

Public Inquiries' Terms of Reference: Lessons from the Past – And for the Future

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ABSTRACT

Terms of reference define public inquiries' power, yet there has been little analysis of them. In this article, the author analyzes the terms of reference of six different public inquiries – three widely considered successful (the Walkerton Inquiry, Goudge Inquiry, and Kaufman Commission), three widely considered unsuccessful (the Somalia Inquiry, Cornwall Inquiry, and Missing and Murdered Indigenous Women Inquiry) – to investigate how terms of reference contribute to the success of public inquiries. Throughout all analyzed inquiries, there is an inevitable tension between wanting to have clear terms of reference that provide guidance to the inquiries, without being so restrictive so as to impede the commissioners from fulfilling their work. He ultimately concludes that specificity is the side on which governments should err when crafting the investigative portions of terms of reference. However, he suggests that it is completely acceptable – and likely desirable – to place

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little if any restrictions on the policy-recommending functions of public inquiries, or the procedural/operational aspects of their terms of reference. He also suggests that fewer commissioners lead to more effective investigative inquiries.

I. INTRODUCTION

Since being called, the National Inquiry into Missing and Murdered Indigenous Women and Girls (“MMIWG Inquiry”) has been criticized for a plethora of reasons, from disorganization, to an ineffectual Interim Report, to neglecting victims.¹ There is little consensus on the alleged reasons for this, but considerable criticism has been levelled at the Commissioners themselves.² In this paper, I suggest another narrow, and likely non-exclusive, reason for the MMIWG’s Inquiry’s difficulties: its terms of reference.

This issue is not confined to the MMIWG Inquiry. All public inquiries take their powers from their terms of reference, promulgated by either the Governor-in-Council, or the Lieutenant-Governor-in-Council.³ Acting outside those terms of reference leads to the inquiry acting without jurisdiction, with such actions being illegal.⁴ It is hard, therefore, to overstate the importance of terms of reference.⁵ So how can terms of reference be crafted to lead to a successful public inquiry? It is this underexplored question – with implications far beyond the MMIWG Inquiry – that I investigate in this paper.

In Part II, I analyze how to define a “successful” public inquiry. In Part III, I explain my choice to investigate the terms of reference of six different public inquiries, with three widely being praised for their effectiveness and three widely being criticized for their ineffectiveness. I also recognize the

¹ See e.g. Nancy Macdonald & Meagan Campbell, “Lost and Broken” *Maclean’s* (13 September 2017), online: <http://www.macleans.ca/lost-and-broken/>.

² *Ibid.*

³ Ed Ratushny, *The Conduct of Public Inquiries* (Toronto: Irwin Law, 2009) at 261-262.

⁴ *Ibid.* at 24. Seen in, e.g. *Ontario Provincial Police v Commissioner of the Cornwall Public Inquiry*, 2008 ONCA 33, 232 OAC 251 [Moldaver *Cornwall* Decision].

⁵ Barbara McIsaac, QC, “Review of Professor Ed Ratushny *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009)” 4 JPPL 121 at 122, summarizing Ratushny, *supra* note 3.

limits of this methodology. In Part IV, I review the terms of reference of the six inquiries, and how they led to the inquiries having positive or negative results. Finally, in Part V, I posit what future (Lieutenant-)Governors-in-Council can learn from past experiences, and how this should inform future cabinets in crafting public inquiries.

It is a trite observation that terms of reference should be specific enough to provide clear guidance to commissioners while also being flexible enough to not foreclose the ability to fulfill the purpose of a public inquiry. I nonetheless conclude that, with respect to defining the subject matter that an inquiry is to investigate, specificity is the side on which governments should err. At the same time, effective inquiries appear to have broad policy mandates and few procedural or operational restrictions. Governments will undoubtedly continue to struggle to strike the right balance between specificity and generality in terms of reference for future public inquiries – there is probably no “one right way” to do so. Though every public inquiry is unique, generality and specificity should almost invariably be present – just in different aspects of terms of reference.

II. WHAT IS AN “EFFECTIVE” PUBLIC INQUIRY?

“Effectiveness” is a difficult concept to define with precision, and its characteristics are more likely to be qualitative rather than quantitative. With respect to the effectiveness of public inquiries, I am content to begin with criteria from Justice Freya Kristjanson, who notes fairness, thoroughness, cost-effectiveness, and providing a “comprehensive and timely report that analyzes the key issues and provides concrete and realistic recommendations”⁶ as the main characteristics of a successful public inquiry.

These factors might not be exhaustive, and another criterion – that of implementation – also seems relevant. A Commission may be successful even if many of its recommendations are not implemented quickly or even at all.⁷ Moreover, sometimes its recommendations may not be acted upon

⁶ Madam Justice Freya Kristjanson, “Procedural Fairness and Public Inquiries” in Ronda Bessner & Susan Lightstone, *Public Inquiries in Canada: Law and Practice* (Toronto: Thomson Reuters, 2017) at 98.

⁷ Professor David Cameron expresses this view in CBC News, “Canada and Public

for years if not decades, as occurred in the case of the recommendation of the Royal Commission on Aboriginal Peoples (“RCAP”) to divide the work of the Department of Indian Affairs.⁸ In any event, implementation is the prerogative of the government, not the commissioner(s), and if a commissioner is a sitting judge, any attempt to be involved in implementation would be particularly inappropriate.⁹ Even so, Peter Carver, while accepting the limitations of using implementation to measure an inquiry’s success, admits that it is not irrelevant,¹⁰ and it would therefore appear to be an appropriate consideration in addition to those noted by Justice Kristjanson.

Lorne Sossin has posited that media coverage and generating “public confidence” are also relevant.¹¹ While the latter is hard to quantify, it would appear to be relevant to the public nature of public inquiries – indeed, public inquiries that are not conducted mostly in public can have difficulty in fulfilling their purposes.¹² Summarizing work in this area,

Inquiries” (13 November 2007), online: <<http://www.cbc.ca/news2/background/cdngovernment/inquiries.html>>, as does Professor Peter Carver in “Getting the Story Out: Accountability and the Law of Public Inquiries” in Colleen M Flood & Lorne Sossin, eds *Administrative Law in Context*, (Toronto: Emond Montgomery Press, 2013) at 547.

⁸ Aaron Wherry, “Another doctor is in: Philpott joins Bennett in pursuit of reconciliation” *CBC News* (28 August 2017), online: <<http://www.cbc.ca/news/politics/jane-philpott-indigenous-services-analysis-wherry-1.4265166>>.

⁹ The Hon Associate Chief Justice Dennis R O’Connor & Freya Kristjanson, “Some Observations on Public Inquiries” (delivered at the Annual Conference of the Canadian Institute for the Administration of Justice, Halifax, October 13, 2007), online: *Court of Appeal for Ontario* <<http://www.ontariocourts.ca/coa/en/ps/speeches/publicinquiries.htm>>; Gregory J Inwood & Carolyn M Johns, “Commissions of inquiry and policy change: Comparative analysis and future research frontiers” 59:3 *Canadian Public Administration* 382 at 399.

¹⁰ Carver, *supra* note 7 at 547.

¹¹ Lorne Sossin, “The Goudge Inquiry: Anatomy of Success for an Inquiry to Change Policy?” in Gregory J Inwood & Carolyn M Johns, eds, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) at 248.

¹² Jasminka Kalajdzic, “Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry” (2010) 36 *Queen’s LJ* 161 is an analysis of one such instance.

Ronda Bessner emphasizes the role of public inquiries in educating the public.¹³ This is a difficult task,¹⁴ and goes beyond media coverage, also including keeping in touch with the public through the internet, and giving the public the option to listen to and/or attend hearings.¹⁵

Bessner also persuasively argues that healing and apologies are relevant to the effectiveness of public inquiries.¹⁶ While these are unlikely to be the primary purposes of public inquiries, as criminal and civil liability do not apply, apologies are more likely in the public inquiry context, which can in turn lead to healing.¹⁷ (Admittedly, these apologies are also facilitated by legislation such as Ontario's *Apology Act*, which restricts the ability to use apologies in future proceedings, with such legislation therefore incentivizing apologies.¹⁸) Ultimately, therefore, I will look at the following eight factors as indicators of an inquiry's effectiveness: i) fairness; ii) thoroughness; iii) cost-effectiveness; iv) quality of report; v) media coverage/public education; vi) any apologies given; vii) facilitation of healing; and viii) implemented recommendations.

III. CHOICES OF INQUIRIES

Before proceeding further, I acknowledge that public inquiries may be considered effective or ineffective for reasons that have little if anything to do with their terms of reference. For instance, a commissioner may behave in a biased manner, as seen in the "Gomery Inquiry" into sponsorship contracts in Quebec,¹⁹ or otherwise violate fundamental principles of

¹³ Ronda Bessner, "Assessing the Effectiveness of the Public Inquiry" in Bessner & Lightstone, *supra* note 6 at 412ff.

¹⁴ See e.g. Peter H Russell, "The Royal Commission on Aboriginal Peoples: An Exercise in Policy Education" in Inwood & Johns, *supra* note 9.

¹⁵ *Supra* note 13.

¹⁶ *Ibid* at 414ff.

¹⁷ The juxtaposition between Indigenous-based healing processes and the traditional criminal justice system has been extensively reviewed since *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679. See e.g. Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNB LJ 313 at 317-319.

¹⁸ *Apology Act*, 2009, SO 2009, c 3.

¹⁹ Officially known as the Commission of Inquiry into the Sponsorship Program and Advertising Activities, discussed in *Chrétien v Gomery*, 2008 FC 802, 333 FTR 157,

procedural fairness,²⁰ such as not giving an affected party adequate notice.²¹ The flip side of this coin is that an inquiry may be particularly successful due to characteristics of a particular commissioner. Indeed, though I use the “Walkerton Inquiry” as one of my examples of a successful inquiry, much of its success has been attributed to the leadership of Justice Dennis O’Connor of the Court of Appeal for Ontario (as he then was), particularly his decisions to hold the inquiry in Walkerton and balance fairness with efficiency.²² However, using multiple case studies to determine the link between an inquiry’s success and its terms of reference mitigates the likelihood that idiosyncratic characteristics of particular inquiries will affect my overall analysis.

With this in mind, the following three instances can be used as cases-in-point of “successful” inquiries. The first is the “Walkerton Inquiry”, led by Justice O’Connor and concerning the tragedy of contaminated drinking water in Walkerton, Ontario. Though not without journalistic detractors,²³ the Walkerton Inquiry is frequently cited by judges and academics as the “model” of successful inquiries in terms of acceptance and effectiveness.²⁴ Stan Koebel’s apology, that “words cannot describe” how sorry he was for his role in doctoring environmental documents, was moving.²⁵ The Inquiry possessed all the hallmarks of effectiveness, was completed in a timely capacity without a single application for judicial

aff’d 2010 FCA 283, 10 Admin LR (5th) 295.

²⁰ See Kristjanson, *supra* note 6 at 98. Admittedly, significant deference is given to Commissioners in determining what procedure was appropriate: see, e.g. *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, 151 DLR (4th) 1 [Krever].

²¹ See e.g. *Stevens v Canada (Attorney General)*, 2004 FC 1746, [2005] 2 FCR 629.

²² Justice John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51:4 McGill LJ 783 at 793; Ronda Bessner, “The Role of the Commissioner of a Public Inquiry” in Bessner & Lightstone, *supra* note 6 at 38-39.

²³ Editorial Board, “It Doesn’t Hold Water” *National Post* (22 January 2002).

²⁴ See e.g. Gomery, *supra* note 22 at 793.

²⁵ Associated Press, “Canadian town wary of water after outbreak” *Deseret News* (20 December 2000), online: <<https://www.deseretnews.com/article/799556/Canadian-town-wary-of-water-after-outbreak.html>>; Bessner, *supra* note 13 at 418.

review (an indicator of fairness),²⁶ and led to a thorough report that changed drinking water policy in Ontario.²⁷

Second, I will turn to the “Goudge Inquiry”, led by Justice Stephen Goudge of the Court of Appeal for Ontario, into Pediatric Forensic Pathology in Ontario. The focus of the Inquiry was primarily on the medical malpractice of Dr. Charles Smith, which led to numerous wrongful convictions. Despite seeking and being granted a short extension,²⁸ the Inquiry was widely considered to be fair.²⁹ The report has been cited by many Canadian academic articles³⁰ and court cases.³¹ After Dr. Smith’s apology to him, William Mullins-Johnson forgave Dr. Smith

²⁶ See quote of William Trudell in Susan Lightstone, “The Roles and Experiences of Counsel for Parties at Public Inquiries” in Bessner & Lightstone, *supra* note 6 at 307-308.

²⁷ See, e.g., Ida Ngueng Feze et al., “The Regulation of Novel Water Assessment Biotechnologies: Is Canada Ready to Ride the Next Wave?” (2014) 26 J Envtl L & Prac 201 at 218-219, noting that examples of the changes in drinking water policy resulting from the Inquiry include “source protection, stricter assessment of laboratory monitoring processes, and a system for the approval of testing methods aimed at assessing drinking water quality”.

²⁸ Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario, Report* (Toronto: Ontario Ministry of the Attorney General, 2008) vol 4, The Honourable Mr. Justice Stephen Goudge, Appendix 2 at 682, online: <https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v4_en_pdf/Vol_4_Eng_App01-09.pdf> [Goudge Inquiry Terms of Reference].

²⁹ Sossin, *supra* note 11 at 258.

³⁰ See, e.g., David Paciocco, “[Taking a ‘Goudge’ Out of Bluster and Blarney: An Evidence-Based Approach to Expert Testimony](#)” (2009) 13 Can Crim L Rev 135, and Sossin, *ibid*. This is just skimming the surface. Based on a July 12, 2018 Westlaw search for “Goudge Inquiry”, I found 45 citations.

³¹ Merely at the appellate level, one can find, e.g., *R v McLennan*, 2016 ONCA 732, 343 CCC (3d) 39; *R v Orr*, 2015 BCCA 88, 368 BCAC 157; *R v T(M)*, 2013 ONCA 476, 308 OAC 143; *Abbott and Haliburton Co v White Burgess Langille Inman*, 2013 NSCA 66, 330 NSR (2d) 301, rev’d on other grounds, 2015 SCC 33, [2015] 2 SCR 182 [“*White Burgess SCC*”]; *Carmen Alfano Family Trust v Piersanti*, 2012 ONCA 297, 291 OAC 62; *R v Simmons*, 2012 ONCA 94, 289 OAC 39; *R v Marquardt*, 2011 ONCA 281, [2011] OJ No 1619; *R v Kumar*, 2011 ONCA 120, 273 OAC 130; *R v F(C)*, 2010 ONCA 691, [2010] OJ No 4471; *R v M(C)*, 2010 ONCA 690, [2010] OJ No 4472; *Adams v Cook*, 2010 ONCA 293, 100 OR (3d) 1; *R v Dooley*, 2009 ONCA 910, 257 OAC 150; *R v Sherret-Robinson*, 2009 ONCA 886, [2009] OJ No 5312.

“for [his] own healing”.³² Commissioner Goudge also noted the effectiveness of the counselling offered during the inquiry process.³³ More importantly, his recommendations were adopted by the provincial government and, as such, forensic pathology services in Ontario are now delivered in a fundamentally different way.³⁴

Third, I will look at the “Kaufman Commission”, officially the Commission on Proceedings Involving Guy Paul Morin, where Justice Fred Kaufman of the Quebec Court of Appeal analyzed the wrongful conviction of Guy Paul Morin. Though the Commission did require a nine month extension,³⁵ its practical recommendations could be implemented³⁶ and the final report has been cited dozens of times by courts (including at least four citations by the Supreme Court of Canada alone³⁷) and academics.³⁸ The report has been particularly cited with respect to the use of evidence that has the potential to be misused.³⁹

The following three cases will be used as examples of “unsuccessful” public inquiries. The first is the “Somalia Inquiry”, officially the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.⁴⁰ No less than five applications for judicial review⁴¹ resulted from

³² Bessner, *supra* note 13 at 419.

³³ *Ibid* at 415.

³⁴ See Sossin, *supra* note 11 at 246-248; Ministry of Community Safety and Correctional Services, News Release, “Ontario Acts on Goudge Recommendations” (23 October 2008), online: <<https://news.ontario.ca/archive/en/2008/10/23/Ontario-Acts-On-Goudge-Recommendations.html>>.

³⁵ Ontario, *The Commission on Proceedings Involving Guy Paul Morin: report* (Toronto: Ontario Ministry of the Attorney General, 1998) vol 2, The Honourable Fred Kaufman at 1249 [Kaufman Report].

³⁶ Discussed by, e.g. Lisa Dufraimont, “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?” (2008) 33 Queen’s LJ 261.

³⁷ *White Burgess* SCC, *supra* note 31 at para 12; *R v White*, 2011 SCC 13, [2011] 1 SCR 433 at paras 45-46 (per Rothstein J), 107 (per Charron J, concurring), and 141 and 182-183 (per Binnie J, dissenting); *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 at para 36; *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 at para 99.

³⁸ See, e.g. Dufraimont, *supra* note 36.

³⁹ *Supra* notes 36-37.

⁴⁰ Described in Ratushny, *supra* note 3 at 21.

⁴¹ *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment*

this inquiry, in addition to the Inquiry needing to seek, and be granted, intervenor status in another case.⁴² The cabinet and the Inquiry also descended into a(n in)famous dispute, which the Federal Court of Appeal had to resolve,⁴³ after the government forced the Inquiry to wrap up its work. Moreover, the government declined to adopt some of its recommendations.⁴⁴

The second ineffective public inquiry I will analyze is the “Cornwall Inquiry”, officially the Commission of Inquiry into the Events Surrounding Allegations of Abuse of Young People in Cornwall. The Inquiry was extensively delayed,⁴⁵ partially because of five judicial reviews.⁴⁶ Failing to find an alleged pedophile ring and making tepid findings regarding institutions’ alleged failures to respond to allegations of child abuse, it appears as though the Inquiry had little if any public policy

of Canadian Forces to Somalia), [1997] 1 FC 911, 126 FTR 241 (TD), rev'd [1997] 2 FC 527 (AD); *Dixon v Canada (Somalia Inquiry Commission)*, [1997] 3 FC 169, 1997 CarswellNat 1133 (AD) rev'g [1997] 3 FC 169 (TD) [*Dixon*]; *Boyle v Canada (Somalia Inquiry Commission)* (1997), 131 FTR 135, [1997] FCJ No 942 (TD); *Morneault v Canada (Attorney General)* (1998), 150 FTR 28, [1998] FCJ No 501 (TD) rev'd, (2000), 184 FTR 15 (AD); *Labbé v Canada (Somalia Inquiry Commission)* (1997), 128 FTR 291, 1997 CarswellNat 325 (TD).

⁴² *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 116 FTR 131, 1996 CarswellNat 946 (TD).

⁴³ *Dixon*, *supra* note 41.

⁴⁴ Martin L Friedland, “Military Justice and the Somalia Affair” (1998) 40 Crim LQ 360 at 398.

⁴⁵ Robert Benzie & Rob Ferguson, “Huge inquiry fails to find pedophile ring in Cornwall”, *Toronto Star* (16 December 2009), online: <https://www.thestar.com/news/ontario/2009/12/16/huge_inquiry_fails_to_find_pedophile_ring_in_cornwall.html>.

⁴⁶ *Commissioner of the Cornwall Public Inquiry v Dunlop*, [2007] OJ No 4768, 231 OAC 189 (Div Ct), with further reasons at (2008), 90 OR (3d) 524 and (2008), 241 OAC 193; *Ontario Provincial Police v Commissioner of the Cornwall Public Inquiry*, 229 OAC 238, 2007 CarswellOnt 5828 (Div Ct), rev'd, *Moldaver Cornwall Decision*, *supra* note 4, with a stay pending appeal granted at 2007 ONCA 673, 2007 CarswellOnt 6267; *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v Commissioner of the Cornwall Public Inquiry* (2007), 223 OAC 66 (Div Ct); *MacDonald v Commissioner of the Cornwall Public Inquiry*, 214 OAC 293, [2006] OJ No 3546 (Div Ct); *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry*, 2007 ONCA 20, 219 OAC 129, aff'g (2006), 219 OAC 58 (Div Ct).

impact, though it may have helped some sexual abuse survivors in their healing processes.⁴⁷

Third, I will look at the MMIWG Inquiry, which, despite not yet having completed its work (meaning I need to rely largely on media sources instead of academic articles), has been subject to a plethora of criticism. The dysfunction of the Inquiry is best symbolized by the resignation of numerous staff members, including a commissioner.⁴⁸ The criticism and negative media coverage of the Inquiry's lack of substantive work has ranged from a poorly received interim report (lack of effectiveness of report and likely lack of implementation)⁴⁹ to the uncertainty of its own mandate (lack of thoroughness).⁵⁰ Moreover, affected individuals and groups have felt hampered in their ability to participate (lack of fairness and likely lack of healing),⁵¹ and the Inquiry has needed to seek more time to complete its work (lack of timeliness).⁵²

I acknowledge that I need to caveat my conclusions regarding the MMIWG Inquiry. The fact is that the Inquiry is not complete, which means that I need to rely largely on media instead of academic articles. Moreover, it is not unprecedented for an Inquiry that has procedural difficulties to nonetheless produce a valuable report – the Goudge Inquiry

⁴⁷ Benzie & Ferguson, *supra* note 45.

⁴⁸ Gloria Galloway & Tu Thanh Ha, “Indigenous women’s group pulls support from missing and murdered inquiry as commissioner resigns”, *The Globe and Mail* (11 July 2017), online: <<https://www.theglobeandmail.com/news/politics/mmiw-commissioner-marilyn-poitras-resigns-in-another-blow-to-inquiry/article35653097/>>.

⁴⁹ See e.g. Gary Mason, “Without a focus, MMIW inquiry will slide toward irrelevancy”, *The Globe and Mail* (29 November 2017), online: <<https://www.theglobeandmail.com/opinion/a-good-project-gone-awry/article37114389/>>.

⁵⁰ Jonathan Kay, “Current MMIW Inquiry a terrible mash-up of two models”, *National Post* (29 November 2017), online: <<http://nationalpost.com/opinion/jonathan-kay-current-mmiw-inquiry-a-terrible-mash-up-of-two-models>>.

⁵¹ Leonard Monkman, “After shaky start, MMIW inquiry wraps first 3 days of hearings in Winnipeg”, *CBC News* (24 August 2017), online: <<http://www.cbc.ca/news/indigenous/mmiw-inquiry-expert-hearings-1.4261471>>.

⁵² Renata D’Aliesio, “Missing, murdered Indigenous women inquiry to ask for more time”, *The Globe and Mail* (4 September 2017), online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/national/missing-murdered-indigenous-women-inquiry-to-ask-for-more-time/article36163093/>>.

needed to request an extension and the Krever Inquiry into the tainted blood tragedy, despite ultimately changing numerous aspects of blood donation policy,⁵³ had an interlocutory judicial review application that reached the Supreme Court of Canada.⁵⁴ The Inquiry could also be like RCAP, with its findings proving valuable years into the future. Further, if the MMIWG Inquiry does ultimately fail, it could have little to do with the terms of reference, instead reflecting a clash between Indigenous culture, knowledge-gathering, and resolution, and Western equivalents, whether adversarial or inquisitorial.⁵⁵ Given its topicality and the issues it has encountered, however, I would be remiss to exclude an analysis of the Inquiry. Even if the Inquiry ultimately proves valuable, its difficult journey, and the potential role of the terms of reference in making that journey difficult, is worth analyzing in and of itself.

Whenever an analysis seeks to extrapolate from examples, criticism can be made of one's choices. However, I trust the above discussion indicates why I believe these are all good examples of successful and unsuccessful public inquiries. While all come from the federal and Ontario realms, these are the two largest governments in Canada, meaning they have the largest number of inquiries from which to draw.

I do recognize that these inquiries are all, at some level, legal-investigative inquiries, and not purely policy advisory inquiries that do not seek to build policy recommendations from a legal investigation. The latter type of inquiries may not necessarily produce the same results.⁵⁶ But in the interests of not muddying the waters, I am content to proceed with an analysis of legal-investigative inquiries, recognizing that my conclusions may need to be modified (or even not be applicable at all) in cases of purely policy inquiries.

⁵³ André Smith, Ralph Matthews & Jay Fiddler, "Blood Donation and Community: Exploring the Influence of Social Capital" (2011) 4:1 *International J of Social Inquiry* 45 at 48ff.

⁵⁴ *Krever*, *supra* note 20.

⁵⁵ See, e.g., Brenda L Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6:1 *Indigenous LJ* 31 at 33-34.

⁵⁶ See, e.g., Ed Ratushny, "The Commission of Inquiry: A Residual Institution of Government" (2010) 4 *JPLP* 275 at 277-278.

IV. CHARACTERISTICS OF SUCCESSFUL AND UNSUCCESSFUL PUBLIC INQUIRIES' TERMS OF REFERENCE

A. Walkerton Inquiry

The terms of references of the Walkerton Inquiry are only nine paragraphs long. Eight of these are fairly standard, appointing Justice O'Connor commissioner,⁵⁷ forbidding any finding of civil or criminal liability,⁵⁸ prescribing how the report is to be delivered,⁵⁹ allowing the Inquiry to make recommendations regarding funding,⁶⁰ noting the Inquiry's broad evidentiary powers,⁶¹ and explaining the Inquiry's resources.⁶² The heart of the Inquiry's mandate is found in paragraph two:

The commission shall inquire into the following matters:

- (a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Esherichia coli* bacteria were found to be present in the town's water supply;
- (b) the cause of these events including the effect, if any, of government policies, procedures and practices; and
- (c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water,

in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.⁶³

Commissioner O'Connor described his mandate as "very wide"⁶⁴ and indeed it was – apart from the legally necessary⁶⁵ prohibition on making

⁵⁷ Ontario, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (Toronto: The Queen's Printer for Ontario, 2002), The Honourable Dennis R. O'Connor, Appendix A at para 1, online: <http://www.archives.gov.on.ca/en/e_records/walkerton/report1/pdf/Appendix_A.pdf> [Walkerton Inquiry Terms of Reference].

⁵⁸ *Ibid* at para 3.

⁵⁹ *Ibid* at para 4.

⁶⁰ *Ibid* at para 5.

⁶¹ *Ibid* at para 6.

⁶² *Ibid* at paras 7-9.

⁶³ *Ibid* at para 2.

⁶⁴ Ontario, The Walkerton Inquiry, "The Inquiry and Its Mandate" (Toronto: June 2000), online:

findings tantamount to civil or criminal liability, no restrictions were imposed on his ability to investigate the causes of the Walkerton tragedy, or make recommendations to prevent future tragedies related to Ontario's drinking water. Moreover, virtually no restrictions were placed upon the Inquiry in terms of the procedure through which it was to be conducted, or how it was to structure itself. However, the fact remains that the mandate was clearly fundamentally confined to the analysis of a single event – the Walkerton tragedy of Spring 2000, and the policy recommendations which should result from that. Though the term “any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water” could be interpreted very broadly, and did grant Commissioner O'Connor a broad mandate from a policy recommendation perspective, the circumstances (and the geography) in which this provision appear are still obvious. Though Commissioner O'Connor could investigate clearly related matters, the mandate was confined in terms of subject matter, time period, and geography. Within that, Commissioner O'Connor was given flexibility. Though the four corners of his mandate were not defined with scientific precision, they were still readily discernible. As noted above, different considerations may be required in non-investigative contexts.

B. Goudge Inquiry

The Goudge Inquiry's terms of reference consist of sixteen paragraphs, three of which address the establishment of the Inquiry and six of which address resources. The three establishing the Inquiry are all clear and pointed, appointing the Commissioner,⁶⁵ prescribing the date for delivery of a report,⁶⁷ and appointing a scientific expert.⁶⁸ The provisions regarding resources give the Inquiry discretion to fulfil its mandate within an approved budget.⁶⁹ While the creation of a website is mandated,⁷⁰ the

<http://www.archives.gov.on.ca/en/e_records/walkerton/cmandate/index.html>.

⁶⁵ *Re Nelles et al and Grange et al*, 46 OR (2d) 210, 1984 CanLII 1861 (ONCA).

⁶⁶ Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 678.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 680.

⁷⁰ *Ibid.*

other provisions give the Inquiry discretion on matters such as determining the practicality of following government expense policies,⁷¹ asking the government for resources,⁷² and, like the Cornwall Inquiry,⁷³ deciding whether and in what circumstances to offer counselling services.⁷⁴

Seven sections of the terms of reference address its mandate, with section 4 at the heart of the matter:

4. The Commission shall conduct a systemic review and assessment and report on:

1. the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings;
2. the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 to 2001; and
3. any changes to the items referenced in the above two paragraphs, subsequent to 2001

in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.⁷⁵

Though hardly a small undertaking, this is nonetheless clearly defined in terms of geography and time period, with subject matter being related to substantive interactions with the criminal justice system. Though the mandate was not confined only to Dr. Smith's wrongdoing – which seems

⁷¹ *Ibid.*

⁷² *Ibid* at 681.

⁷³ See e.g. Ontario, *Report of the Cornwall Inquiry* (Cornwall, ON: Ministry of the Attorney General, 2009) vol 4, The Honourable G Norman Glaude at 2, online: <<https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/index.htm> |> [Cornwall Inquiry].

⁷⁴ Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 681.

⁷⁵ *Ibid* at 678-679.

appropriate, as institutions around him enabled his actions – the type of actions in the Inquiry's mandate clearly relate to the persons and organizations that empowered him. Sections 5 and 6 state, as per usual, that no pronouncements on criminal or civil liability can be made.⁷⁶ It adds that no findings on professional responsibility liability could be made, presumably to protect the medical profession's ability to decide what discipline should have come to Dr. Smith.⁷⁷ Sections 7 and 8 guide the Inquiry in terms of evidence is it to rely upon, but they are not exhaustive, as section 10 clarifies.⁷⁸

Ultimately, the Goudge Inquiry's terms of reference gave it significant flexibility on its own management, practice, and procedure. However, what was to be investigated, though broad on its face, was clearly defined geographically, temporally, and in terms of subject matter.

C. Kaufman Commission

The Terms of Reference for the Kaufman Commission were just eight paragraphs long. The first paragraph appoints Justice Kaufman commissioner, terms six through eight address resources, term three forbids making findings of civil or criminal liability, term four prescribes how the report is to be delivered, and term five permits (but does not mandate) the reliance on particular documents.⁷⁹ The heart of the Commission's mandate is in term two:

The Commission shall inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province.⁸⁰

Much like the Walkerton Inquiry, the Kaufman Commission's terms of reference clearly confine its subject matter and investigative powers to

⁷⁶ *Ibid* at 679.

⁷⁷ See e.g. Hilary Young, "Why Withdrawing Life-Sustaining Treatment Should Not Require 'Rasouli Consent'" (2012) 6:2 McGill J L & Health 54 at 98, explaining the self-governing nature of the medical profession in terms of professional discipline.

⁷⁸ Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 679-680.

⁷⁹ Kaufman Report, *supra* note 35, Appendix A-1 at 1245-1248.

⁸⁰ *Ibid* at 1247.

particular events and/or matters relating to the prosecution of Morin and his exoneration. But from a policy perspective, much like the Walkerton Inquiry, there was little restriction on what the Commission could recommend to improve “the administration of criminal justice” in Ontario. Moreover, virtually no restrictions were placed on the Commission’s operational or procedural powers.

D. Somalia Inquiry

The Somalia Inquiry’s terms of reference vis-à-vis subject matter were detailed. The Inquiry was directed to investigate nineteen different aspects of the Canadian Armed Forces’ deployment in Somalia in the early 1990s, with each aspect being matched to a particular time period.⁸¹ The other provisions, much like the MMIWG Inquiry’s terms of reference, largely relate to the appointment of commissioners, their ability to adopt their own procedures, the manner in which to protect confidentiality and national security, and the submission of the report.⁸² The terms were amended three times when the Inquiry was unable to deliver the report on time.⁸³ Justice Gilles Létourneau of the Federal Court of Appeal, Chief Commissioner, indicated that the timeline was unrealistic⁸⁴ – this could be a cautionary tale to future commissioners who believe timelines are unrealistic. The largest difference between the Somalia Inquiry’s terms of reference and the three aforementioned inquiries is their vastness in terms of investigative and policy mandates. General states of affairs within the armed forces, rather than specific incidents, were to be investigated, such as “the extent, if any, to which cultural differences affected the conduct of

⁸¹ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Dishonoured Legacy: The Lessons of the Somalia Affair, *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997) vol 5, The Honourable Gilles Létourneau, Appendix 1 at 1503-1507 [Somalia Inquiry Terms of Reference].

⁸² *Ibid* at 1505-1507.

⁸³ *Ibid* at 1509-1512.

⁸⁴ Tamar Witelson, “Interview with Mr. Justice Gilles Létourneau: Somalia Commission Chair” in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2015) at 361-363. Also summarized in Bessner, *supra* note 22 at 30-31.

operations”⁸⁵ and “the adequacy of selection and screening of officers and non-commissioned members for the Somalia deployment”.⁸⁶

E. Cornwall Inquiry

Most of the Cornwall Inquiry’s Terms of Reference bear striking similarity to those of the Goudge Inquiry. Sections 1 and 10-13 of the Cornwall Inquiry’s Terms of Reference establish Justice Norman Glaude of the Ontario Court of Justice as Commissioner before dealing with the issue of resources in a manner that is not uncommon.⁸⁷ Sections 4-9 provide directions on evidence, delivery of the report, and the need to not express an opinion on civil or criminal liability.⁸⁸

The core of the Inquiry’s mandate is found in Sections 2 and 3:

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.
3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.⁸⁹

Unlike the Goudge Inquiry, there is no clear temporal restriction on the Inquiry’s mandate – “historical” is a vague term, the meaning of which had to be litigated.⁹⁰ Similarly, “young people”, “abuse”, and “other public and community sectors” are not defined. Though the Inquiry was clearly

⁸⁵ Somalia Inquiry Terms of Reference, *supra* note 81 at 1504.

⁸⁶ *Ibid* at 1503.

⁸⁷ Cornwall Inquiry, *supra* note 73, vol 1, Appendix A1, OIC 558/2005, April 14, 2005 at 1, 4-5.

⁸⁸ *Ibid* at 3-4.

⁸⁹ *Ibid* at 2.

⁹⁰ Moldaver *Cornwall* Decision, *supra* note 4, explaining that “historical” could, viewed in isolation, mean any event that occurred in the past but such an interpretation would manifestly be too broad given the purposes of the Inquiry.

called in response to allegations of a pedophile ring and the failure of institutions to respond to allegations of abuse,⁹¹ there is no hint of that in the terms of reference. The phrase “allegation of historical abuse of young people in Cornwall” appears too broad to get at the primary evils that the Inquiry was to investigate.⁹²

F. MMIWG Inquiry

The MMIWG Inquiry has twenty-five primary parts of its Terms of Reference. The first two are the most important, mandating that the Inquiry:

- a. [...] inquire into and to report on the following:
 - i. systemic causes of all forms of violence – including sexual violence – against Indigenous women and girls in Canada, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada, and
 - ii. institutional policies and practices implemented in response to violence experienced by Indigenous women and girls in Canada, including the identification and examination of practices that have been effective in reducing violence and increasing safety

- b. [...] make recommendations on the following:
 - i. concrete and effective action that can be taken to remove systemic causes of violence and to increase the safety of Indigenous women and girls in Canada, and
 - ii. ways to honour and commemorate the missing and murdered Indigenous women and girls in Canada[.]⁹³

It should be noted that section “a” contains no geographic or temporal restrictions on the Inquiry’s mandate (apart from “in Canada”). The number of cases that the Inquiry is to investigate is also very large. Over 1,300 witnesses had been heard from by June 2018.⁹⁴ Comparative

⁹¹ Benzie & Ferguson, *supra* note 45.

⁹² Cornwall Inquiry, *supra* note 73, vol 1, Appendix A1, OIC 558/2005, April 14, 2005 at 1, 4-5.

⁹³ Indigenous and Northern Affairs Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, “Terms of Reference” (12 December 2016), online: <<http://www.mmiwg-ffada.ca/files/terms-of-reference.pdf>> [MMIWG Terms of Reference].

⁹⁴ Maura Forrest, “Ottawa grants six-month extension to missing and murdered

data would be necessary to be sure that this is not too large and, admittedly, the Inquiry's mandate has been considered too narrow by some critics, who have condemned the government for not giving it the power to order that particular police investigations be reopened.⁹⁵ However, sections "r" and "s" explicitly authorize the Inquiry to refer instances of particular wrongdoing to the competent authorities.⁹⁶ This still recognizes that public inquiries can typically "only report and recommend [and] cannot [...] determine rights",⁹⁷ with a possible power to order police to take particular steps being potentially problematic.

Term "c" gives the Inquiry its name, and the last six provisions in the terms of reference ("t"-"y") relate to protection of privacy and the need to ensure that the official languages of Canada are respected.⁹⁸

Terms "d" through "q" mostly relate to the Inquiry's operations.⁹⁹ Many of these – such as the authorization to rent space and retain experts – are unremarkable. Some details are worth noting, however: the terms of reference explicitly authorize the Inquiry to establish regional and issue-specific advisory bodies (term "g"),¹⁰⁰ take particular culturally- and subject matter-sensitive approaches to its work ("e")¹⁰¹, consider particular past reports ("h"),¹⁰² and review the government's pre-Inquiry engagement process ("i").¹⁰³ Moreover, the Inquiry is authorized to provide an opportunity to participate to "any person" affected ("f").¹⁰⁴ Each of these

Indigenous women inquiry", *National Post* (5 June 2018), online: <<https://nationalpost.com/news/politics/ottawa-grants-six-month-extension-to-missing-and-murdered-indigenous-women-inquiry>>.

⁹⁵ Kathryn Blaze Baum & Gloria Galloway, "Missing, murdered inquiry will lack power to compel police action", *The Globe and Mail* (20 July 2016), online: <<https://www.theglobeandmail.com/news/national/missing-murdered-indigenous-women-inquiry-unlikely-to-have-mandate-to-review-police-conduct/article31020957/>>.

⁹⁶ MMIWG Terms of Reference, *supra* note 93, ss r-s.

⁹⁷ Ratushny, *supra* note 3 at 11.

⁹⁸ MMIWG Terms of Reference, *supra* note 93, ss c, t-y.

⁹⁹ *Ibid*, ss d-q.

¹⁰⁰ *Ibid*, s g.

¹⁰¹ *Ibid*, s e.

¹⁰² *Ibid*, s h.

¹⁰³ *Ibid*, s i.

¹⁰⁴ *Ibid*, s f.

may be a good idea, but they are more procedurally specific than can be seen in the other terms of reference. The MMIWG Inquiry was granted a shorter-than-requested extension of time to complete its work.¹⁰⁵

V. GOING FORWARD

A. Conclusion on Above Analysis

The above analysis of six public inquiries' terms of reference leads to several conclusions. First, governments should err on the side of specificity when crafting the subject matter and investigative mandate portions of terms of reference. However, this need not be the case with respect to the policy mandate sections of terms of reference. Second, there appears to be no need to give specific procedural or operational guidance in terms of reference. A final point, somewhat unrelated, would be that fewer commissioners appear to create more effective inquiries than more commissioners, at least with respect to investigative inquiries. I will now expand on each of these points.

B. Defined Investigative Mandates, Open-Ended Policy Mandates

Two criteria seem to unite the terms of reference of the successful public inquiries. The first is that they had clear mandates to investigate particular events. These events can be summarized as follows:

- (a) What went wrong in Walkerton that resulted in the outbreak of *e.coli* in Spring 2000?
- (b) How was Dr. Charles Smith able to give evidence that led to so many wrongful convictions?
- (c) What went wrong in the criminal justice system that led to the wrongful conviction of Guy Paul Morin?

Needless detail was not added on how the commissioners should investigate these events (indeed, the terms of reference were quite concise).

¹⁰⁵ Gloria Galloway, "Head of inquiry into missing, murdered Indigenous women says scope will narrow after extension limited to six months", *The Globe and Mail* (5 June 2018); online: < <https://www.theglobeandmail.com/politics/article-ottawa-allows-extension-for-inquiry-into-missing-murdered-indigenous/>>.

However, the geography, time period, and subject matter to be investigated were clear. These narrow mandates allowed the commissioners to “hone in” on either particular tragedies caused by multiple systemic factors (such as insufficient monitoring of water safety in the case of Walkerton¹⁰⁶ or reliance on jailhouse informants in Morin¹⁰⁷) or how a single individual’s actions led to multiple tragedies (in the case of Smith). Perhaps because of this, healing of affected individuals and apologies by wrongdoers occurred in these inquiries.

This in turn leads to the second notable aspect, which is the nature of the subject matter of the successful inquiries’ terms of reference. Though the inquiries’ investigative mandates of particular events were clear, sufficient flexibility was given to allow the commissioners to look at the systemic, policy issues that caused the particular tragedies. For example, the Goudge Inquiry’s terms of reference gave a broad mandate to “make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario”.¹⁰⁸ Similarly, paragraph 2(c) of the Walkerton Inquiry’s terms of reference allowed Commissioner O’Connor to look at anything that affected the safety of Ontario’s drinking water.¹⁰⁹ Language like this responds to concerns that narrow terms of reference will constrain inquiries’ effectiveness.¹¹⁰ It is not surprising that similar language to paragraph 2(c) has been used in other public inquiries, such as the Long-Term Care Homes Inquiry, chaired by Justice Eileen Gillette of the Court of Appeal for Ontario.¹¹¹ Though such language can be interpreted very broadly, this does not appear to be a problem in practice, as specific investigative mandates seem to ensure that inquiries will not veer too far off-course. In any event, a government can decline to adopt unreasonable policy recommendations. That being said, if an inquiry

¹⁰⁶ Feze et al., *supra* note 27 at 218-219.

¹⁰⁷ Kaufman Report, *supra* note 35, Chapter III at 403-602.

¹⁰⁸ Goudge Inquiry Terms of Reference, *supra* note 28, Appendix 1 at 679.

¹⁰⁹ Walkerton Inquiry Terms of Reference, *supra* note 57.

¹¹⁰ See e.g. M Anne Stalker, “The Protection of Individual Rights and the Public Inquiry” (1994) 43 UNB LJ 427 at 433.

¹¹¹ Order-in-Council 1547/2017, Legal Framework, Long-Term Care Homes Public Inquiry, online: <http://longtermcareinquiry.ca/wp-content/uploads/LTCH_OIC.pdf>, s 2(c).

cannot make clear investigative findings due to an excessively broad mandate, it may never compile a valuable factual record.

This balance between narrow investigative and broad policy mandates was not present in the Cornwall and MMIWG Inquiries' terms of reference. Rather than starting with narrow investigative mandates and then going broad from a policy perspective, these inquiries started with very broad investigative mandates that left the inquiries unable to build a strong factual footing. Jonathan Kay has written about the MMIWG Inquiry's lack of certainty about whether it is an investigative inquiry or a mechanism to facilitate healing, and the difficulty inherent in attempting to do both.¹¹² Strangely, the Somalia Inquiry's terms of reference managed to be too specific and too far-reaching at the same time. On the one hand, the commissioners were told exactly what specific issues they were to investigate, rather than looking at a specific event and asking the commissioners to unpack the issues raised. Moreover, there were so many specific issues to be investigated that, to cite Professor Ed Ratushny, "[t]he massive terms of reference were incapable of completion during the short time frame available, even with extensions."¹¹³

Ultimately, therefore, it appears helpful to clearly define inquiries' investigative purposes.¹¹⁴ At the same time, it is important to not confine (subject to constitutional constraints regarding determining criminal and civil liability) what inquiries can recommend from a policy perspective. This is a practical way to balance the competing dangers, recognized by Professor Ratushny that "the government will overreact and include too much in the terms of reference or try to curtail the inquiry's scope to a degree that could inhibit its effectiveness."¹¹⁵

C. Terms of Reference – Procedure and Operations

Despite the need for significant specificity in terms of subject matter mandate, such clarity does not appear necessary – and can in fact be counterproductive – when it comes to procedure and operations. None of

¹¹² Kay, *supra* note 50.

¹¹³ Ratushny, *supra* note 56 at 281.

¹¹⁴ Stalker, *supra* note 110 at 433 posited that this might be the case, and also that it may help protect individual rights.

¹¹⁵ McIsaac, *supra* note 5 at 122, summarizing Ratushny, *supra* note 3 at 133.

the Goudge, Walkerton, or Kaufman Inquiries had any substantive restrictions on how they were to conduct their operations or construct their procedures. On the contrary, all terms of reference seemed to clarify just how broad these powers could be, so long as they were related to the subject matter of the inquiries. To be fair, this is also mostly true for the Cornwall and Somalia Inquiries. However, the MMIWG Inquiry gave numerous directions to the commissioners on how to construct itself (including with issue-specific and region-specific advisory groups), how it should receive evidence, and what past reports and government actions it should consider. To some extent, this is understandable given the broad nature of the Inquiry and the government's desire to ensure no one feels excluded. It was also partially necessary given that many issues within the Inquiry's mandate were within provincial jurisdiction,¹¹⁶ but it still seems to have been unhelpful.

D. Number of Commissioners

I would be remiss if I failed to note one other observation in passing. Each of the three successful inquiries I analyzed had a single commissioner, while two of the three unsuccessful inquiries had multiple commissioners. It is a longstanding hypothesis that multiple commissioners increase the likelihood of division on an inquiry, thereby decreasing its likelihood of success.¹¹⁷ There are other virtues that may accompany the risks of multiple commissioners, such as subject matter expertise that a judge (a common choice for a sole commissioner) would be unlikely to possess.¹¹⁸ Even so, my brief analysis does suggest that having multiple commissioners may come with the risks hypothesized in the past. It would appear that the risk coming from multiple commissioners would be amplified in cases of investigative inquiries –

¹¹⁶ The Canadian Press, "Provinces commit to help inquiry into missing, murdered Indigenous women" *Macleans* (1 May 2016), online: <<http://www.macleans.ca/news/canada/provinces-commit-to-help-inquiry-into-missing-murdered-indigenous-women/>>.

¹¹⁷ See e.g. Inwood & Johns, *supra* note 9 at 398.

¹¹⁸ For instance, an accountant, Renaud Lachance, FCA, was a commissioner on the Charbonneau Inquiry into public construction contracts in Québec. Québec, Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction, "Notes biographiques" (16 June 2015), online: <<https://www.ceic.gouv.qc.ca/la-commission/notes-biographiques.html>>.

where diverging views on investigative functions can have serious ramifications – as opposed to policy inquiries – where the virtues of having persons with diverse backgrounds are likely more valuable in any event.

VI. CONCLUSION

Terms of reference define a public inquiry. In this paper, I have explored six public inquiries – three widely considered successful, three widely considered unsuccessful – to analyze how their terms of reference affected their (lack of) success. Though the terms of reference cannot be considered the only reasons for the inquiries' success, it nonetheless appears that several conclusions can be drawn – some specific, others more general. On the specific front, clear terms of reference with respect to an inquiry's investigative subject matter are likely to help commissioners build a successful inquiry. This appears to result in an inquiry being able to build a proper factual record. However, when it comes to making policy recommendations, terms of reference should not be constraining. Indeed, broad powers on this front can be very helpful. Further, when it comes to the procedure an inquiry is to use, or its operations, there appears little if any reason for prescriptions in the terms of reference. I have mostly invested legal-investigative inquiries in this paper, that lend themselves to public inquiries, and different conclusions may be appropriate for purely policy-based inquiries. Nonetheless, these guidelines for terms of reference still appear helpful, as demonstrated by the experience of the three unsuccessful legal-investigative inquiries analyzed in this paper.

The decision to call a public inquiry is to a significant extent a political decision. But governments should be hesitant to cave into political pressure to call inquiries or, at the very least, should not cave into political pressure to call inquiries with broad mandates. The Walkerton Inquiry, Goudge Inquiry, and Kaufman Commission were all called in response to particular tragedies caused by multiple factors (in the Walkerton and Kaufman cases) or multiple tragedies caused by the same individual (the Goudge Inquiry). As a result, the inquiries could handle their mandates and deliver concrete results. But one cannot help but wonder if political pressure to call the Somalia Inquiry, Cornwall Inquiry, and MMIWG Inquiry may have resulted in mandates that were too broad, perhaps because governments wished to avoid political blowback if anyone

felt excluded. This motivation may be coming from a good place (wanting to respond to a terrible tragedy and be seen as doing something), but at times the result has been unwieldy mandates and ineffective inquiries.

Regardless of the government's motivations for calling a public inquiry, an unsuccessful public inquiry is in no one's best interests. To return to where I began, the MMIWG Inquiry is currently proving to be unsatisfactory to the government and all affected parties. Governments have very little control over public inquiries after setting the terms of reference;¹¹⁹ as such, governments must take the utmost care in their drafting. The risk of an excessively narrow mandate is a very real one, but so is an excessively broad mandate. At times, individuals with a grievance to air – maybe even a legitimate grievance – may not be captured by an inquiry's mandate. Nonetheless, that would appear to be an acceptable price to pay for a successful public inquiry.

¹¹⁹ Robert Centa & Patrick Macklem, "Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada" (2001) 39:1 *Osgoode Hall LJ* 117 at 130.

