



# THE RULE OF LAW AND ECONOMIC DEVELOPMENT IN RUSSIA

## An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commission) in Canada

### Executive Summary and Bibliography

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# Independent Commissions of Inquiry: Executive Summary and Bibliography

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## General Introduction

Royal Commissions are a particular form of *ad hoc independent commission of inquiry* that originated in England and that may also be found today in many countries that are, or were former, colonies of England. While independent commissions of inquiry are an instrument of governance in many contemporary democracies, the Royal Commission is unique to states that are (1) constitutional monarchies, and (2) have Parliamentary systems of governance. Canada is one such state.

This Executive Summary examines the Canadian experience with independent commissions of inquiry (whether or not formally denominated as Royal Commissions), making comparisons with practices in other states where appropriate. In Part I, it reviews the definition, types, and history of Royal Commissions and independent commissions of inquiry. In Part II, it details the legal framework for public inquiries in Canada today, considering their purposes, mode of constitution, powers and procedures, the impact of commissions on private rights, the constitutional limitations on public inquiries, and judicial control of independent commissions of inquiry. Part III assesses the impact of public inquiries. It notes criteria for assessing the success of inquiries, paying particular attention to the question of public confidence, sets out various proposals for reform, and considers how commissions have been assessed in the academic and critical literature. This Executive Summary concludes with several observations about the adaptability of this mechanism of governance to states that are not parliamentary democracies.

## Part I: Introduction to Independent Commissions of Inquiry in Canada

### 1. What are Independent Commissions of Inquiry (Royal Commissions)?

Independent commissions of inquiry can be understood as a mechanism of the executive branch of government established on an *ad hoc* basis to inquire into and report on issues of public concern. Today, they are typically initiated by an executive order issued pursuant to statutory authority, although historically they could also be initiated by an instrument issued under the executive powers reserved to the monarch. For this reason, the focus here will be on independent commissions of inquiry that are authorized under either federal or provincial *Inquiries Acts*. Commissions constituted under these statutes *Acts* are also known as public inquiries. They are sometimes called Royal Commissions, even though not established by the executive under the executive powers reserved to the monarch. Today, nothing of significance turns on the specific label given to any particular *ad hoc* inquiry.

The federal *Inquiries Act* contemplates two different types of public inquiries. Part I of the Act (ss. 2-5) empowers the executive to establish a public inquiry into matters connected with the good government of Canada or the public business of Canada (s. 2). Part II (ss. 6-10) enables the Minister of any federal department to appoint a commissioner to investigate and report on the state and management of the business of the department, as well as the conduct of employees as it relates to their official duties (s. 6). Part II inquiries are usually called departmental investigations.

Each Canadian province has a similar statute for the establishment of public inquiries, although they have a variety of titles, and tend to envision only Part I inquiries. These provincial statutes allow the executive branch in each province to establish commissions of inquiry into matters of public concern that are under provincial jurisdiction. The new Ontario *Public Inquiries Act*, in force only since June 1, 2011, is the most comprehensive of these provincial statutes.

The types of inquiry and the subject matters they may be charged with investigating are multiple. Some commissions of inquiry are established to inquire into and provide recommendations on general issues of public policy, such as the situation of Aboriginal peoples in Canada (*Royal Commission on Aboriginal Peoples*, 1996). Others are appointed to investigate in the wake of disturbing events in Canadian society, be these alleged wrongdoing by public officials such as a scandal involving the sponsorship of public events in Quebec (*Commission of Inquiry into the Sponsorship Program and Advertising Activities*, 2006) or major disasters such as the collapse of the bridge over the St. Lawrence River while under construction in 1907 (*Royal Commission, Quebec Bridge Inquiry Report*, 1908). Although *ad hoc* independent commissions of inquiry are sometimes classified as either advisory or investigatory in function, it is widely accepted that many inquiries may do both.

The executive, in the order authorizing the commission, outlines the terms of reference for the inquiry, and these terms of reference determine the scope of the commission's mandate. There are no legal limitations on who may be appointed a commissioner (whether as a sole commissioner or as a member of a multi-member inquiry), although the commissioners appointed to head inquiries frequently are judges, either sitting or retired. If authorized to do so by the mandate as set out in the executive order by which they are constituted, commissions are permitted to make findings of wrongdoing against individuals, groups or organizations. Nonetheless, even in these cases commissions of inquiry are not meant to replace regular legal proceedings. They cannot make findings of civil or criminal responsibility. Moreover, their findings and report have no executory legal effect, and there is no obligation on the government to implement any recommendations they may make. Sometimes, the executive order may even permit the government to keep parts of a report secret (*Gouzenko Inquiry*, 1946).

Although public inquiries are established by the executive branch, a key characteristic is their independence, most notably from the executive, but from Parliament and the judiciary as well. All scholars and commentators agree that this independence is essential for the effectiveness and credibility of an inquiry. The executive creates the inquiry, chooses the commissioner, decides the terms of reference, and can even impose a timeline; however within these parameters commissioners have a great deal of flexibility in fleshing out the actual activities of the inquiry, as well as a broad discretion to make whatever recommendations seem appropriate. That being said, there are also challenges to the independence of commissions of inquiry, which will be discussed below in Part II.

The fact that *ad hoc* independent commissions of inquiry are appointed by the executive does not mean other institutions of public governance are disabled from establishing similar inquiries. In the United States, for example, congressional inquiries with many of the same powers as inquiries under Canadian *Inquiries Acts* are frequent (most notoriously, the investigation of communist activity in the public service and the army conducted by the Un-American Activities *Committee* of the United States' House of Representatives in the early 1950s). Occasionally Parliamentarians in Canada will attempt to establish extra-Parliamentary inquiries (for example, the *Canadian Parliamentary Coalition for Combating Antisemitism*, 2009) but unlike the case in the U.S., these inquiries have no coercive legal powers and, to date, have never issued a report following their hearings.

Some advantages of commissions of inquiry include their ability to investigate underlying social and political problems as well as their ability to uncover facts. Court proceedings are generally focused on determining cases and controversies and assigning responsibility; they are therefore unable to examine the broader, underlying issues (Centa & Macklem, 2003). Furthermore, court proceedings in Canada usually follow the adversarial model, in which judges adjudicate on the facts and legal arguments as presented by counsel, without the ability to investigate further (LRCC, 1978). By contrast, inquiries follow an inquisitorial model which allows commissioners to conduct factual inquiries at their own initiative, and to call their own witnesses.

Commissions of inquiry are also considered valuable because of their ability to involve and inform the public. Commissions often conduct public hearings and most reports are released to the public after completion. Participation in inquiries is also broader than in ordinary civil or criminal

litigation as organizations and individuals who meet requirements established by the commission can be granted standing as parties to the inquiry, sometimes with government funding to support their participation. There is no formal description of the criteria for granting participation rights, but usually an established interest in the issue is required, at a minimum. Their role in the inquiry process is similar to that of the *amicus curiae*, or intervener, in the litigation process, in that they can raise issues relating to the public interest, which might have otherwise been ignored (Williams, 2000).

Finally, inquiries can be advantageous for the victims of misconduct, despite the emotional difficulty they may experience in reliving their experiences publicly. Inquiries can draw attention to the issues and help advance demands for corrective action (*Truth and Reconciliation Commission of Canada*, 2009-present), and some inquiries have helped expose misconduct or other flaws in the criminal justice system or trial process that had led to the wrongful conviction of particular individuals (for example the *Lamer Inquiry into the Administration of Justice*, 2006 and the *Royal Commission on the Donald Marshall Jr. Prosecution*, 1989) (Derrick, 2003).

Even with their many benefits, independent commissions of inquiry are often the subject of criticism. Governments are frequently accused of using public inquiries as a political tool. Inquiries are also often denounced for infringing on the rights of private citizens and for giving commissioners powers similar to those of judges, but without providing participants with the protections of the regular judicial system. In addition, inquiries are routinely criticized for being time consuming and costly, especially because in a large number of cases, their Report is shelved and commission recommendations are never implemented. Despite the criticisms, however, much of the literature supports the existence of independent public inquiries as an instrument of governance, both for their role in bringing information to light and for their independence from regular institutions of governance. Indeed, the consensus seems to be that implementation of recommendations constitutes only one of the criteria that should be used in evaluating the overall usefulness of inquiries.

## 2. Various Types of Public Inquiry Mechanisms in Canada

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Although the focus here is on *ad hoc* independent commissions of inquiry established under federal and provincial inquiry statutes, there are many other mechanisms which governments can use to inquire into issues of public concern. Some have similar powers and perform similar functions as inquiries under the *Inquiries Acts*, while others have a very different legal framework.

First there are still some inquiries appointed under an executive order issued by the delegate of the reigning monarch. These inquiries are therefore traditionally known as Royal Commissions, (even though the term Royal Commission is now used to describe inquiries that originate from other sources as well). Commissioners appointed in this manner have no coercive powers, such as the power to compel witness to attend or to compel the production of documents (*The Bernardo Investigation Review: Report of Justice Archie Campbell*, 1996), unless these powers have been specifically and independently conferred upon them by statute (*Attorney General of Quebec and Keable v Attorney General of Canada*). Although the monarch still has the constitutional authority to appoint inquiries, almost all inquiries are now established under statutes such as the *Inquiries Acts*.

Second, a number of statutes other than the federal and provincial the *Inquiries Acts*, contemplate the creation of public inquiries. These statutes may create inquiries on an *ad hoc* basis (*Mackenzie Valley Pipeline Inquiry*, 1977) or they may establish ongoing mandates. They may even create new organizations or agencies with an inquisitive or investigative mandate. Of course, the most common of those agencies with an ongoing investigatory mandate is the police force. But legislatures have also created other agencies with a specific ongoing investigatory mandate. One example is the coroner's inquest. Canadian provinces have each adopted statutes outlining the role

and responsibilities of coroners, a significant part of which includes the power to conduct public inquiries into deaths of individuals. These provincial statutes even make inquiries mandatory when an individual has died under particular circumstances (for example, in Ontario these include inquiries into deaths in police custody). Each province also has a Fire Commissioner, Fire Marshal or equivalent official who is directed by legislation to conduct investigations into fires. Federally, a Fire Protection Services office conducts investigations and reports into fires at federal buildings. Most Fire Marshalls also have investigatory powers similar to those given to coroners.

Third, there are statutory agencies with investigative and inquisitive mandates, such as the Transportation Safety Board of Canada. This Board is a statutory agency with a mandate to investigate transportation occurrences, including conducting public inquiries into accidents such as airplane crashes. Often these statutes provide investigators with the same coercive powers as commissions of inquiry under the *Inquiries Acts*, and they normally follow similar procedures.

Fourth, there are also provincial and federal statutes respecting ombudsmen, a specialized office with a mandate to inquire into allegations of maladministration whether in relation to specific cases or an entire department or agency. In the latter case, the ombudsman investigation resembles a Part II inquiry under the *Inquiries Act*, although the ombudsman's power to conduct investigations or inquiries is not usually backed by the same powers conferred on a commissioner under the federal and provincial inquiry statutes. Some provincial *Ombudsman Acts* do, however, confer powers to compel testimony, produce documents and enter premises, although the exercise of such powers typically requires prior approval of the Attorney General.

Task forces are a fifth type of official, public, inquiry mechanism. Task Forces are non-statutory inquiries that are invariably appointed by a particular Minister who seeks to advance a policy objective. As such, they are less formal and usually less independent than commissions of inquiry established under statute or the royal prerogative. They normally have no coercive powers to summon witnesses or require the delivery of documents. They can be created to inquire into any issue, and they can be made up of members inside or outside the public service. Their reports are not necessarily made public although most are (see, for example, *Quebec Task Force on Access to Justice*, 1991). Parliamentary committees are another form of non-statutory inquiries, which again would be considered less independent, and subject of political dynamics, such as party discipline (Trebilcock et al., 1982). Internal investigations, such as investigations by Police Commissions into specific instances of police intervention (usually those involving a shooting by a police officer) are another form of inquiry, and even regular police investigations can be considered a form of inquiry.

A final type of inquiry mechanism, which is meant primarily to provide ongoing advice on matters of public policy, is exemplified in the plethora of advisory bodies established either by Parliament (as in the case of the former *Law Commission of Canada*) or by the executive or a particular Ministry (for example, the *Science, Technology and Innovation Council of Canada*, an ongoing body which provides external policy advice and reports to the government). While these bodies perform a role similar to those *ad hoc* commissions of inquiry created to look into a major policy issue confronting the government (*Mackenzie Valley Pipeline Inquiry*, 1977), they typically do not have coercive powers and are mandated to make general policy recommendations to the legislature or to the sponsoring Ministry. Those reporting to Parliament have a degree of independence similar to commissions of inquiry, while those constituted by a Ministry are most often not given the same independence.

The differences between the many types of public inquiry mechanisms just reviewed can include the level of independence, the level of public involvement, whether or not findings and reports are released to the public, the procedures followed, as well as the overall objective of the inquiry. Part II, below, provides an overview of inquiries under the provincial and federal inquiry statutes and the features that distinguish them from all these other inquiry mechanisms.



### 3. Brief History of Independent Commissions of Inquiry in Canada

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Independent commissions of inquiry enjoy a long history in Canada and have at times been an instrument heavily relied upon by government. As described above, historically public inquiries were established by the monarch and were known as Royal Commissions. Royal Commissions have existed in some form in England as far back as the year 1066. The origin of the power to appoint Royal Commissions comes from the power to appoint officials to perform duties in the name of the Crown, as with judges, sheriffs and colonial governors, for example. The earliest commissioners appointed in this way exercised not only investigative functions, but also administrative and judicial functions (Lockwood, 1967).

Over the centuries in England, Royal Commissions came increasingly to be established under various statutes. The first commissions of inquiry into issues relevant to Canada were those created by the British Cabinet during the period when Canada was a colony (for example, the commission conducted by Lord Durham (*Report on the Affairs of British North America*, 1839) which led to the union of Upper and Lower Canada in 1840 (Lockwood, 1967). The executive in colonial Canada also began to establish Royal Commissions even prior to Canada being formally constituted as a country in 1867. In 1846 the first public inquiries statute was enacted temporarily, and was extended and re-enacted permanently in 1867, in the form of what is now Part I of the *Inquiries Act*. Departmental investigations in the form of what is now Part II of the *Act* were introduced in an amendment in 1880. In 1996 an official executive publication estimated the number of Part I inquiries from 1870-1996 at over 350 (D’Ombrain, 1997). Part II inquiries are more difficult to track, but as of 1977 the number was estimated by the Law Reform Commission of Canada at over 1500, (LRCC, 1979).

Commissions of inquiry constituted under federal or provincial *Inquiries Acts* have now essentially replaced inquiries established under the executive power of the monarch. Today the term Royal Commission of Inquiry has come to mean the same thing as a public inquiry under the relevant federal or provincial inquiries statute. This said, only some inquiries receive the formal title of Royal Commission. The rationale for labeling some inquiries Royal Commissions and others mere Public Inquiries is not clear, although it appears that those inquiries that have a broad public policy mandate are more likely to be called Royal Commissions (for example, *Royal Commission on Bilingualism and Biculturalism*, 1970; *Royal Commission on the Economic Union and Prospects for Canada*, 1985; *Royal Commission on Aboriginal Peoples*, 1996; but not *Commission of Inquiry into the Non-medical Use of Drugs*, 1973) than those investigating wrongdoing (for example, *Commission of Inquiry into the Sponsorship Program and Advertising Activities*, 2006; *Commission of Inquiry into the Deployment of Canadian Forces in Somalia*, 1997; *Commission of Inquiry on the Blood System in Canada*, 1997; but not the *Royal Commission on the Donald Marshall Jr. Prosecution*, 1989) (D’Ombrain, 1997).

There have been periods in Canadian history where inquiries were heavily relied upon as a policy instrument, and other times where they have been used more rarely. It appears that the use of investigatory inquiries has, by contrast, been relatively consistent. Overall, it is widely noted that public inquiries have played a significant role in influencing Canadian public policy and in uncovering specific instances of malfeasance in office (Manson & Mullan, 2003; LRCC, 1979).

## Part II: Legal Framework of Public Inquiries under Inquiries Acts

This Part examines the current legal framework governing the constitution, management and reporting mechanisms of inquiries, as well as the judicially enforceable legal and constitutional controls over the manner in which they are established and fulfill their mandate.

### 1. Scope and Purposes of Inquiries

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#### What constitutes a valid matter for inquiry under Parts I and II of the Act?

As already noted in the Introduction, under Part I of the federal *Inquiries Act*, the executive has the authority to appoint a commission for matters concerning the good government of Canada and the conduct of any part of the public business of Canada. Under Part II, a Minister can appoint a commissioner to investigate and report on the state and management of the business of the minister's department, as well as into the conduct of employees of the department, as long as it relates to their official duties.

To simplify, Part I is meant to be reserved for matters of public concern while Part II is aimed at investigating matters internal to a specific department. Although Part I inquiries are often emphasized in discussions of the federal *Inquiries Act*, some notable inquiries have been established under Part II, such the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, 1996). In some cases, conversely, a matter that could have been the subject of a departmental investigation under Part II is referred to an inquiry established under Part I (Wilson, 1982). Part II inquiries are noted as being less formal than Part I inquiries and their reports are not always made public (Kernaghan & Siegel, 1995). There has not been, to date, a successful judicial challenge to the decision to appoint a Part I or a Part II inquiry, this matter apparently being left to the discretion of the executive.

During the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, 2006, an inquiry constituted under Part I of the *Inquiries Act*, an attempt was made to challenge the jurisdiction of the inquiry on the basis that the phrasing of the executive order, and the fact that the Minister of Public Safety and Emergency Preparedness and not the Prime Minister had recommended that it be established, had the effect of constituting the inquiry as a legally impermissible hybrid of Part I and Part II inquiries. The commissioner rejected the challenge on the basis that the matters leading to the establishment of Part I and Part II inquiries are not mutually exclusive, that there is no specific language required in an executive order as long as the intention is clear, and that although it is usually the Prime Minister who recommends a Part I inquiry, this is not a legal requirement under the *Act* (*Arar Inquiry*, 2006).

Provincially, while *Inquiries Acts* differ from province to province, generally they contain a provision that the executive branch of the provincial government has the authority to appoint a commissioner to investigate into matters concerning the good government of the province, or matters which the executive deems to be of public concern. That is, most provincial statutes focus on inquiries that would, if created under the federal *Act*, be Part I inquiries.

In principle, the power to establish commissions of inquiry is limited to the subject matters that fall within the constitutional jurisdiction of the government that wishes to establish it. The application of the division of powers provisions of the Canadian constitution to the scope of inquiries appointed by federal and provincial governments will be covered below in Section 5 of this Part.

## Why inquiries are usually established

In theory, there are no restrictions upon the reasons governments may provide for establishing an inquiry. Based on the inquiry statutes, the executive has a broad discretion in deciding both whether to establish a public inquiry and, subject to constitutional constraints, the scope of the mandate given to any particular inquiry (Centa & Macklem, 2003). Almost any matter could fit within the parameters of Part I of the *Inquiries Act*. There is, moreover, no principle that establishes when governments are obliged to set up an inquiry. The decision is often described as a political one, which may be made for reasons such as to delay action on controversial issues (Wilson, 1982), to satisfy public outcry, and to avoid criticism by assigning blame to particular individuals or organizations. Governments may also establish an inquiry in order to forestall criminal investigation in matters of public administration where it is felt that charges of misconduct are likely, although they appear most likely to establish inquiries when anticipated findings will not reflect negatively on current officials.

A better question may be why a government chooses not to establish an inquiry, as this can also be a source of contention (Centa & Macklem, 2003; Macdonald, 1980). For example, the government of Ontario refused for a long time to establish an inquiry into the death of an Aboriginal man killed by police during a protest, despite the fact that there was significant public concern over possible government interference with police operations. Although it is difficult to determine the reasons why a government chooses not to establish an inquiry, it has been theorized that blame avoidance may be a factor, meaning governments may be reluctant to establish inquiries that will reflect negatively on them (Sulitzeanu-Kenan, 2010). This is related to the fact that the independence of a public inquiry implies that government loses control over what happens during the inquiry, including what may be said in the report. Nonetheless, sometimes governments attempt to control the potential damage or embarrassment that might be caused in an inquiry by strictly limiting the issues which the inquiry may investigate (*Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, 2010)

## Functions of inquiries: policy/advisory vs. investigative vs. mix of both

Commentators usually conclude that there are two main functional categories of commissions of inquiry: policy (or advisory) commissions that seek to inquire into a particular current situation of public importance and offer a forward-looking perspective on this topic could be handled in the future; and investigative inquiries that are fundamentally directed to examining past events and providing recommendations about what should be done to correct a past problem.

Policy inquiries are those established to make recommendations to the government on policy issues. Examples of well-known federal policy inquiries include the *Romanow Commission on the Future of Health Care in Canada*, 2002, or the *Royal Commission on the Economic Union and Development Prospects for Canada*, 1985. Some experts note that the use of policy inquiries has declined from earlier years, even though they observe that such inquiries have played an important role in the development of public policy in Canada. They are similar to many other instruments of policy advice such as parliamentary committees, departmental policy groups, or non-governmental research organizations but have several distinctive features. For example, their independence can allow them to be more impartial and transparent; their mandates typically allow them to focus more on long-term issues; and they generally are given more resources and time to fulfill their role than the most common alternatives (Ratushny, 2009; McCamus, 2003; LeDain, 1972; Macdonald, 1980).

Investigative inquiries are those that are given a specific fact-finding mission, and are sometimes referred to as who-did-what-to-whom inquiries (Berger, 2003). Such inquiries often make findings of misconduct against individuals, groups or organizations. Nonetheless, because these inquiries are not judicial proceedings they are not permitted to make any findings of civil or criminal responsibility. At most, an inquiry might recommend that such proceedings be brought

against named individuals. Examples of well-known Canadian inquiries that fit into this category are the *Commission of Inquiry into the Sponsorship Program and Advertising Activities*, 2005, 2006, the *Commission of Inquiry into the Facts of Allegations of Conflict of Interest concerning the Honourable Sinclair M. Stevens*, 1987 and the *Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, 1997. Similar limitations also apply to the recommendations of mixed policy/investigatory inquiries such as the *Commission of Inquiry into the Blood System in Canada*, 1997. Inquiries with an investigative function have been the subject of most legal analysis and critique since their processes and outcomes sometimes border on legal proceedings like grand jury investigations, and can have significant impact on the civil rights of individuals and organizations. These procedural protections for persons whose conduct is investigated by an inquiry will be discussed below in section 4 of this Part.

It is widely noted however, that many inquiries perform both an investigative and a policy function. For example, in making policy recommendations, a commission might have to consider past events, undertaking investigations and taking testimony under compulsion of law (OLRC, 1992; Trebilcock & Austin, 1998). Conversely, many investigative inquiries are also given the mandate to provide recommendations on how to improve policies and procedures so as to avoid similar events in the future. The exact mix of these two functions of an inquiry will depend on the specific terms of its mandate.

## 2. Appointing Public Inquiries

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A commission of inquiry under Part I of the Canadian *Inquiries Acts* may only be initiated through an executive order. In these inquiries, the executive appoints a commissioner to inquire into a particular matter on the recommendation of either the prime minister (which is usually the case), or on the recommendation of a particular minister (D’Ombrain, 1997). Under a Part II inquiry (a departmental investigation), the commissioner is appointed by a minister to inquire into a particular matter, although the authority to do so is provided by a minute from the report of a regular meeting of the executive (Anthony & Lucas, 1985).

### The Executive Order

The executive order or instrument establishing an inquiry names the commissioner or commissioners who shall conduct it and sets out the terms of reference for the commission, as well as provides other directives to the commissioner. These other directives might relate, for example, to the manner of submission of the report, deadlines, the hiring and remuneration of commission staff and counsel, the participation of third parties in the inquiry and their funding, and specific rules relating to the disclosure of information. In cases where there is more than one commissioner, the executive order will specify who shall be the chairperson (or in rare cases such as the *Royal Commission on Provincial-Dominion Relations* (Rowell-Sirois), the *Royal Commission on Bilingualism and Biculturalism* (Laurendeau-Dunton), and the *Royal Commission on Aboriginal Peoples* (Dussault-Erasmus), which two commissioners will be co-Chairs). The overall budget of an inquiry is not set out in the executive order but is provided for in a separate executive document, although the salary of commissioners is specified by the initial executive order. Any modifications to terms established by the original executive order must be made through another executive order.

Once the commission is established, the commissioner or chairperson must hire staff to support the commission. The federal *Inquiries Act*, and most provincial statutes, provide for staff such as accountants, technical advisers and other experts, as well as clerks, reporters and assistants, along with a Commission Legal Counsel, as long as these are authorized by the executive order (s. 11(1)). Commission staff are often seconded from within the public service, although the Commission Legal Counsel and particular support or research personnel are typically external to the public service and hired on contract. Salary of commission staff is, in principle, governed by the regular rules and guidelines that apply to members of the public service or that apply to regular government contracts (Wilson, 1982).

## Inquiry Commissioners

In the past, sitting judges of the various Canadian courts were frequently appointed as commissioners, particularly for inquiries with an investigative mandate (Manson & Mullan, 2003). These are almost always drawn from the federally-appointed senior judiciary, including the Supreme Court of Canada (in the *Gouzenko Inquiry*, 1946, both Justices Taschereau and Kellock from the Supreme Court were appointed commissioners) although some provincial inquiries are headed by provincially-appointed judges. The appointment of sitting judges has been the subject of much debate and is somewhat less frequent today. On one side it is argued that judges bring knowledge, experience and impartiality to the inquiry process, and judges are generally well respected by the public (LRCC, 1979). On the other hand, involving a sitting judge in what may turn into a partisan political issue can threaten the independence of the judiciary, an important feature of the Canadian constitutional system. The reputation of the particular judge for impartiality can also be affected by his or her involvement in an inquiry.

Some countries prohibit sitting judges from conducting inquiries. Nonetheless, even in the face of such constitutional prohibitions in times of “national emergency” sitting judges have been permitted to serve on independent commissions of inquiry (for example, the *President’s Commission on the Assassination of President Kennedy in the United States* was chaired by Chief Justice Earl Warren). The Canadian Judicial Council has published a protocol for the appointment of judges to serve as a guideline, and the federal *Judges Act* prohibits judges from receiving additional remuneration for conducting an inquiry.

Retired judges (frequently retired judges of provincial Courts of Appeal and the Supreme Court of Canada) are increasingly being appointed as commissioners. In the past fifteen years, for example, five recently retired Supreme Court judges have conducted inquiries. Other individuals with relevant expertise are also appointed as commissioners. Commissioners who are not members of the judiciary have included former politicians, law school deans, members of the legal community, and members of groups or communities affected by the inquiry. Former politicians are most often chosen to head public policy type inquiries that have a significant overlay of political sensitivity (for example, a former federal finance minister chaired the *Royal Commission on the Economic Union and Development Prospects for Canada*, 1985, and a former premier of the province of Saskatchewan chaired the *Royal Commission on Canada’s Health Care System*, 2002. Legal academics and lawyers are often chosen to serve on policy inquiries that have a technical legal dimension (for example, a law faculty dean chaired the *Inquiry into the Non-Medical Use of Drugs*, 1973, and a former law faculty dean chaired the *Quebec Task Force Inquiry on Access to Justice* (1991)). Often, an inquiry with a broad policy mandate is constituted with several commissioners, each bringing different experiences to the commission, and in many such cases, the commission is given co-Chairs. For example the *Royal Commission on Aboriginal Peoples*, 1996, was comprised of seven commissioners drawn from Aboriginal, Inuit and Métis populations of Canada and also included a former Justice of the Supreme Court and (initially) a former provincial premier, later replaced by a retired senior provincial public servant; it was co-chaired by a francophone appeal court judge from Quebec and an English-speaking former National Chief of the Assembly of First Nations.

## Independence of Public Inquiries

Independence is an essential feature of commissions of inquiry and one of the main reasons they are considered effective and legitimate (Witelson, 2003). Although the terms of reference for an inquiry are set by the government in the executive order and any limitations of the jurisdiction of inquiries are enforceable by the courts, once the commission has been established commissioners have a wide discretion to conduct the inquiry as they see fit. When a timeline has been imposed on a commission of inquiry, commissioners often request extensions in order to complete their work. These requests are usually granted. Commissioners also usually have the power to decide on the form the inquiry will follow and on certain operating procedures, such as the format of hearings and whether they will be conducted in public. If commissions need funding beyond what was originally

allocated, a separate request for additional funding must be made. As with extensions of time, however, it is customary for those requests for additional funding to be granted (Centa & Macklem, 2003).

Despite the protective framework of the *Inquiries Acts* and the several independence-reinforcing practices that have grown up around inquiries, they do not benefit from a constitutional or legal guarantee of independence like that which is granted to the judiciary under the Canadian constitution, notably section 96 of the *Constitution Act, 1867* as interpreted by the Supreme Court of Canada (*Provincial Judges Reference*). The central elements of judicial independence (not all of which are currently in place in Canada) are these: an a-political appointments process; life-tenure; a protection against reductions in salary and benefits; autonomy of administration of the judicial function; removal only for cause following a highly formalized process involving the participation of both Houses of Parliament (the House of Commons and the Senate).

Despite the public expectation of independence, reinforced when constitutionally-independent judges are appointed commissioners, many of the guarantees applicable to the judiciary (or their analogues) are absent from the inquiry framework. To begin, courts have emphasized that inquiries are created by the executive and are largely under the control of the executive. Through an executive order, the executive creates an inquiry, chooses a commissioner, determines the terms of reference, and fixes a reporting deadline. The executive can also amend the contents of an executive order on its own initiative by passing a new executive order, and may effectively terminate an inquiry in this way (*Dixon v. Canada*). Even though commissioners have a great deal of flexibility within their terms of reference as to interpretation and procedure, the executive order can be drafted in a way that allows the executive to tightly control what an inquiry is able to accomplish. Limitations of this type are enforceable in court should an inquiry informally attempt to enlarge its mandate. The executive also has the power to determine whether or not an inquiry report will be released to the public. Even though some provincial inquiry statutes make release of the report mandatory, there is still an allowance for sensitive information to be withheld.

Overt political interference in an inquiry, once constituted, has been rare in Canadian history, but it has occurred and when this happens it is likely beyond the reach of the courts to prevent. Normally, partisan politics, if present at all, are manifest in the definition of the terms of the inquiry and the choice of commissioners. Given the close relationship between the public expectation of independence and public confidence in inquiries, the failure to enact appropriate guarantees of independence can be seen as a major gap in the inquiry framework. This issue, as well as the manner in which, by conscripting judges, governments seek to use the principle of judicial independence to enhance the legitimacy of inquiries, will be considered in Part III, Section 2.

### 3. Powers and Procedural Aspects

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While each inquiry is at liberty to develop its own internal procedures, there are certain powers and procedures which are outlined in the various inquiry statutes. To date, however, no Canadian jurisdiction has enacted a comprehensive *Administrative Procedures Act* or *Statutory Powers Procedure Act* to govern comprehensively public inquiries. The recent *Ontario Public Inquiries Act*, 2009 does, however elaborate in section 5-31 a detailed code relating to impartiality, information and evidence, witnesses, search and seizure powers, hearings, public participation, protection of participants and witnesses, and enforcement procedures including the power to punish for contempt.

#### Right to Notice and Counsel

Federally, the *Inquiries Act* requires that any individual being charged with misconduct must be given reasonable notice of the charge, and must also be granted the opportunity for a hearing before a report is made. The Supreme Court of Canada in *Canada (Attorney General) v Canada (Commission of Inquiry into the Blood System)* determined that notices must be as detailed as

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possible, and must be issued as soon as possible, but that the point at which a commissioner will be able to issue notices will depend on the situation. Otherwise there is no requirement as to when a notice must be issued or what form it must take, and these elements have differed from inquiry to inquiry. The federal *Inquiries Act* also provides the right to counsel for anyone against whom allegations of misconduct are, or are likely, to be made. Other individuals under investigation may be granted counsel at the commissioner's discretion.

Provincially, statutes vary greatly and may include provisions that are not in the federal statute such as provisions on granting participation rights, on the type of hearings that should be held, on the immunity of commissioners (sometimes giving the same immunity as a judge of the court), the power to state a case before the courts, admission of evidence, and search and seizure. Conversely, some provincial statutes do not include the same rights as the federal statute, for example the right for persons charged to be represented by counsel. It is believed, however that the denial of counsel would be subject to judicial review (MacKay & McQueen, 2003). Some provincial statutes also omit the requirement of notice for charges of misconduct, but notices would still likely be required based on the judicially-developed principles of procedural fairness (Ratushny, 2009).

### Evidence

The federal and all provincial inquiry statutes give commissions various powers with respect to evidence. They usually do not have the power to compel the production of documents covered by executive privilege, but are authorized to summon witnesses and require them to testify, as well as to require the production of documents. The extent of such powers, especially when exercised in connection with an inquiry that has the mandate to attribute opprobrium for past conduct, and the right of witnesses to refuse to testify, are the subject of much debate and will be discussed in Section 5 below.

### Report/Recommendations

Most executive orders establishing inquiries require that, following the inquiry, a report be submitted to the executive or, in the past, sometimes to Parliament (Anthony & Lucas, 1985). Recently it has been the practice that the Report is submitted to the executive, rather than directly tabled in Parliament. In some provinces, the inquiry statute states that reports will be released to the public. However, in other provinces and federally, unless the executive order specifically provides that the report be made public, the government retains the discretion whether or not to release the report. Even so, most reports are released to the public. In some situations, parts of a report might be censured, for example because it contains information considered secret (Wilson, 1982; *Gouzenko Inquiry*, 1946).

It is often noted that the recommendations resulting from inquiries often do not get implemented, and this is used to support the argument that inquiries are an ineffective tool of governance. Similar arguments are also made about Reports issuing from institutionalized investigation, inquiry and recommendatory processes such as Law Reform Commissions. It is interesting, however, that there is significant uptake of recommendations from coroners' inquests, perhaps because the events giving rise to the inquest are well-defined specific instances and the recommendations tend to be specific and not particularly costly to implement. Whether implementation of recommendations is appropriate as a measure of the success of an inquiry will be examined in Part III, section 1, below.

## 4. Public Inquiries and Private Rights

It is inherent in investigatory processes, particularly when the investigation is triggered by an allegation of official wrongdoing or a tragic event – for example, a flood, a mining disaster, a bridge collapse, or a transportation accident – that certain individuals, groups or organizations may be singled out for censure. Unlike a civil or criminal trial in which defendants or accused

persons (i) face particular, precisely-drawn allegations, (ii) benefit from a presumption of non-liability or of innocence, and (iii) have a full right to counsel, (iv) to present evidence, (v) to cross-examine witnesses, and (vi) to seek interlocutory relief, in investigative inquiries these procedural protections are usually attenuated. The Supreme Court of Canada has upheld a commission's right to make findings of wrongdoing, even when the types of protections given to parties to judicial proceedings are not present in the executive order and have not been afforded in practice by the commission. In reaching this conclusion, the court emphasized that these are not findings of criminal or civil responsibility (*Canada (Attorney General) v Canada (Commission of Inquiry into the Blood System)*).

Those about whom an inquiry is contemplating making a finding of wrongdoing are entitled, under section 13 of the *Inquiries Act*, to receive advance notice of the commission's intention, and to make representations in relation to that potential finding. In some inquiries, such as for example, the *Commission of Inquiry into the Blood System*, 1997 *Attorney General of Quebec and Keable v Attorney General of Canada et al.*, dozens of section 13 notices were sent. However, this protection does not extend to other persons, who may be indirectly implicated in certain findings, nor does section 13 apply to any prior stages of the inquiry process. The fact that under the *Inquiries Act*, although not nearly to the same extent under the new Ontario *Public Inquiries Act*, a finding of wrongdoing by a person can be made without trial-like procedural safeguards is viewed with concern by lawyers and scholars. One reason is that despite the findings having no legal effect, reputations can be damaged simply by being named or singled out for blame in a report. There are also concerns about the impact on future criminal and civil proceedings, as these proceedings sometime follow inquiries. Finally, investigative inquiries are sometimes accused of acting as a substitute for criminal proceedings, and one of the concerns identified is that commissioners have coercive powers equivalent or superior to those of judges in a court setting, but without the same protections for witnesses. For example, commissioners have the right to compel testimony of witnesses, including those being investigated for wrongdoing, and they also frequently have the power to cite witnesses or participants for contempt.

In Canadian criminal law, a person charged with a crime cannot be forced to testify at his own criminal trial (Mackay & McQueen, 2003). The role of the *Canadian Charter of Rights and Freedoms* with respect to this issue will be discussed Section 5, immediately below. The Supreme Court of Canada has acknowledged that inquiries may damage reputations, but has also concluded that, as independent and impartial governance institutions, they have an important role to play in uncovering facts, preventing future tragedies, educating and informing the public, and restoring public confidence (*Canada (Attorney General) v Canada (Commission of Inquiry into the Blood System)*). The manner in which Canadian courts have deployed judicially-developed principles of procedural fairness to protect the rights of participants in inquiries will be discussed in Section 6, below.

## 5. Public Inquiries and the Constitution

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Historically, Canadian courts have used two constitutional tools to supervise the independent inquiry process. First, the provisions on the division of legislative powers (sections 91-92) of the *Constitution Act, 1867* have been invoked to prevent federally-established inquiries from trespassing on provincial jurisdiction, and *vice versa*. Second, the "legal rights" guarantees (sections 7-15) of the *Canadian Charter of Rights and Freedoms* have been invoked to ensure that inquiries respect for the procedural principles of fundamental justice.

### Division of Powers and jurisdiction for federal/provincial inquiries

The division of powers in the Canadian Constitution imposes a constraint on federal and provincial inquiries. Each order of government may only establish inquiries into matters within its own legislative jurisdiction. So, for example, criminal law, penitentiaries, the Royal Canadian Mounted



Police and the army are matters within federal jurisdiction, and therefore provincial inquiries are prohibited from establishing inquiries which are criminal in nature. They are equally prohibited from investigating the administration and management of federal institutions such as prisons. That being said, the Supreme Court of Canada has held that provincial inquiries into provincial matters can sometimes touch on federal matters if the two are connected (*Attorney General of Quebec and Keable v Attorney General of Canada et al.*; OLRC, 1992).

### Application of the Canadian Charter of Rights and Freedoms

A more important mechanism of constitutional control arises from the application of the *Canadian Charter of Rights and Freedoms*. The *Charter* applies to enactments of the Parliament and government of Canada as well as enactments of the legislature and government of each province as long as state action is involved. In consequence, the various inquiry statutes, as well as the activities carried out under them, are subject to the rights and freedoms guaranteed by the *Charter*.

Sections 7 to 14 of the *Charter* are directed to ensuring the protection of legal rights. However, many of the rights enunciated in these sections would not be affected by a public inquiry. For example section 7, which protects the life, liberty and security of the person, and prevents infringement of such rights unless in accordance with the principles of fundamental justice, is unlikely to apply to a public inquiry. Apart from contempt citations, inquiries have no coercive powers, so that to invoke section 7 it would be necessary to claim that damage to reputation is protected under security of the person guarantee (Mackay & McQueen, 2003).

Section 11 protects individuals charged in criminal and penal proceedings, providing rights such as a fair and public hearing before an independent and impartial tribunal, and the right to not be compelled as a witness against oneself. These are rights similar to those that many critics argue should be granted to public inquiry witnesses, particularly the right not to be compelled to self-incriminate. The courts have supported the power to compel testimony in inquiries, as long as it does not infringe on the rights of the witness in future proceedings (Ratushny, 2009). The right of witnesses to not have previous incriminating testimony used against them in other proceedings is protected in section 13 of the *Charter*. The wording of the section, referring to a witness who testifies in any proceedings, suggests the section would apply to commissions of inquiry (ALRI, 1992). Similar provisions are also found in the federal *Evidence Act*, as well as its provincial counterparts which relate to civil matters.

Quebec's provincial *Charter of Human Rights and Freedoms* contains a unique section pertaining to public inquiries. Section 23, similar to section 11 (d) of the Canadian *Charter*, provides that all persons with charges brought against them have the right to a hearing in front of an independent and impartial tribunal. The definition of tribunal in the Quebec *Charter* includes public inquiries, potentially ensuring that commissioners meet the constitutional norms of impartiality and independence (Lemieux, 2003). However, because the section requires that the claimant be charged, as well as that a person's rights and obligations be affected, the application of section 23 to inquiries is improbable (Witelson, 2003).

## 6. Non-constitutional Judicial Review of Inquiries

The federal *Inquiries Act*, as with most provincial inquiry statutes, does not specifically provide for judicial review of inquiry mandates, procedures and activities. Nonetheless, because from a constitutional perspective independent commissions of inquiry are administrative bodies that exercise statutory powers, they are subject to the ordinary law of judicial review on grounds of jurisdiction and a failure of procedural due process. Challenges related to jurisdiction, which includes both constitutional jurisdiction and jurisdiction arising from the terms of reference of the inquiry as set out in the executive order, are common (Anthony & Lucas, 1985). Although a commission has the right to interpret its terms of reference, its interpretation can be the subject of a

court challenge (the *Cornwall Inquiry*, 2009, cited in Carver, 2008), and where an inquiry is found to have exceeded its mandate courts will issue an order restraining the inquiry to its specific terms of reference (*Re Nelles and Grange*). Other aspects of the executive order, such as a deadline imposed by the government, have been challenged (but unsuccessfully) on judicial review as an improper interference with the independence of an inquiry (*Dixon v Canada*).

The procedures of an inquiry can also be a source of judicial review on the basis of that they are contrary to the principles of procedural fairness. Although it has been determined that the rules of natural justice (*audi alteram partem, nemo iudex in causa sua debet esse*) do not apply to commissions of inquiry because their functions are not judicial or quasi-judicial in nature, the judicially-developed principles of procedural fairness do apply to commission proceedings. Judicial review may be sought to have a commissioner recused for bias and partiality. Courts will also ensure, even in the absence of a provision like section 13 of the *Inquiries Act* in provincial law, that a person against whom charges of misconduct are about to be made receives a notice of that fact, and is given an opportunity to retain counsel, make representations, call evidence and submit documents (Carver, 2008; Anthony & Lucas, 1985; Ratushny, 2009). The admission of, or refusal to admit, evidence can also be a basis for judicial review on fairness grounds, as can findings of fact made by an inquiry (*Morneault v Canada*). While, in keeping with the law as developed in respect of judicial review of the activities of administrative agencies, the standards of procedural fairness for inquiries are more flexible and less rigorous than those applicable to judicial and quasi-judicial proceedings, they can still provide a significant opportunity for parties to ensure that those who may be affected by an inquiry have an opportunity to present evidence and arguments before a determination is made and the inquiry Report submitted.

### **Part III: Impact and Overall Assessment of Public Inquiries**

In the introduction it was noted the independent commissions of inquiry are an instrument of governance that originated as an instantiation of the royal prerogative in the late middle ages in England. As such, they can be assessed in a logic of “instrument choice”.

One begins with the question: “What are independent public inquiries meant to accomplish?” Next one asks: “What other governing instruments may be imagined to accomplish these purposes?” Thereafter, one considers: “What are the special merits (and demerits) of this form of legal instrument?” This then raises a larger issue of institutional design: “Are independent commissions of inquiry easily transplantable from state to state and legal system to legal system, or are there certain necessary political and constitutional prerequisites that must be in place for this type of instrument to work appropriately?” And finally one must ask: “How might this institution be improved so that it even more effectively achieves its purposes?”

This Part pursues these questions by considering the impact of independent public inquiries and making an overall assessment of strengths and weaknesses as an instrument of governance. It notes criteria for assessing the success of inquiries, paying particular attention to the question of public confidence, sets out various proposals for reform, and considers how commissions have been assessed in the academic and critical literature. This Part concludes with several observations about the adaptability of this mechanism of governance to states that are not parliamentary democracies.

#### **1. Evaluation**

It is difficult to develop general criteria for evaluating the success of public inquiries. Much depends on the particular objectives of a particular inquiry. Different criteria may well apply to policy-oriented inquiries as opposed to who-did-what-to-whom inquiries. Moreover, the time frame for assessing impact has a bearing on how one evaluates success. The true measure of some policy-

oriented inquiries (Rowell-Sirois, 1940; Laurendeau-Dunton, 1970; LeDain, 1973; Macdonald, 1985; Dussault-Erasmus, 1996)) can only be taken decades after the release of the Report. Other inquiries, whether they were policy-oriented (Berger, 1977), investigatory (Kaufman, 1998), or mixed (Krever, 1997), have had an immediate impact. As noted, implementation of inquiry recommendations is frequently used as a benchmark of success. However, some inquiries almost immediately considered as successful have not had their recommendations implemented in any meaningful way. In fact, it is not uncommon that recommendations of some inquiries are never implemented (LeDain, 1973). The question, then, is when inquiries might still be considered valuable even if their findings do not lead to obvious changes in practice or policy, or do not lead to later judicial proceedings of a civil or criminal nature.

### Implementation of recommendations

Both policy and investigative inquiries are usually mandated in the executive order to issue a Report containing recommendations, even though there is no requirement that the government follow the recommendations made. The fact that recommendations are often not implemented has led some commentators to argue that public inquiries are procedural tools used to delay action and stifle public controversy. If this is the case, then an inquiry might be considered successful by the government applying a choice of governing instrument perspective (but not by citizens applying broader public interest perspective), precisely because its recommendations are *not* implemented.

Although there has been little empirical research in this area, there appear to be certain conditions which may make implementation of recommendations more or less likely (Stutz, 2008; Salter, 1990). Some of these are within an inquiry's control and some are not. Among the former conditions one might cite the feasibility of the recommendations made. Recommendations that would drastically alter the *status quo* are less likely to be implemented. So too recommendations that would be inordinately expensive to implement are likely not to be acted upon. For example, in Quebec the 1991 *Task Force Report on Access to Justice* (1991) recommended significant increases to the budget for legal aid and was not implemented; conversely, the Quebec Justice Minister's *Committee on Strategic Lawsuits against Public Participation* (2007) produced recommendations that entailed little cost to the government, and were enacted into legislation within a year. Of course, it is not advisable that commissioners spend too much time considering what would be feasible to government since such a pre-occupation might come at the expense of the quality of analysis and the creativity of proposed solutions (Campbell, 2003, Salter, 1990).

Reasons for non-implementation outside the inquiry's control might include jurisdictional issues, a change in government, or evolving public attitudes that diminish the political advantage to be gained from implementation. In addition, there may occasionally be situations where certain policy recommendations of a Report are rendered less relevant because of intervening legislative or judicial decisions. Finally, especially in the case of investigations where a commission recommends the prosecution, dismissal or other sanction of a wrongdoer, a resignation, death or flight *extra juris* may make it impossible to act upon the recommendations.

### Other measures of success

Essentially, the action taken or not taken following an inquiry is not necessarily a reflection on the quality of the inquiry's work. Despite the fact that none of an inquiry's recommendations are ever implemented, a commission can still be considered to have been a success because of its work in informing and educating the public, or because it enabled broad segments of an affected public to participate in the inquiry process. Furthermore, it has been noted that inquiries play an important role in framing public issues and initiating policy debate (Salter, 1990). For example, it is frequently observed that the Canadian understanding of Aboriginal issues has been influenced by public inquiries (McCamus, 2003; Lemieux, 2003).

Even if inquiry recommendations are disregarded, there is still value to be found in the process and findings of the inquiry. For example, public inquiries often influence the future behaviour of government officials (Ratushny, 2009), and sometimes inquiries can have unanticipated effects on policy and practices. The process of engagement with Aboriginal peoples during the *Mackenzie Valley Pipeline Inquiry*, 1977 modeled, and created expectations about, the way government should consult with Aboriginal people on resource development. These practices have now become standard practice in all such negotiations with Aboriginal people.

Still other commissions, for example the *Commission on the Non-Medical Use of Drugs*, 1973, the *Royal Commission on the Economic Union and Development Prospects for Canada*, 1985 and the *Royal Commission on Aboriginal Peoples*, 1996, all produced a considerable amount of valuable research. This research was not constrained in the way that policy research within government departments or by academic investigators working under government contract typically is, and also unlike such in-house or commissioned research, it was immediately put into the public domain.

Finally, some have argued that in many cases, the primary role of an inquiry is to enable a society to engage in a process of catharsis, either following a period of great social upheaval (as in Truth and Reconciliation Commissions) or when a society is in the process of accommodating itself to a new reality (as in the case of the *Royal Commission on Bilingualism and Biculturalism*, 1970). In such cases, the inquiry can address these issues outside the rough-and-tumble of everyday politics and make recommendations that might well be different from the partisan positions taken by all political parties (LeDain, 1973; Macdonald, 1980).

## 2. Public Confidence and Independence of Inquiries

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It is well known that there is a great deal of public confidence in public inquiries in Canada. Inquiries can help inform and educate the public, and can sometimes provide individual citizens or informal groups of citizens with an occasion for direct involvement in the hearings or an opportunity to make submissions. Furthermore, the final reports of inquiries are often released to the public where they can continue to nourish public debate and policy discussion of the issues they raise. In general, the open, consultative and transparent processes of inquiries do much to enhance public confidence in the impartiality of commissioners. Public confidence is also greatly dependent on the perceived independence of inquiries from the government that established them. This section will examine how independence adds to the value and legitimacy of inquiries, and how the independence of inquiries can be threatened, thereby compromising public confidence (Stutz, 2008; LRCC, 1979.).

Apart from rare cases where the *Charter of Rights and Freedoms* is applicable or the principles of procedural fairness (notably the rule *nemo iudex in causa sua debet esse*) may be invoked, the independence of inquiries is not guaranteed by law. Whether an inquiry is, in fact, independent depends on a series of political decisions by the government relating to the scope of its mandate, the persons selected as commissioners and the ability of the inquiry to conduct its proceedings in public.

The presence of judges as commissioners greatly increases the appearance of independence of an inquiry. Canadian judges are generally well respected by the public and have a reputation for fairness and impartiality. Judges also have knowledge and expertise which is particularly relevant to investigative commissions. Most importantly, as noted in Part II, because judges themselves benefit from security of tenure flowing from the principle of judicial independence, they are able to conduct inquiries without fear of seeing their status or remuneration diminished as a consequence of any conclusions they reach or recommendations they make. A general perception that the judicial guarantee of independence carries over into situations where judges serve as commissioners increases public confidence and adds credibility to the inquiry process.

That being said, there are also disadvantages to having judges as commissioners. A first concern is that by using judges to perform non-judicial functions the executive is undermining the principle of separation of powers that underlies the justification for judicial independence. However, in Canada, and in Parliamentary systems generally, separation of powers is less absolute than in congressional systems like that found in the United States; judges are often conscripted to perform executive tasks as *personae designatae*, and the Chief Justice of Canada acts in the place of the Head of State when the latter is not available. Where the government uses the independence of the judiciary for political purposes, by bringing judges into partisan or politically controversial issues this can not only undermine the independence of the judiciary as an institution, but also permanently damage the reputation of the individual judge (Dodek, 2010). Some also claim that excessive use of judges for non-judicial purposes compromises the capacity of the judiciary to handle its everyday workload.

The Canadian Judicial Council has generally supported the involvement of judges in commissions, but in the past has issued position statements and certain guidelines for the appointment of judges to commissions of inquiry. In 2010, the Council released a formal protocol (*Canadian Judicial Council*, 2010) setting out guidelines to govern the practice. These include consulting first with the chief justice who is to make the decision in cooperation with the requested judge; the guidelines require the chief justice to consider the impact of the appointment on the regular work of the court, the appropriateness of the judge requested, and the nature of the subject matter. The protocol also provides that judges should be given the specific terms of reference before being asked to accept; the idea is to enable the chief justice and judge to determine whether or not the executive seeks to unduly constrain the inquiry and limit the judge's independence through the constituting executive order. Overall, the protocol indicates that the involvement of judges is a positive thing, but requires safeguards in order to protect the judiciary and ensure public confidence.

### 3. Various Proposals for Reform

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In addition to the abundant literature criticizing public inquiries, there have been a number of official reports making recommendations on the reform of inquiry statutes. In Canada, the Law Reform Commission of Canada (LRCC, 1979), and two Canadian provincial commissions -- the Alberta Law Reform Institute (ALRI, 1992) and the Ontario Law Reform Commission (OLRC, 1992) -- have each released reports recommending amendment of their respective inquiry statutes. The Law Commission of Canada also published an edited book of papers from a conference held on Commissions of Inquiry which included proposals for improving the legislation establishing public inquiries, as well as the processes and procedures involved (Mullan & Manson, 2003). Many of the other common law jurisdictions where public inquiries are used have done the same. For example, in Australia, the Australian Law Reform Commission (ALRC, 2010), and two Australian state commissions -- the Victorian Law Reform Commission (VLRC, 2005), and the Tasmania Law Reform Institute (TLRI, 2003) -- have all made recommendations regarding public inquiry statutes; the New Zealand Law Commission (NZLC, 2008) and the Law Reform Commission of Ireland (LRCI, 2005) have also released reports recommending reform to inquiry statutes. Despite differences in legislation and political climate, reports from other jurisdictions recommending reform have raised similar concerns to those highlighted in Reports from Canada.

One of the common issues to the three Canadian proposals for reform is the extent of the coercive powers typically granted to commissioners. The Law Reform Commission of Canada recommended that inquiries be divided according to their function -- investigatory or advisory -- with investigative inquiries being granted coercive powers, while advisory inquiries possibly being granted such powers but not necessarily. This functional approach was not particularly well received, and although considered in the provincial proposals from Ontario and Alberta, was not recommended by either. The Ontario proposal recommended that all inquiries have coercive powers, while the Alberta proposal recommended that the Lieutenant Governor in Council could grant such powers to any inquiry if deemed necessary.

The three Canadian reports also addressed issues of individual rights and recommended protections such as immunity for commissioners and commission counsel and protection for witnesses similar to that in judicial proceedings. The Law Reform Commission of Canada proposal included recommendations such as the right to counsel for all witnesses, immunity from defamation action for witnesses, and the right to call witnesses for those being charged with misconduct. The Alberta proposal also included protections such as immunity for witnesses and the right to be represented by counsel, while the Ontario proposal included the right, subject to narrow exceptions, not to self-incriminate.

All three proposals aimed at encouraging public participation through open and transparent inquiry processes, outlining situations when commissions can hold hearings *in camera*, providing guidelines for individuals and organizations interested in participating, as well as attempting to ensure that inquiry reports are released to the public. The Ontario and Alberta proposals specifically addressed the issue of independence, with the Alberta report recommending that a provision on independence be specifically included in a new inquiry statute, while the Ontario report recommended that independence be a guiding principle of public inquiries. The Law Reform Commission of Canada report did not make any specific recommendations for independence, but some of its procedural recommendations appear to be an attempt to ensure independence.

Not surprisingly given the fact that inquiries frequently taken much longer to complete than initially contemplated in the executive order, and often run over-budget, a common theme of each Report was the need to increase the efficiency of public inquiries. None of the three reports made any specific recommendations regarding the role of judges as commissioners of inquiries, although this issue has been the subject of extensive debate in the literature, as noted earlier.

Finally, the proposal from the Alberta Law Reform Institute included a detailed recommendation related to when judicial review of inquiry decisions should be permitted, while the view of the Law Reform Commission of Canada was that judicial review of public inquiries should be governed by the general law relating to judicial review of administrative action.

Despite the consistency of the recommendations of these reports, neither the Parliament of Canada, nor most provincial legislatures have amended their *Inquiries Acts* in consequence. Only the province of Ontario, which enacted a totally revised *Public Inquiries Act* (that came into force on June 1, 2011), has significantly recast its public inquiries legislation. This statute, adopted in conjunction with the *Good Government Act* in 2009 incorporated a number of structural and procedural proposals meant to codify the rights of participants in an inquiry process. Even though the Act sought to incorporate the latest thinking about the scope, function, processes and judicial oversight of inquiries, it has been criticized, primarily on the basis that it gives the government too much control over commissions, limiting their independence and constraining their capacity to conduct truly impartial and independent policy and investigative inquiries.

#### **4. The Political Economy of Public Inquiries**

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Although the legislative branch of any state or country could, in theory, enact legislation providing a mechanism to establish *ad hoc* independent public inquiries, this type of governing instrument is not necessarily transplantable from one jurisdiction to another. The likelihood of successful adoption of the *Inquiries Act* model depends on a variety of factors: social, economic, legal and political. This section will provide an overview of some of the important institutions and practices that affect the actual impact of inquiries seen as an instrument of governance. In particular it considers the adaptability of the *ad hoc* independent commission of inquiry mechanism to states that are not parliamentary democracies.

First, the involvement of judges in inquiries would be impossible in a climate with a strict separation

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of powers doctrine (Carver, 2008). While the independence of the judiciary is an important characteristic of the Canadian constitutional system, there is no strict doctrine of separation of powers in Canada, and nothing to prevent judges from performing executive functions. This is not the case in other jurisdictions, for example in the United States where the constitution would not permit it (*Re Residential Tenancies Act*). However, having a sitting judge as an inquiry commissioner is certainly not necessary, and many Canadian inquiries are headed by individuals who are not members of the judiciary. On the other hand, in Canada the involvement of judges, specifically in investigative inquiries, has been an important source of public confidence in inquiries. In this light, retired members of the senior judiciary may well be an adequate substitute for sitting judges as inquiry commissioners.

The existence of mechanisms to protect individual rights should be considered essential to the proper functioning of commissions of inquiry. The coercive powers granted to commissioners, despite the criticism, are generally considered necessary to ensure that commissioners obtain the information required to carry out an investigation. Such powers do have a serious impact on individual rights, and therefore it is necessary that all those involved be protected. In Canada, public inquiries are subject to the *Canadian Charter of Rights and Freedoms*, and also to certain rights in the *Canadian Bill of Rights*. Other statutes, such as the federal *Evidence Act* also provide protections to inquiry participants. An independent prosecutorial service may also be important in ensuring that serious infringement of individual rights does not occur. Inquiries can generate pressure to charge and convict individuals (Fitzgerald Inquiry, 1989) even though the goal of inquiries is not to act as a substitute for judicial proceedings. Without a strong and independent prosecutorial service there is a risk that an inquiry might inflame public pressure for criminal proceedings rather than serve to provide a dispassionate report that can be assessed and acted upon, if necessary.

The role of commission counsel is also important in ensuring the legitimacy of an inquiry (O'Connor, 1990). Particularly in investigative inquiries where commission counsel is responsible for cross-examining witnesses; a task which is adversarial by nature and which if undertaken by the commissioner, would compromise the perception of the commissioner's impartiality. Sometimes this role means they do not participate in drafting the final report (Ratushny, 2009).

The free flow of information within civil society is also necessary for inquiries to be effective. As has been noted, much of the value of public inquiries lies in their ability to inform and educate the public. However if information is not accessible, there is no guarantee that the public is receiving accurate information, or any information at all. The media is crucial to providing information on public inquiries, and can even be involved in initiating calls for a public inquiry. An independent media is therefore another important institution in ensuring that inquiries can achieve their public information and education function (Fitzgerald Inquiry, 1989).

*Ad hoc* independent public inquiries are an instrument of governance. As such they must be seen in relation to the role played by other governmental institutions. In the concrete, each inquiry is a creature of the executive, which establishes them through an executive order. Yet, also in the specific and concrete, their effectiveness depends on their relative independence from the executive. In the more abstract, they reflect a choice by the legislative branch to create an institution aside from Parliament, the executive, the judiciary and the public service to inquire into issues of policy or to investigate misfortune or wrongdoing. Without a strong and vigilant Parliament, and especially an opposition that will hold the executive to account for the manner in which it deploys this particular governing instrument, the advantages of independent inquiries will be compromised and they will become nothing other than one more mechanism by which the government of the day is able to advance its policy agenda or impose its political will.

Finally, a public culture of respect for the Rule of Law, backed by a series of complementary institutions of accountability that report to the legislative arm of government provides a crucial reinforcement for the fairness, effectiveness and accountability of inquiries. These complementary institutions include independent auditors-general, independent information and privacy commissioners, independent

ombudsmen, independent ethics commissioners, independent police commissions, independent civil service commissions, independent chief electoral officers, and independent judicial councils. While not all of these types of institutions are essential for creating a public culture of respect for the Rule of Law, it is inconceivable that *ad hoc* independent commissions of inquiry could make much of a difference to promoting democratically accountable governance and to rooting out wrongdoing and corruption were they totally absent (Macdonald, 2004).

## Conclusion

*Ad hoc* independent commissions of inquiry are a longstanding tradition in the Canadian constitutional system. They have been established to advise on policy issues of public importance, as well as to investigate major disasters and allegations of wrongdoing of various public officials. Although the reliance of government on inquiries as an instrument of governance has fluctuated over the years, in general they have been an instrument well-liked by governments of all political persuasions and valued by the general public. Despite this popularity, however, the existence of public inquiries in their current structural and procedural form has been the source of repeated criticism. The litany that has attracted attention in the literature includes: (i) their potential to infringe on individual rights, (ii) the costs and time required to complete an inquiry, (iii) whether they are simply tools used by government to delay action and improperly influence public opinion on matters of policy, (iv) whether they are instrument of governance that enables governments to persecute political opponents or unpopular minorities without following the basic procedural protections of the criminal and civil justice systems, and (v) their impact on the reputation of the judiciary for impartiality.

Should a state be contemplating establishing a structure of *ad hoc* independent commissions of inquiry as an institution of government, experience in Canada would suggest that due regard must be paid to the following three considerations:

1. The basic structural and procedural features of commissions – a mechanism for appointment, an independent review of the specific terms of the commission mandate, an independent check on the qualifications of commissioners, and a detailed procedural code to guide hearings and deliberations – should be elaborated in a statute.
2. The mandate, scope of activity and procedures of commissions must be subject to judicial review to ensure no excess of jurisdiction or breach of the procedural “principles of fundamental justice”.
3. The statute under which commissions are established must specify that, notwithstanding any purported limitations in the executive order or instrument under which a particular inquiry is established, the Report and Recommendations of the commission must be made public (subject to very narrow exceptions), and the executive must be required to publicly table a Report before the state’s legislative body within a short period after submission (for example, 90 days), and when doing so, must provide a written response as to why certain parts of the Report have been deleted, and must also submit a written response as to how it proposes to deal with the Commission’s recommendations.

Enacting these three types of requirement (not all of which, regrettably, are currently in place in Canada) will serve to ensure that commissions are truly effective as an instrument of governance.

Taking all the above into account, there is no doubt that *ad hoc* independent commissions of inquiry have made a significant contribution to achieving evidence-based public policy and to advancing the citizen input into, and the transparency of, public governance. In combination with an independent judiciary, an active and vigilant Parliament, a free press, and a brace of other institutions of accountability, independent commissions of inquiry can be a powerful instrument for promoting and reinforcing a public culture of respect for the Rule of Law.



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