the inquiry's mandate or terms of reference? Justice O'Connor, who conducted the Walkerton and Arar inquiries, agrees with the CJC that the discussions should be detailed and that the commissioner be satisfied that the mandate is one of public importance and is capable of being fulfilled on the terms proposed.⁴² Nevertheless, as both the CJC and Justice O'Connor note, many inquiries deal with controversial matters. A commissioner may well be called on during the course of an inquiry to interpret the terms of reference under which he or she is operating. For this reason, it may make sense for a prospective appointee to leave the drafting of the substantive terms largely to government, while ensuring that matters dealing with inquiry resources and logistics are appropriately addressed.

3. Terms of Reference or Inquiry Mandate

Setting the mandate or terms of reference for an inquiry is a crucial step in determining what the inquiry is intended and able to achieve. By setting the terms of reference, governments exercise significant control over how far-reaching an inquiry will be. Of course, the more politically sensitive the subject matter is, the more likely opposition politicians, the media, and members of the public will take an active role in monitoring and shaping the government's decision making in this regard. In the case of alleged improper cash payments made

³⁹ *Re Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (1978), 94 D.L.R. (3d) 365 at 370.

⁴⁰ [1981] 1 S.C.R. 714 at 728.

⁴¹ See <<http://www.cjc-ccm.gc.ca/cmslib/general/JIC-CIsc-protocol-finalE-August-2010.pdf>>. The CJC has also developed a Reference Guide for Judges Appointed to Commissions of Inquiry: <http://www.cjc.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf>.

⁴² Dennis R. O'Connor & Freya Kristjanson, "Why Do Public Inquiries Work?" in Ronalda Murphy & Patrick Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Toronto: Canadian Institute for the Administration of Justice, 2007).

by German businessman Karlheinz Schreiber to former Prime Minister Brian Mulroney, Stephen Harper's Conservative government asked an outside individual, David Johnston, since appointed governor general of Canada, to give advice on whether an inquiry should be held and what its terms of reference should be. This move followed the previous government's decision to conduct a "pre-inquiry inquiry" into the Air India disaster before establishing the full public inquiry into that matter.⁴³ These actions represent attempts by governments to give the appearance of an independent, arm's-length process for deciding on the structuring of an inquiry. Nevertheless, the ultimate decision rests with executive government.

The terms of reference set out in an order represent the "law of the inquiry" and have binding force on the inquiry commissioner. Nevertheless, it is useful to remember that terms of reference are a form of delegated legislation, or regulatory law. In the case of the Somalia inquiry in the mid-1990s, the Federal Court of Appeal took the position that, as with other regulatory law, an inquiry's terms of reference can be modified by the executive at its discretion (see the discussion of independence under the heading II.A.4, "Independence of Inquiries," below).

The latter point was picked up in an interesting way by the British Columbia Court of Appeal in *British Columbia v. Commission of Inquiry into the Death of Frank Paul (the Davies Commission)*.⁴⁴ The commission was created to inquire into the circumstances surrounding the death of Frank Paul, an aboriginal man who died on a Vancouver street after being released from custody by police officers despite his being in a severely intoxicated and vulnerable state. The terms of reference included the phrase "to make findings of fact regarding circumstances relating to Mr. Paul's death, including findings of fact respecting the response of ... the Criminal Justice Branch of the Ministry of Attorney General to the death of Mr. Paul."⁴⁵ Commissioner Davies ruled that his mandate included investigating how and why the Crown had exercised its prosecutorial discretion not to lay charges against any of the police officers involved, and acceded to a request to subpoena former prosecutors (now judges) to testify. The Ministry of the Attorney General sought judicial review to quash this decision, arguing that the principle of prosecutorial independence made such questioning improper. The Court of Appeal dismissed the application. It said that the principle of prosecutorial independence had a basis in the separation of powers, but that as public inquiries are part of executive government, not the judiciary, the principle did not apply. Further, the court noted, citing the Federal Court of Appeal's decision in *Dixon*, the government could always change the inquiry's terms of reference if it wished to do so and was prepared to explain its actions to the public. In *Davies*, the B.C. Court of Appeal implicitly criticized the attorney general for having advised the provincial Cabinet on the inquiry's terms of refer-

⁴³ See *Lessons to Be Learned: The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on Outstanding Questions with Respect to the Bombing of Air India Flight 182* (Ottawa: Queen's Printer: November 2005), online: <<http://www.publicsafety.gc.ca/prg/ns/ai182/rep1-eng.aspx>>.

⁴⁴ *Supra* note 9.

⁴⁵ *Ibid.* at para. 9.

ence, presumably including their constitutionality, and then turning around and applying for judicial review to obtain a narrow reading of those terms on constitutional grounds.⁴⁶

The commissioner of an inquiry plays an important role in interpreting the terms of reference. The more brief or general the wording of the terms, the more interpretive work is necessary. Depending on how broadly the commissioner understands the scope of his or her inquiry, the more evidence will be relevant, the more questions will be probed, and the more witnesses will be called. This has significant implications for the cost and time needed for an inquiry, as well as for the nature of its findings. A commission's interpretation of its terms of reference is subject to judicial review. This is a form of "substantive review" (see discussion under section II.C, Substantive Review, below).

4. Independence of Inquiries

To what degree are public inquiries independent? The credibility and effectiveness of an inquiry depends very much on the degree to which it is and appears to be independent of executive government. It may be true to say, however, that the independence of public inquiries is more a matter of personal integrity, enforced at the level of politics, than a matter of law. As noted, inquiries are created by executive government, and the executive sets the terms of reference, time frames for reporting, and budgets, and appoints commissioners for an inquiry. While the constitutional principle of judicial independence protects the judicial careers of judges serving as commissioners of inquiry, it does not likely extend to an inquiry itself. In Chapter 8, *Caught Between Judicial Paradigms and the Administrative State's Pastiche: "Tribunal" Independence, Impartiality, and Bias*, Laverne Jacobs discusses the state of the law going to whether administrative tribunals of an adjudicative nature attract the constitutional principle of independence. Inquiries, of course, are not adjudicative bodies.

The clearest challenge to date to the independence of a public inquiry occurred with the Somalia inquiry. The evidence given at the public hearings of this inquiry into the abuse of Somalis in Canadian military custody caused considerable embarrassment to military and civilian officials and led to the resignation of the chief of defence forces. When the commissioners asked for a third extension of the deadline for the hearings and final report, the government of Prime Minister Chrétien refused. This decision effectively terminated the inquiry. A legal challenge alleging that the decision exceeded Cabinet's authority and violated the rule of law succeeded at first instance, but was rejected by the Federal Court of Appeal. Marceau J. stated:

It has often been suggested, expressly or impliedly, especially in the media but also elsewhere, that commissions of inquiry were meant to operate and act as fully independent adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created. This is a completely misleading suggestion, in my view. The idea of an investigative body, entirely autonomous, armed with all of the powers and authority necessary to uncover the truth and answerable to no one, may well be contemplated, if one is prepared to disregard the risks to individuals and the particularities of the Canadian context. But a commission under Part I of the *Inquiries Act* is simply not such a body. ... All this, however, does

⁴⁶ *Ibid.* at paras. 70-77.

not alter, in any way, the basic truth that commissions of inquiry owe their existence to the Executive. As agencies of the Executive, I do not see how they can operate otherwise than within the parameters established by the Governor in Council.⁴⁷

The Federal Court of Appeal's decision in *Dixon* raises important questions concerning inquiry independence. It implies that an inquiry's terms of reference, which can be changed at will by Cabinet, do not provide a firm foundation for independence. However, fears that the experience with the Somalia inquiry will make it easier for governments to interfere in the operations of public inquiries have not borne fruit. Governments know that interfering with the mandate or the proceedings of a public inquiry in mid-course may not only undermine the inquiry's credibility, but also create a political firestorm. In this way, commissioners of inquiry are not powerless in their relationship with the executive that created an inquiry.⁴⁸

Recent statutory reforms raise new questions concerning the independence of public inquiries. As noted, public inquiry statutes have replaced prerogative power as the source of government authority to initiate inquiries in all Canadian jurisdictions. This development occurred roughly between 1960 and 1980. Even so, most inquiry statutes remained brief, general statements of the authority that could be delegated to commissioners of inquiry. In the last four years, Ontario and British Columbia have rewritten their inquiry statutes, making them significantly more detailed and directive with respect to the conduct of public inquiries. The reform of Ontario's legislation is particularly noteworthy in this regard.⁴⁹ The Glaude inquiry raised concerns in that province about the risks of inquiries running "out of control." That inquiry is estimated to have cost \$53 million and gone well past its intended completion date by the time it concluded in 2009. Almost immediately on its completion, the government of Ontario introduced new legislation that includes several provisions that set out limits and accountability measures on inquiry operations. Among other things, the *Public Inquiries Act, 2009* makes it a duty of an inquiry to be "financially responsible and [operate] within its budget";⁵⁰ allows inquiries to rely on forms of written and documentary evidence that would not generally be admissible in court proceedings;⁵¹ bars inquiries from holding public hearings unless expressly so authorized in the order establishing the inquiry;⁵²

⁴⁷ *Dixon c. Canada (Gouverneur en conseil)*, [1997] 3 F.C. 169 at para. 13 (C.A.); leave to appeal to the Supreme Court of Canada dismissed, January 8, 1998. See critical comment on the Federal Court of Appeal decision by Inquiry Commissioner Peter Desbarats, "The Independence of Public Inquiries: *Dixon v. Canada*" (1997) 36 Alta. L. Rev. 252. It might be noted that concerns in the United States over the role of independent prosecutors not subject to executive or congressional supervision became a major issue in the year following the Somalia inquiry as a result of prosecutor Kenneth Starr's investigation into the private life of President Bill Clinton. See Cass Sunstein, "Unchecked and Unbalanced: Why the Independent Counsel Act Must Go" (2002) 38 American Prospect, online: The American Prospect <<http://prospect.org/article/unchecked-and-unbalanced>>.

⁴⁸ It is worth noting that in the missing women inquiry, Justice Oppal requested a one-year extension of his mandate from the original date for reporting of December 31, 2011 to the end of 2012, but was given only six months to June 30, 2012, possibly putting significant time pressure on the Inquiry.

⁴⁹ *Ontario Public Inquiries Act, 2009*, *supra* note 32. The legislation was brought into force on June 1, 2011.

⁵⁰ *Ibid.*, s. 5(c).

⁵¹ *Ibid.*, s. 9(1).

⁵² *Ibid.*, s. 14.

and obliges a commission to deliver its final report on the date set out in the order.⁵³ A provision permitting the attorney general to release any unfinished work of an inquiry where it fails to provide its final report on time had not been proclaimed as of the time of writing.⁵⁴ While these legislative parameters have benefits in terms of clarifying responsibilities, they also have the potential for making inquiries more like ordinary government activities, subject to statutory mandates and ministerial oversight, and less like the independent operators they have often been viewed to be.

5. Reasonable Apprehension of Bias

The appointment of a particular individual as a commissioner of inquiry might be challenged on grounds of bias should that person have prior involvement with interested parties or a conflict of interest. Concerns of this nature were raised in public on the appointment of Wally Oppal as commissioner in the missing women inquiry. Mr. Oppal had served as attorney general of British Columbia from 2005 to 2009, and so had ministerial responsibility for the Crown's conduct of the Pickton trial, including decisions made by the Crown about how many murder charges to lay, and whether untried charges should be pursued after the initial convictions. No applications for Mr. Oppal's disqualification on this basis were brought to court prior to the inquiry's commencement.

Claims of bias on the part of commissioners have tended to arise more in connection with their conduct during an inquiry. The most striking finding of bias against an inquiry commissioner arose in the context of the sponsorship inquiry. Following the issuance of the phase 1 report that found Prime Minister Chretien responsible for maladministration of the sponsorship program, Chretien launched a challenge to Commissioner Gomery's impartiality. He cited a number of statements Justice Gomery made to the media during the course of the inquiry, including a description of Chrétien's ordering of autographed golf balls to give to other world leaders as "small town cheap." Justice Teitelbaum of the Federal Court of Canada agreed that the statements created a reasonable apprehension of bias on Justice Gomery's part, both with respect to a prejudgment of the issues before hearing all the evidence, and with respect to a predisposition against Chretien personally. In a tart judgment, Justice Teitelbaum expressed disapproval of a commissioner's commenting to the media during the conduct of the inquiry:

The media is not an appropriate forum in which a decision maker is to become engaged while presiding over a commission of inquiry, a trial, or any other type of hearing or proceeding. Indeed, the only appropriate forum in which a decision maker is to become engaged is within the hearing room of the very proceeding over which he or she is presiding. Comments revealing impressions and conclusions related to the proceedings should not be made extraneous to the proceedings either prior, concurrently or even after the proceedings have concluded.

⁵³ *Ibid.*, s. 20(1).

⁵⁴ *Ibid.*, s. 20(4), which reads, "If a commission does not for any reason deliver its report, the Minister may publish any unfinished work of the commission, and that work shall be treated as if it had been published by the commission."

I stress that even in public inquiries where the purpose of the proceedings is to educate and inform the public, it is not the role of decision makers to become active participants in the media. First and foremost, a decision maker's primary duty is to remain impartial, with an open mind that is amenable to persuasion. It is only when all the evidence is heard and after deliberating on that evidence that a decision maker is to form conclusions and, finally, to issue a judgment or report on the basis of these conclusions.⁵⁵

During the Somalia inquiry, Commissioner Mr. Justice Gilles Letourneau was reported to have made private comments about a witness before the inquiry to the effect that "Brigadier General Beno had not given straight answers and perhaps Beno had been trying to deceive." On learning of these remarks, Beno sought to have Justice Letourneau disqualified for having created a reasonable apprehension of bias. The Federal Court of Appeal (from which bench Justice Letourneau had been appointed to the inquiry) rejected Beno's application.⁵⁶ The Court distinguished between a public inquiry and a trial process for purposes of the bias test. Because an inquiry is not an adjudicative process, a more relaxed bias standard is appropriate. At the same time, the Court rejected the idea of going so far as to apply the "closed mind" test to inquiries:

Depending on its nature, mandate and function, the Somalia Inquiry must be situated along the *Newfoundland Telephone* spectrum somewhere between its legislative and adjudicative extremes. Because of the significant differences between this Inquiry and a civil or criminal proceeding, the adjudicative extreme would be inappropriate in this case. On the other hand, in view of the serious consequences that the report of a commission may have for those who have been served with a section 13 notice, the permissive "closed mind" standard at the legislative extreme would also be inappropriate. We are of the opinion that the Commissioners of the Somalia Inquiry must perform their duties in a way which, having regard to the special nature of their functions, does not give rise to a reasonable apprehension of bias.⁵⁷

6. Constitutional Issues

Delegated authority in Canada is subject to the constraints and obligations imposed by the Constitution. A government's decision to appoint an inquiry and its drafting of the inquiry's terms of reference may thus be open to constitutional challenge. Provincially appointed inquiries have been particularly subject to challenge on federalism grounds, especially with respect to whether they invade the federal jurisdiction over criminal law.

⁵⁵ *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 at paras. 104-5; aff'd [2010] F.C.J. No. 1274 (C.A.) (QL) (oral reasons 26 October 2010, amended reasons 5 November 2010). For further discussion of the *Chrétien* case, see Chapter 8, Laverne Jacobs, Caught Between Judicial Paradigms and the Administrative State's Pastiche: "Tribunal" Independence, Impartiality, and Bias.

⁵⁶ *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527 (C.A.).

⁵⁷ *Ibid.* at para. 26.

In the 1970s, a series of cases went to the Supreme Court of Canada addressing the jurisdiction of provinces to inquire into criminal activities, and into activities of the RCMP as a federally regulated institution. In *Di Iorio v. Warden of Montreal Jail*,⁵⁸ the Court permitted a Quebec inquiry into organized crime to proceed as falling within provincial jurisdiction over “the administration of justice” in s. 92(14) of the *Constitution Act, 1867*. A year later, in *A.G. of Que. and Keable v. A.G. of Can. et al.*,⁵⁹ the Court ruled that while a provincial inquiry may investigate wrongdoing by individual police officers, it may not examine the policies and management of the RCMP.

The division of powers has played a role in limiting the authority of provinces to establish public inquiries directed at establishing individual responsibility for acts of a potentially criminal nature. In *Starr v. Houlden*,⁶⁰ the Supreme Court found that the “pith and substance” of an Ontario inquiry was alleged criminal wrongdoing by individuals, and that this infringed on the federal government’s criminal law power. The Court has since narrowed the holding in *Starr*. In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*,⁶¹ the Court rejected an application by a land developer to quash a judicial inquiry initiated by Sarnia City Council into certain land transactions after the police had closed a criminal investigation file on the matter. The Court found that the inquiry was properly directed at the “good government” of the municipality. Even should it turn up misconduct of a possibly criminal nature, the inquiry lacked the power to make criminal findings. Justice Binnie stated that the commissioner’s duty to comply with common-law requirements of the duty of fairness were sufficient to protect the interests of the developer. The facts of *Starr*—which included quoting provisions of the *Criminal Code* in that inquiry’s terms of reference—were described as unusual.

Public inquiries are bound by the *Charter of Rights and Freedoms* with respect to the exercise of coercive statutory powers, such as the powers to subpoena witnesses or documents. There may be an issue as to whether an inquiry, given its non-adjudicative nature, is subject to the Charter with respect to its fact-finding or recommendation-making functions. In *Blencoe v. British Columbia*,⁶² the Supreme Court held that the Charter applies to human rights tribunals as governmental actors. It would seem likely that an inquiry would be viewed similarly, on the basis of the test set out in *Eldridge v. British Columbia*,⁶³ for entities implementing important government programs or policies. On the issue of the application of the Charter to administrative tribunals and executive agencies, see Chapter 12, *The Charter and Administrative Law: Cross-Fertilization or Inconstancy?*, by Evan Fox-Decent and Alexander Pless.

⁵⁸ [1978] 1 S.C.R. 152.

⁵⁹ [1979] 1 S.C.R. 218.

⁶⁰ *Starr*, *supra* note 24.

⁶¹ [1998] 3 S.C.R. 3.

⁶² *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307.

⁶³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

B. Procedural Justice Issues

The status of investigative processes in administrative law is ambiguous. Investigations directed at ascertaining evidence, but not at the determination of legal rights and obligations, are not always subject to common-law rules of fair process. In *Knight v. Indian Head School Division No. 19*,⁶⁴ L'Heureux-Dubé J. stated that the question whether a function is final or merely preliminary in nature is a threshold question with respect to the duty of fairness. The most typical example of a “preliminary” function is the investigative stage of a decision-making process. That is, the investigation may be able to be conducted free of procedural obligations, so long as any final determination of legal rights does not occur until the evidence is tested in accordance with due process.

There is little doubt, however, that investigative inquiries are subject to the duty of fairness in administrative law.⁶⁵ This follows from three things. First, inquiry statutes authorize inquiries to compel the testimony of witnesses. This extraordinary power exposes witnesses to legal consequences, as well as denying them the right to remain silent in the face of public scrutiny and possible future prosecution. Second, the findings of fact of an inquiry carry with them significant consequences. Inquiry findings may be the closest our society comes to “received truth.” Reputations can be made or broken as a result of these findings. Third, public inquiries generally operate like judicial hearings. It is neither difficult nor inappropriate for inquiries to be required to meet standards of fair process.

The particular requirements of fair process in any particular case depend on contextual factors.⁶⁶ Courts have frequently held that the investigative nature of public inquiries and the fact that they do not have decision-making power mean that they are subject to relaxed procedural standards and rules of evidence. The question each time is whether this is appropriate in light of the individual interests at stake in a particular inquiry.

The following discussion addresses several issues of fair process that arise frequently in the course of public inquiries.

1. Inquisitorial Process

Public inquiries employ an inquisitorial rather than an adversarial approach to adducing evidence. This means that the inquiry commissioners decide what evidence to call rather than any individual parties. The inquiry may receive and act on the advice of a witness or

⁶⁴ [1990] 1 S.C.R. 653.

⁶⁵ In *Taser International Inc. v. British Columbia (Commissioner) (Taser No. 1)*, 2010 BCSC 1120, [2010] B.C.J. No. 802 (QL), the manufacturer of Taser weapons sought judicial review against the Dziekanski inquiry headed by Thomas Braidwood on grounds of breach of procedural justice. Justice Sewell of the B.C. Supreme Court addressed the threshold issue in procedural justice briefly, but then concluded, at para. 24:

My review of the authorities leads me to the conclusion that the courts have readily found a duty to act fairly on the part of investigatory or inquiry tribunals and have focused their analysis on the nature and extent of the duty rather than on whether any such duty exists.

⁶⁶ See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and generally the discussion in Chapter 5 by Grant Huscroft.

subject of investigation as to what other evidence and other witnesses to call, but is unlikely to cede its authority. A commissioner is charged with the responsibility of conducting a thorough investigation, but must do so in an impartial and non-prosecutorial fashion. Questions as to how to accomplish this task characterize many of the individual issues of fair process that arise in the course of an inquiry's proceedings. These issues will be more acute for inquiries investigating specific acts of alleged misconduct.

Public inquiries will generally produce procedural rules to govern the hearing process at the outset of the inquiry, dealing with matters of calling witnesses and examination and cross-examination, among others. Justice O'Connor established rules for the Arar inquiry that addressed these issues in the following way:

35. 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 in court proceedings, unless otherwise directed by the Commissioner.

36. Commission counsel have a discretion to refuse to call or present evidence.

(a) Commission counsel will lead the evidence from the witness. Except as otherwise directed by the Commissioner, Commission counsel are entitled to ask both leading and non-leading questions;

(b) Parties 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 and, if they are unable to reach agreement, by the Commissioner;

(c) After cross-examinations, counsel for a witness may then examine the witness. Except as otherwise directed by the Commissioner, counsel for the witness is entitled to ask both leading and non-leading questions;

(d) Commission counsel will have the right to re-examine last.⁶⁷

What is the status in law of an inquiry's published rules? In the *Phillips* case, Cory J. made the general statement that "the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's powers to control their own proceedings."⁶⁸

Although the rules of an inquiry provide useful guidance to all parties and witnesses about how the hearings will unfold, the binding force of an inquiry's rules is questionable. On the one hand, disobedience of the rules might give rise to an exercise by a commissioner of his or her statutory contempt power. On the other, the rules should not be viewed as the last word on procedure before the inquiry. In the absence of an explicit statutory power to make procedural regulations, the rules adopted by an inquiry should be subject to judicial review for compliance with the principles of procedural fairness, either as a general matter or in specific applications.

⁶⁷ *Supra* note 22, "Rules of Procedure."

⁶⁸ *Phillips*, *supra* note 17 at para. 175.

2. Standing

Standing is the legal concept that defines who has a sufficient interest in proceedings to justify having a participant role in the process.⁶⁹ In ordinary legal proceedings, standing is limited to those persons who have a direct interest in the outcome. Standing tends to be an “all or nothing” proposition: a person is either a full participant with responsibility for carrying one side of the legal dispute or not a participant at all. For more on the issue of standing, see Chapter 5 by Grant Huscroft, *From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review*, and Chapter 7, *Access to Administrative Justice and Other Worries*, by Lorne Sossin.

The issue of standing in public inquiries is more nuanced. Who are the parties to a public inquiry? Inquiries are generally called in the public interest, with the intention that much of the population has an interest in the outcome. To the extent that an inquiry concerns wrongdoing, individuals who may be found responsible likely have interests at stake that support their right to participate in some or all of the inquiry’s proceedings. The same may be true of “victims” of the wrongdoing. In addition, other organizations, such as non-profit societies, who do not have a personal stake in the proceedings but have a long-standing interest and expertise in the area of public policy under scrutiny, may wish to participate in the hearings. Standing can be granted in degrees, both in terms of the scope of participation (that is, whether the person gets to call witnesses, to question and cross-examine witnesses, etc.), and in terms of duration (that is, whether the person has these rights only for some part of the inquiry’s hearings, but not for others).

In the Arar inquiry, Justice O’Connor adopted a “substantial and direct interest” test for full party standing. After receiving submissions from persons wishing standing at the inquiry, Justice O’Connor granted full party standing to Maher Arar and the attorney general of Canada, and standing “so far as the evidence affects” their interests to the Ontario Provincial Police, the Ottawa Police Service, and individual RCMP officers. He granted intervener standing to a coalition of non-profit organizations, including the Canadian Council on American-Islamic Relations, the Canadian Arab Federation, and Amnesty International.⁷⁰

In the missing women inquiry, Justice Oppal distinguished between “full participants” and “limited participants.” The former, which included families of the suspected victims of Robert Pickton, were those believed to have evidence of a factual nature to provide with respect to the historical events being investigated. They were given the right to access documents, cross-examine all witnesses, and make submissions to the commissioner on any points arising. Limited participants were organizations with strong policy interests but who would be given permission to cross-examine only select witnesses and to make final submissions only.⁷¹

⁶⁹ In fact, both the British Columbia and Ontario inquiry statutes now refer to standing as “participation” and persons with standing as “participants” at the inquiry.

⁷⁰ *Supra* note 22, see “Rules of Procedure.”

⁷¹ See “Ruling on Participation and Funding Recommendations” (5 May 2011), online: Missing Women Commission of Inquiry <<http://www.missingwomeninquiry.ca/wp-content/uploads/2011/05/RulingonParticipationandFundingRecommendations.pdf>>.

3. Representation by Counsel and Role of Commission Counsel

It is generally accepted that parties to public inquiries may be represented by counsel in the proceedings. Section 12 of the federal *Inquiries Act* makes this a statutory right with respect to persons who are the subject of an investigation:

The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.

A more difficult question is whether witnesses called to testify at an inquiry are entitled to be represented by counsel and what role counsel may play. Subject to the requirements of fair process, this is a matter for commissioners to decide depending on the nature of the inquiry and of the evidence being sought. In the Arar inquiry, witnesses were permitted to have their own counsel present during pre-hearing interviews and at the hearing if their interests would not be adequately represented by counsel for a party. Counsel for witnesses were permitted to ask questions of their clients following examination in chief by commission counsel and cross-examination by counsel for parties.

Representation at an inquiry can be expensive given the period of time and amount of documentary material that may be involved. This is a serious barrier to access and participation. The Supreme Court of Canada has recognized a limited right to state-funded legal counsel in matters that implicate the rights of life, liberty, or security of the person protected by s. 7 of the Charter. Given the decision in *Blencoe*, however, the subject of an inquiry likely cannot successfully argue that he or she has a constitutional right to funded counsel.⁷² The question of funding for counsel is therefore a decision for government to make on an inquiry-by-inquiry basis. In some instances, governments have provided funding for counsel for parties in the budget of an inquiry and delegated authority to distribute the funds to commissioners. More commonly, inquiry commissioners are asked by government to make recommendations concerning who should receive funding for counsel. Should a recommendation be refused, the inquiry commissioner would be placed in the position of deciding whether it would be fair to continue the proceedings.

Controversy over funding of counsel cast an early shadow over British Columbia's Missing Women Commission of Inquiry. Several groups representing women victims of violence and women living in Vancouver's downtown eastside sought and obtained participant status before the commission. However, the provincial government declined the commissioner's recommendation to fund counsel for those groups. The groups pulled out of the inquiry, which may well have consequences for how the inquiry's work and final report come to be viewed.⁷³ The groups alleged that the fact police organizations and individual officers would be well represented by government-funded counsel gives them a distinct advantage over unrepresented persons and groups making complaints about police conduct and thereby

⁷² In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, a challenge to the imposition of a provincial tax on legal services, the Supreme Court rejected the argument that the unwritten constitutional principle of the rule of law could serve as a basis for a right to state funding of legal counsel.

⁷³ See e.g. "U.N. Intervention Sought in Oppal Inquiry," Vancouver Province (7 October 2011), online: <<http://www2.canada.com/theprovince/news/story.html?id=dc3f7d95-7308-49af-b2c1-1aaba8237c82>>.

render the process unfair. One response of the B.C. government was to say that counsel for the commission had the responsibility to ensure that all participants were treated fairly and to protect participants from any overly aggressive cross-examination by counsel for other participants.

Counsel for a commission of inquiry indeed has a unique role. Although commission counsel takes the lead in adducing evidence before the inquiry and does so in the public interest, he or she does not assume the role of a prosecutor in the proceeding. Rather, counsel works for and is selected by the commissioner. Justice O'Connor, who conducted the Walkerton and Arar inquiries, has described commission counsel as the "alter ego" of the commissioner. Justice O'Connor in fact chose the same lawyer, Paul Cavaluzzo, to act as commission counsel in both inquiries, having clearly established a good working relationship in the Walkerton proceedings. Counsel's responsibilities include advising the commission on matters of legal procedure, preparing the evidence in advance of hearing days, leading most witnesses through their evidence in chief, and increasingly, being a spokesperson for the inquiry and its chair.⁷⁴ Counsel must perform these functions in an impartial fashion that does not create an impression that the proceedings are adversarial. In the *Krever Commission* case, the Canadian Red Cross sought a ruling that commission counsel could not participate in drafting the final report because counsel had viewed confidential submissions not introduced into evidence at the inquiry. The Supreme Court of Canada found this objection premature, but agreed that in some circumstances the multiple roles of counsel could lead to an order for disqualification.⁷⁵

4. Notice and Opportunity to Respond

The federal *Inquiry Act* requires that any person about whom a finding of misconduct may be made in a final report must be notified in advance and given an opportunity to respond. Section 13 reads:

No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

Section 13 is a statutory embodiment of the minimal fairness duty to give notice and an opportunity to be heard to persons who may be adversely affected by an inquiry's findings. However, the provision is unclear with respect to what constitutes a "charge of misconduct,"

⁷⁴ Justice O'Connor enumerates six aspects to commission counsel's role. In addition to those just listed, he mentions maintaining communication with parties to the inquiry and participating in drafting the inquiry report. Justice Dennis O'Connor, "The Role of Commission Counsel in Public Inquiries" (2003) 22 *Advocates' Soc. J.* 17.

⁷⁵ Cory J. wrote: "This argument too is premature, because there is no indication that the Commissioner intends to rely upon his counsel to draft the final report. ... However, in the unlikely event that the submissions also included material that was not disclosed to the parties, there could well be valid cause for concern. ... If the submissions did contain new, undisclosed and untested evidence, the Commissioner should not seek advice regarding the report from counsel who received the confidential submissions" (*Krever Commission*, *supra* note 3 at para. 72).

when in the process such notice should be given, and whether a “full opportunity to be heard” includes the calling of further evidence or only the right to make submissions after the evidence is in. In *Krever Commission*, several parties who received s. 13 notices argued that the delivery of notices at the conclusion of the hearing process denied them the opportunity to make full answer and defence. Cory J. disagreed. He pointed out that the statute did not specify any particular period of notice, and that while notices

should be given as soon as it is feasible, it is unreasonable to insist that the notices of misconduct must always be given early. There will be some inquiries ... where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure.⁷⁶

5. Disclosure

We earlier discussed the compellability of witnesses who face potential criminal prosecution. Closely related to this is the issue of the scope of discovery or disclosure powers of a public inquiry. The very purpose of investigative inquiries seems to support broad powers of discovery. These powers may, however, conflict with competing interests in confidentiality and non-disclosure. Common arguments of this nature include national security, solicitor–client privilege, rights of confidentiality to counselling records, and privacy interests.

In general, public inquiries benefit from the grant of statutory power to compel disclosure. It is up to inquiry commissioners to decide, in each case, what evidence they believe is necessary and relevant to their investigation. A commissioner could always decide not to pursue evidence by means of compulsory power. Where a commissioner issues a subpoena, a recipient who objects to production must make one of the following arguments: (1) the demand for disclosure or its statutory authorization is unconstitutional; (2) the evidence goes to a matter not within the terms of reference of the inquiry; or (3) the statutory authorization is not broad enough to include the particular demand for disclosure in the face of a competing interest. In other words, in light of the statutory power to compel testimony or disclosure, it will rarely be sufficient to argue that the demand is unfair at common law.

In considering the issue of disclosure, it is important to differentiate between disclosure to the inquiry and disclosure by the inquiry to the public. The latter is more a question of what can or must be done in public rather than in closed sessions or *in camera*, and is discussed in the section “Conducting Hearings in Public,” below. The issue of disclosure *per se* goes to the power of the inquiry to obtain evidence, irrespective of claims of confidentiality or privilege.

With respect to handling national security information, Parliament has increasingly placed responsibility in the hands of judges to view information that the federal government claims is subject to a national security privilege, to decide whether in fact it is, and then to decide what part of it is disclosable in legal proceedings. That has been the general approach taken in inquiries looking at national security matters. In the *Air India* inquiry, commissioner John Major, a former justice of the Supreme Court of Canada, went public with his

⁷⁶ *Ibid.* at para. 69.

concerns that the inquiry would not be able to accomplish its mandate if the government did not change its position with respect to withholding evidence from the inquiry on national security grounds.

In *McKeigan v. Hickman*,⁷⁷ the Supreme Court dealt with the issue of claimed judicial immunity from disclosure. A Nova Scotia public inquiry held into the wrongful murder conviction of Donald Marshall sought to compel testimony and notes concerning the deliberations of the Nova Scotia Court of Appeal at the time when that court had conducted a review of Marshall's conviction. The justices opposed this demand. A majority of the Supreme Court of Canada concluded that, as a matter of judicial independence (a constitutional principle), judges cannot be summoned to answer questions concerning their deliberations. Several of the justices stated that the general language of the province's *Public Inquiries Act* should be read to accord with the power of superior court judges to issue subpoenas and order discovery in civil proceedings, and that the latter power has long been understood to be subject to judicial immunity.

Inquiries dealing with prosecutorial conduct have also raised issues going to immunity and privilege. As noted above, the Inquiry into the Death of Frank Paul led to a ruling by the B.C. Court of Appeal⁷⁸ to the effect that because an inquiry is an executive, not a judicial, function, a mandate given it to examine the exercise of prosecutorial discretion does not violate the separation of powers doctrine that underlies a principle of prosecutorial independence. Some of the most important and influential inquiries in recent Canadian history have been those dealing with wrongful convictions.⁷⁹ They have examined in detail the internal communications between and among police and prosecution officials.

In the absence of express statutory authority, however, inquiries would not likely be able to compel disclosure of communications falling within solicitor–client privilege. Other privileges, such as doctor–patient and counsellor–client privileges, have generally been viewed as having lesser status. Bryan Schwartz has argued that inquiry statutes should exclude access to counselling records from the purview of inquiries' powers of disclosure.⁸⁰

6. Conducting Hearings in Public

As noted, carrying out the inquiry process in public is one way in which the inquiry achieves its social purposes. One expects that inquiry hearings will be held in public and be reported in the media unless there are strong counterbalancing factors that militate in favour of *in camera* proceedings.

⁷⁷ [1989] 2 S.C.R. 796.

⁷⁸ *B.C. (A.G., Criminal Justice Branch) v. B.C. (Commission of Inquiry into the Death of Frank Paul)* (2010,) 99 B.C.L.R. (4th) 26 (C.A.).

⁷⁹ Such inquiries include those into the wrongful convictions of Donald Marshall in Nova Scotia and Guy Paul Morin in Ontario. See the useful discussion of wrongful conviction inquiries in Ratushny, *supra* note 5 at 67-85; see also *Searching for Justice: An Autobiography* (Toronto: Osgoode Society for Legal History, 2005) by Fred Kaufman, Commissioner of Inquiry in the Morin matter.

⁸⁰ Bryan Schwartz, "Public Inquiries" (1997) 40 Can. Pub. Adm. 72-85.

The Arar inquiry dealt with matters of national security, and it was understood from the outset that parts of the evidence would be received in closed sessions. The terms of reference directed the commissioner to act with discretion in protecting the confidentiality of national security information disclosed to him by government agencies, but still left it to him to rule on those questions.⁸¹ Justice O'Connor addressed the nature of his mandate in ruling on one of several motions dealing with a request for confidentiality:

The government chose to call a public inquiry, not a private investigation. Implicit in the Terms of Reference is a direction that I maximize the disclosure of information to the public, not just in my report, but during the course of the hearings. The reason for that direction is consistent with what are now broadly accepted as two of the main purposes of public inquiries: to hear the evidence relating to the events in public so that the public can be informed directly about those events, and to provide those who are affected by the events an opportunity to participate in the inquiry process.⁸²

The need to receive evidence in secrecy created a serious challenge to the inquiry's credibility, particularly in its early phases when it "disappeared" from public view for weeks and months at a time. Justice O'Connor dealt with this challenge in several ways. First, he provided a public summary of evidence received in closed sessions in September 2004. He granted access to certain confidential material to Mr. Arar for the purpose of preparing his evidence. While Justice O'Connor maintained the confidentiality of evidence and findings, which he concluded were properly protected for national security reasons, he largely succeeded in convincing Mr. Arar, the media, and other observers that the most important facts concerning the events in question had been opened to public scrutiny.

A sequel to the Arar inquiry was the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, conducted by former Supreme Court of Canada Justice Frank Iacobucci (hereafter, "the Iacobucci inquiry"). Justice O'Connor recommended that an inquiry be conducted into the circumstances involving the holding in Syrian custody of these three other Canadian citizens. The Iacobucci inquiry was conducted largely *in camera*, on the basis of extensive evidence that was not disclosed to the individuals concerned, and only partially disclosed to their counsel. One of those counsel, Jasminka Kalajdzic, has written a trenchant critique of the secretiveness of these inquiry proceedings.⁸³ She writes that although the inquiry's

⁸¹ The Arar inquiry's terms of reference (*supra* note 22) stated:

(k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely,

(i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security.

⁸² Ruling Concerning RCMP Testimony (12 May 2005), online: *supra* note 22, under "Rulings."

⁸³ Jasminka Kalajdzic, "Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry" (2010) 36 Queen's L.J. 161.

findings largely vindicated the individuals' positions, it failed in meeting the broader purposes for which inquiries are held: informing and educating government and the public, providing a measure of restorative justice to victims of mistreatment, and the socio-democratic goal of fostering ethics in government activity. In her view, the lack of visibility of the inquiry undermined these purposes.

The goal of investigative inquiries may be to bring little-known or unknown facts into public light, but they are not adversarial proceedings, nor should they need to rely on surprise. It is common practice now for commission counsel to interview prospective witnesses in advance of their public testimony, so that counsel for all sides as well as witnesses will have a good idea of what will be covered and said in open session. Whether a prospective witness is entitled to be interviewed in advance or to receive notice of questions to be asked in open session is a matter of what fairness required in the circumstances. Had an inquiry commissioner published a rule to this effect, as did Justice O'Connor in the Arar inquiry, a legitimate expectation of such a process would likely have been created for each witness.

C. Substantive Review

In Canadian administrative law the review of substantive decision making has long been associated with notions of jurisdiction and the circumstances that justify or limit review by the courts of findings on the merits made by statutorily delegated delegates. In *Dunsmuir v. New Brunswick*,⁸⁴ the Supreme Court of Canada set a new course in substantive review. It identified the appropriate approach, a "standard of review analysis," that looked to certain factors to decide whether review of a decision should be conducted on one of two standards, correctness or reasonableness. Reasonableness review is a deferential standard in which the reviewing court allows the decision to stand so long as the court concludes it is supported by logical and intelligible reasons or falls within a range of reasonable outcomes. Correctness review affords no deference and allows the reviewing court to substitute its view of the right decision for that of the delegate.⁸⁵ Substantive review is relevant to public inquiries in two principal respects: (1) the inquiry commission's interpretation of its mandate or terms of reference; and (2) the inquiry's findings and recommendations.

1. Interpretation of Terms of Reference

As earlier stated, the terms of reference established for an inquiry are viewed as the "law of the inquiry." A commissioner has authority to investigate only those matters identified by the terms of reference. Like any such statement, however, an inquiry's terms of reference are subject to interpretation. The commissioner's interpretation of the terms under which he or she operates is subject to judicial review. The interesting question from the perspective of substantive review is whether a court should apply a correctness or reasonableness standard to that interpretation. Depending on the circumstances, a strong case may be made for

⁸⁴ 2008 SCC 9.

⁸⁵ For detailed discussions of substantive review, the standard of review analysis, and review for reasonableness, see Chapters 9 and 10 by Audrey Macklin and Sheila Wildeman, respectively.

either. Under the approach set out by the majority in *Dunsmuir*, correctness review may often apply to “issues of law,” especially issues of a general nature. The interpretation of an inquiry’s terms of reference involves an issue of law—but how general is it?

We can look to certain pre-*Dunsmuir* cases to see how courts have dealt with this issue. In early 2008, the Ontario Court of Appeal rendered judgment on a judicial review application brought by the government of Ontario and several police organizations challenging a ruling by Commissioner Normand Glaude concerning the scope of the inquiry into the handling by various public officials of complaints of child sexual abuse in Cornwall, Ontario over a number of years.⁸⁶ The government of Ontario established the inquiry in 2005 with terms of reference reading in part:

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:

- (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
- (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse in order to make recommendations directed to the further improvement of the response in similar circumstances.⁸⁷

Justice Glaude interpreted this mandate as going to the manner in which police in Cornwall had responded to complaints of sexual assault made by minors at any time prior to 2005. The applicants for judicial review argued that the terms of reference limited the inquiry to look into how officials had responded to allegations that a child sex abuse ring existed in Cornwall at a certain limited period. A majority of the Court of Appeal agreed with the applicants and set aside Justice Glaude’s ruling on the scope of the inquiry. The majority referred to the commissioner’s interpretation of the inquiry’s mandate as a “jurisdictional question,” declined on that basis to defer to Commissioner Glaude’s interpretation of the terms of reference, and found it both incorrect and unreasonable.

In *Stevens v. Canada (Attorney General)*,⁸⁸ former federal Conservative Cabinet Minister Sinclair Stevens applied to quash the report of Commissioner William Parker, who had led an inquiry into Stevens’s activities while he was in government. Stevens argued that the commissioner had exceeded the jurisdiction given to him by the inquiry’s terms of reference. The terms directed that an inquiry and report be made into

whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister [Brian Mulroney] ... of September 5, 1985.⁸⁹

⁸⁶ *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*, 2008 ONCA 33, [2008] O.J. No. 153 (QL).

⁸⁷ See website for the Cornwall Public Inquiry at <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/index.htm>>.

⁸⁸ 2004 FC 1746, [2004] F.C. No. 2116 (O’Keefe J., December 15, 2004) (QL).

⁸⁹ *Ibid.* at para. 6.

Justice O’Keefe of the Federal Court quashed the inquiry report, which found that Stevens placed himself in a conflict of interest on six occasions, on the basis that the commissioner exceeded his authority by developing his own definition of “conflict of interest” beyond that set out in the code in question. O’Keefe J. did not apply a standard of review analysis, but stated that a court should not adopt an “overly legalistic” approach to reviewing an inquiry’s interpretation of its terms of reference, especially where the inquiry is directed at the alleged wrongdoing of a single individual.

The *Cornwall Inquiry* and *Stevens* cases suggest that reviewing courts may take a fairly strict jurisdictional approach, more akin to correctness review, to inquiry commissioner’s interpretations of their mandates. However, post-*Dunsmuir* case law from the Supreme Court of Canada has moved in the direction of saying that when tribunals are engaged in interpreting the provisions of their own enabling statutes, they should be accorded deference. In a sense, that is what commissioners do when they interpret their terms of reference. This may point to a more deferential approach in future, at least in instances that do not put individuals’ rights at risk.

2. Review of Inquiry Findings

Whether a person who is unhappy with the ultimate findings of fact of an inquiry is able to challenge them in judicial review is an interesting question. In *Dunsmuir* and subsequent cases, the Court has made it clear that fact-based determinations call for reasonableness, or deferential, review. Public inquiries, as we have seen, produce only findings of fact and policy recommendations, not decisions with legal consequences. We expect that inquiry reports would attract deferential review, if indeed they are reviewable at all. This appears to be the case. Following the release of the report and recommendations of the inquiry into the death of Robert Dziekanski at Vancouver airport, the manufacturer of Tasers sought to have the report quashed. The company raised both procedural and substantive grounds, alleging with respect to the latter that there was no evidence on which Commissioner Braidwood could base his findings that the use of conducted energy weapons like the Taser posed some risk of death or serious injury. Justice Sewell ruled that a study commission or phase two inquiry was not exercising a “statutory power of decision,” making certain administrative law remedies unavailable. He further concluded that the inquiry’s findings met a standard of reasonableness.⁹⁰

Even if an applicant were to succeed in a substantive challenge to an inquiry’s findings, questions remain about the nature of the remedies available through judicial review. This issue arose before Reed J. of the Federal Court Trial Division in *Morneault v. Canada*,⁹¹ a case arising from the Somalia inquiry. Lieutenant-Colonel Paul Morneault had been involved in troop training in Canada prior to the troops’ deployment to Somalia. The pre-deployment phase ended up being the only one of three time periods in the Somalia mission concerning which the commission of inquiry was able to complete its investigation and

⁹⁰ *Taser International v. British Columbia (Commissioner) (Taser No. 2)*, [2010] B.C.J. No. 1578 at para. 52 (S.C.) (QL).

⁹¹ [1998] F.C.J. No. 501 (QL), 1998 CanLII 7647 [*Morneault*].

report, given the termination of the inquiry by the Chrétien government. In its report on this phase, the commissioners made findings of misconduct against Morneau with respect to the inadequacy of the training program. Lieutenant-Colonel Morneau applied to Federal Court to have these findings quashed. Reed J. first had to decide whether the finding of misconduct constituted a reviewable “decision” under s. 2(1) of the *Federal Courts Act*.⁹² The respondent argued that mere findings of fact without legal consequences did not constitute a decision. Reed J. disagreed, ruling that the consequences of such findings for an individual’s reputation made them a “decision,” and thus subject to judicial review. Next, the Court needed to identify the appropriate standard of review for this issue of fact determination. Reed J. concluded that the standard should be patent unreasonableness.⁹³ Finally, the Court ruled that the commissioners had misconstrued some of the evidence and drawn improper inferences from other evidence, and that their findings of misconduct against Lieutenant-Colonel Morneau were indeed patently unreasonable. With respect to remedy, Reed J. ordered the following:

What then is the appropriate disposition of his application? The Report has had wide public dissemination. The Commission no longer exists. I have concluded that the appropriate remedy is a declaration by the Court that the Commission’s findings of individual misconduct against the applicant set out in chapter 35 of its Report are invalid. Also, as noted, he is entitled to a declaration that the record does not support a conclusion that the two general statements of condemnation found in the Report, identified above, apply to him. Declarations of invalidity will issue accordingly.⁹⁴

A similar order was made by Justice Teitelbaum of the Federal Court of Canada with respect to Jean Chretien’s successful judicial review application alleging bias on the part of Commissioner John Gomery in the sponsorship inquiry. Teitelbaum J. ordered that: “the findings in the Phase I Report of the commissioner, dated November 1, 2005, and relating to the Applicant, are set aside.”⁹⁵ Such an order may provide a degree of solace to an individual who feels wronged by an inquiry’s process and report. However, it does not change what was heard and said during the inquiry nor its conclusion. The Canadian public would likely be surprised to learn that the findings of the sponsorship inquiry, at least with respect to the role of the highest government officials, have been “set aside.”

III. Public Inquiries and Public Benefit

In his political memoir *My Years as Prime Minister*,⁹⁶ former Prime Minister Chrétien engages in a pointed criticism of public inquiries. He defends his decision to shut down the Somalia inquiry in mid-course on the ground that it had become overly long, expensive,

⁹² R.S.C. 1985, c. F-7.

⁹³ *Morneault*, *supra* note 91 at para. 59.

⁹⁴ *Ibid.* at para. 114.

⁹⁵ *Chrétien v. Canada*, *supra* note 55 at judgment para. (a).

⁹⁶ Jean Chrétien, *My Years as Prime Minister* (Toronto: A.A. Knopf Canada, 2007).

and of benefit only to the many lawyers involved. After noting that “I never appointed another commission of inquiry,” Mr. Chrétien writes:

For the opposition parties, calling for a public inquiry is usually an easy way to dig up dirt or keep a hot issue on the front burner after they’ve exhausted their own supply of facts and questions. For the government, giving in to the calls is often a mechanism to do nothing, to dodge responsibility, or to postpone a controversial decision until after the next election. Very few of these inquiries in my experience have ever been of much use, and those few were valuable only because they didn’t turn into television soap operas. . . . But it is in the nature of public inquiries to get turned into show trials, kangaroo courts and political entertainment. The rules of evidence don’t have to be respected as they are in a court. There’s not the same right of due process or even the same process to protect the innocent during the investigation into a possible wrongdoing. Scores of reputations are shattered for no good cause.⁹⁷

Of course, this comment was made in the shadow of the sponsorship inquiry report of Justice Gomery. Nevertheless, Mr. Chrétien’s criticism is a good sharp summary of the major concerns about inquiries.

Have Canadian inquiries become overjudicialized and too expensive? Michael Trebilcock and Wendy Austin also asked this question following the Krever inquiry into Canada’s blood system in the mid-1990s. The authors noted that the inquiry cost several times what had been budgeted for it, took over three years to complete, and involved the services of over 50 lawyers acting for the parties granted different forms of standing. Canadian public inquiries have indeed become highly lawyered enterprises. This may be an inevitable consequence of having inquiries into specific events with serious consequences in the lives of individuals. The need to respect individual rights is the principal explanation for the takeover of public inquiries by lawyers and judges, and the expenditure of time and money follows from the use of trial-like procedures. If public inquiries are intended in part to provide greater public access to government, it must nevertheless be recognized that this access is now largely filtered through the language and habits of judges and lawyers. To the extent that this is a matter of concern, it should lead to thinking about how the influence of the legal profession can be reduced where it is least needed, in policy inquiries.⁹⁸ The division between phase 1 and phase 2 processes might on occasion be helpfully taken one step further, by assigning a judge to the more forensic tasks of event investigation, while naming commissioners with different backgrounds to take the lead on the more consultative and prospective task of making policy proposals.

⁹⁷ *Ibid.* at 187-88.

⁹⁸ For a critique of the suitability of a judge to disentangle complicated issues of public administration, see Ruth Hubbard & Gilles Paquet, *Gomery’s Blinders and Canadian Federalism* (Ottawa: University of Ottawa Press, 2007). The authors attribute what they view as Justice Gomery’s penchant for overemphasizing individual blame for the failed oversight of the sponsorship program to his professional background (*ibid.* at 41-42):

First, Gomery is a judge. He has been trained to adjudicate and to find guilt or innocence, and he can no more escape from this reality than a turtle can leave its shell. He is neither an organizational design specialist nor an expert in political philosophy or public administration.

However, we have seen that public inquiries have the potential to enhance public accountability in Canada's governing structures. Nowhere has this been more true than with respect to the justice system itself, especially the criminal justice system. The missing women inquiry is only one of many examples of inquiries that have been called to shine light on the actions and decisions of police and Crown officials. Some of the most revealing and important inquiries in Canadian history have been those dealing with wrongful murder convictions, such as those involving Donald Marshall, Guy Paul Morin, and Thomas Sophonow.⁹⁹ In Ontario, the Goudge inquiry into the state of pediatric forensic pathology following the revelation that pathologist Charles Smith had testified erroneously in several cases leading to the conviction of innocent persons pointed out numerous problems and needed reforms in the justice system.¹⁰⁰ Those trained in the law are used to thinking that procedural protections afforded in court proceedings, combined with the zealous advocacy promoted by the adversarial system and appellate review, are significant guarantees of fairness and transparency. The fact is, though, that many of the most important things that happen in the justice system take place out of sight of the public, and often under the protection of various immunities and presumptions of good faith that remove them from the scrutiny of the courts themselves. Public inquiries have proven to be an important adjunct to the proper administration of justice. That this is true with respect to one of our society's most open institutions of public authority makes it easier to understand the benefits public inquiries offer to governance in general.

SUGGESTED ADDITIONAL READINGS

BOOKS AND ARTICLES

- Manson, Allan, & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003).
- Ratushny, Ed, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009).
- Roach, Kent, "Canadian Public Inquiries and Accountability" in P.C. Stenning, ed. *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995).
- Ruel, Simon, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010).
- Van Harten, Gus, "Truth Before Punishment: A Defence of Public Inquiries" (2003) 29 *Queens L.J.* 242.

⁹⁹ See *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (1998), online: Ministry of the Attorney General of Ontario <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin>>; and Manitoba, *The Inquiry Regarding Thomas Sophonow* (2001), online: <<http://www.gov.mb.ca/justice/publications/sophonow/toc.html>>.

¹⁰⁰ See <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html>>.

CASES

B.C. (A.G., Criminal Justice Branch) v. B.C. (Commission of Inquiry into the Death of Frank Paul) (2010), 99 B.C.L.R. (4th) 26 (C.A.).

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440 (Krever commission).

Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities), 2008 FC 802, [2009] 2 F.C.R. 417.

Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia), [1997] F.C.J. No. 985 (C.A.) (QL).

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97.

COMMISSIONS OF INQUIRY

At least since the late 1990s, commissions of inquiry at both the federal and provincial level have created websites for their proceedings. The websites generally include terms of reference, rules of procedure, rulings made by the commission on standing and other matters, a record of testimony, links to video of public hearings, research reports, and the final reports. This provides a wealth of material for further research into the events and issues studied in the inquiries. Provincial inquiries may be searched under their official names or the names of the inquiry commissioner. Federal inquiries now have their separate websites removed from the Internet at some point after conclusion. The website material is now stored by the Privy Council Office, online: Government of Canada Privy Council Office <<http://www.pco.gc.ca/index.asp?doc=archives/topic-sujet-eng.htm&lang=eng&page=information&sub=commissions>>.

The site also provides online access to the final reports of all federal inquiries and royal commissions going back to Confederation.