

Inquiries

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I. INTRODUCTION

Inquiries have a long and storied history in Canada. Described as a "classically Canadian union of law and politics",¹ inquiries have special investigatory and coercive powers that are not available in the traditional legal system.² As a result, they are often able to fill in the gaps where traditional judicial remedies have failed by investigating, educating and informing the government and public about matters of great importance.³ Inquiries are tremendously powerful digging devices that can unearth previously unseen nuggets of information that, like all "searches for the truth",⁴ should lead to improved policy, improved confidence in the political system and improved governance. As the Supreme Court has said:

In times of public questioning, stress and concern [inquiries] provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem ... They are an excellent means of informing and educating concerned members of the public.⁵

There is, unfortunately, a fundamental problem with the statutory framework that governs inquiries in Canada. Consider that inquiry reports are rarely

A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" (1989) 12 Dal. L.J. 29 at 30.

See the *Manitoba Evidence Act*, R.S.M. 1987, c. E150, C.C.S.M. c. E150, at s. 88(1): Powers to summon witnesses. The section gives inquiry commissioners the power to summon witnesses and examine them under oath.

Robert Centa & Patrick Macklem, "Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada" in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 79 at 80. See also Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992) at 9 on the principal functions and value of inquiries.

Alberta Law Reform Institute, *Proposals for Reform of the Public Inquiries Act: Report No. 62* (Edmonton: Alberta Law Reform Institute, 1992) at 16.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 98 at 137-38.

complementary-in fact, they almost inevitably involve allegations of serious wrongdoing. This, combined with legislation that allows the government of the day unfettered discretion in its decision to call an inquiry, raises a serious conflict. Given the commissioner's power to act as judge, jury and scold,⁶ what government would even consider signing its own death warrant by appointing an inquiry that could expose its malfeasance? As the Ontario Law Reform Commission has said, an inquiry's independence may be its most valuable asset.⁷ But, given the sitting government's ability to ignore *bona fide* calls for an inquiry, that independence may be neutered by legislation that places far too much discretionary power in the cabinet's hands. As history has shown, this power has been misused in a manner directly contrary to the public interest. Examples of the potential areas of abuse created by this discretionary power include:⁸

- The establishment of an inappropriately narrow or broad scope of inquiry;
- The selection of a partisan commissioner; and
- The imposition of an unreasonably short time frame for a final report.

Something must be done to solve this problem. This paper proposes two solutions: an independent body could be set up to determine when an inquiry should be called and what its terms of reference should be. Or, given the tremendous use of resources and the long time frame associated with inquiries,

Inquiry reports cannot contain findings of civil or criminal liability: *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 34 [(Krever Commission)]. However, a report's scolding can nevertheless deliver a serious blow to a government or organization: see, for example, the Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible?: Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005) [Gomery Report], which is universally credited as helping to bring down the Martin federal Liberal government. See also: Manitoba, Commission of Inquiry into Allegations of The Elections Act and The Elections Finances Act during the 1995 General Election, *Report of the Commission of Inquiry into Allegations of The Elections Act and The Elections Finances Act during the 1995 General Election* (Winnipeg: Election Inquiry Commission, 1999) [Monnin Inquiry].

Ontario Law Reform Commission, *supra* note 3 at 213.

Relevant legislation allows a government to set the scope of an inquiry as widely or narrowly as it chooses. Similarly, there are no neutrality requirements for the selection of a commissioner. This created problems during the Gomery Commission, for example, when former Prime Minister Jean Chretien accused Justice John Gomery of bias. Finally, the federal government has been accused of terminating the *Commission of Inquiry into the Deployment of Canadian Forces in Somalia* (Ottawa: Minister of Public Works and Government Services Canada, 1997) by setting a premature reporting date that did not allow commissioners to complete hearings: See Peter Desbarats, "The Independence of Public Inquiries: *Dixon v. Canada*" (1997) 36 Alta. Law Rev. 252 at 252, commenting on *Dixon v. Canada (Governor in Council)*, [1997] 3 F.C. 169.

it may be more palatable to keep the official power to call an inquiry in the government's hands, while handing off *de facto* power to an independent entity that would file a preliminary report on whether an inquiry should be called. While the government would not be legally bound to hold an inquiry in this situation, it would likely find the public uproar generated by a baldfaced refusal to call an inquiry too loud to ignore.

Inquiries are a powerful, expensive implement in the overall good governance toolbox. As such, they should only be called when traditional legal proceedings--criminal or civil--have failed to "get to the bottom of the matter".⁹ However, the current law on inquiries vests far too much power in the government, allowing these devices to be inappropriately used as political weapons, or worse, not even used at all. The light of an inquiry is supposed to shine brightest in areas where full disclosure is in the public's interest. Political expediency should be irrelevant, and this is why reform to Canada's inquiry laws is necessary.

II. THE GOVERNMENT'S UNCHECKED DISCRETION

A. Broadly Worded Legislation

Legislation governing the creation and operation of inquiries grants the government an incredible amount of discretion. Manitoba's inquiry legislation--Part V of the *Manitoba Evidence Act*¹⁰--states that the Lieutenant Governor in Council can call an inquiry when it deems it "expedient to cause inquiry into and concerning any matter within the jurisdiction of the Legislature. This subject matter need only be connected with one of a number of broad government responsibilities, including "good government" and "the administration of justice within the province".¹¹ Canada's *Inquiries Act*¹² likewise grants unchecked discretion to government. Section 2 of the *Inquiries Act* reads:

The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the business thereof.

While the courts can decide if the subject matter to be examined by an inquiry is within the government's jurisdiction, they cannot decide if the inquiry would be expedient and in the public interest. As a result, the government is left with "virtually untrammelled discretion to establish a public inquiry"Y Justice John Gomery, writing after the release of his report into the alleged sponsorship

Krever Commission, *supra* note 6 at para. 5.

¹⁰ See *Manitoba Evidence Act*, *supra* note 2 at ss. 83-96.

¹¹ *Ibid.* at ss. 83(1)(a) and (c).

¹² R.S.C. 1985, c. I-11.

¹³ Alberta Law Reform Institute, *supra* note 4 at 24.

scandal in Quebec,¹⁴ described s. 2 of the federal *Inquiries Act* as "so vague and all inclusive that it is fair to conclude that there is really no matter that cannot be the subject of an inquiry, *if* the government decides to create a commission."¹⁵ The two emphasized letters in Gomery's statement are of massive significance. As the legislation indicates, there are limited legal means to force a government to call a sorely-needed inquiry if it chooses to duck the issue completely.

B. An Unfortunate Track Record of Abuse

The "untrammelled" discretion afforded by legislation would be of no significance if governments did not choose to abuse this power. However, as the history of several Canadian governments indicates, inquiries are often delayed until after the election of a new administration that is no longer afraid of proceedings into allegations of political malfeasance.

1. Ipperwash

The basic facts and rough timeline surrounding the 6 September 1995 shooting death of unarmed Aboriginal protester Dudley George were well known within a few weeks of the incident.¹⁶ The exact circumstances surrounding his death—including the Harris provincial government's involvement and its directions to Ontario Provincial Police (OPP) leading up to the shooting—remained unknown. As a result, Aboriginal leaders almost immediately called for an "impartial inquiry ... to determine what happened when Ontario Provincial Police fired on native protesters".¹⁷

In the ensuing weeks, months and years, various criminal and civil proceedings associated with the incident worked their way through the courts.¹⁸ However, the Harris government's involvement remained unknown, despite repeated opposition and media calls for an inquiry.¹⁹ With no requirement to force it to call an inquiry, the government continued to let these calls go unanswered, even using its majority in the Legislative Assembly to vote down an opposition

¹⁴ See the Gomery Report, *supra* note 6.

¹⁵ John H. Gomery, "The Pros and Cons of Commissions of Inquiry" (2006) 51 McGill L.J. 783 at 785 [emphasis added].

¹⁶ Murray Campbell, "Native leaders seek inquiry into fatal shooting by police" *The Globe and Mail* (8 September 1995) A1.

¹⁷ *Ibid.*

¹⁸ Acting Ontario Provincial Police Sgt. Kenneth Deane, who fired the bullet that killed Mr. George, was convicted of criminal negligence causing death in 1997: "Pressure is building for an Ipperwash inquiry," Editorial, *The Globe and Mail* (5 September 2001) A12.

¹⁹ *Ibid.*

motion for an inquiry.²⁰ Premier Mike Harris eventually ceded control of his party to Ernie Eves, yet still no inquiry was called, despite outstanding policy questions like proper government procedure in the event of conflict with Aboriginals, the relationship between the government and the OPP and an examination of measures to keep a similar event from happening in the future.²¹ In time, Ontario Justice Sidney Linden was appointed to preside over an inquiry into the matter. It should be noted, however, that Justice Linden was not appointed by the Ontario Tories—he was appointed by the newly installed McGuinty Liberal government, which had campaigned on a promise to call an inquiry.²² It was a richly ironic move, considering the essence of an inquiry is supposed to be its independence from government.²³

2. *Crocus*

Manitoba's Crocus Investment Fund, a labour sponsored fund with about 34 000 shareholders, suddenly halted trading on 10 December 2004. The fund's directors later announced a \$46..million writedown in the value of its investment portfolio, a move that sent shockwaves through Manitoba's relatively small investment community.²⁴ A subsequent Provincial Auditor's report found that while the government wasn't directly responsible for the wilted fund, it was aware of several significant management deficiencies.²⁵ An RCMP probe was launched the next year,²⁶ but-like Ipperwash—the governing party refused to call an inquiry into the matter. Making matters worse, a leaked briefing paper obtained by the media several years after the scandal broke showed the government made three changes to the fund's legislative structure at the request of its officials when it appeared a collapse

²⁰ Richard Mackie, "Tories vote down bill calling for probe into Harris's involvement in Ipperwash" *The Globe and Mail* (10 December 1999) A6.

²¹ See Centa & Macklem, *supra* note 3 at 86: "[D]espite these compelling policy concerns and despite the fact that there are no legal barriers to the establishment of a commission of inquiry, the Government of Ontario ... has consistently refused to hold an inquiry into the circumstances surrounding Mr. George's death."
Richard Mackie, "Ipperwash shooting probe launched" *The Globe and Mail* (13 November 2003) A7.

²³ See Ontario Law Reform Commission. *supra* note 3 at 206: "Although the independence of public inquiries is not absolute, its central features should be protected. If they could not be protected, the case for retaining public inquiries as a unique instrument of government would be weakened considerably."

²⁴ Mia Rabson, "Fund needed 'closer look' by province, auditor says" *Winnipeg Free Press* (31 May 2005) A1.

²⁵ *Ibid.*

²⁶ Paul Egan, "Crocus faces RCMP probe" *Winnipeg Free Press* (15 June 2005) A1.

might be imminent.²⁷ Unlike Ipperwash, there still has been no inquiry called, and as a result, several important issues remain unanswered.²⁸ If, as Cory J. has said at the Supreme Court of Canada, the role of inquiries is to "get to the bottom" of public disasters,²⁹ such an investigation into Crocus's demise would be especially appropriate. As a local editorial noted:

[A]s the bleeding stops, Manitobans deserve to know why the bleeding started in the first place, why the blood trail went unnoticed and why when it was noticed and brought to the Doer government's attention it was not stemmed. Manitobans deserve to know how it is that over 13 years some \$350 million changed hands to produce a fund that was last evaluated as having a value of just \$96 million.³⁰

The need for an inquiry into Crocus goes beyond the simple matter of placing blame, though that may too be a valuable exercise. The Auditor General's report chastised the Manitoba Securities Commission for failing to forestall the collapse, leaving Manitoba's investment climate to wallow in "needless anxiety, rumour, suspicion and acrimony" (as one editorial described it) while important governance questions continue to go unanswered.³¹ These are important policy questions that should be answered in the advancement of the public interest. The tangled mess of information and web of "who knew what" may be a Gordian knot when viewed through the lens of the traditional legal and political system, but the problem is well suited to an inquiry.³²

C. Who Can Blame Them?

As both of the above examples indicate, governments that are prepared to try to ride out a political storm by refusing to call an inquiry are completely free by law to do so. Many governments have chosen this route, and who could blame them? When faced with the prospect of the scarlet letter of an inquiry's report, what government would put its head in the noose by acquiescing to demands for an inquiry? This phenomenon, created by current legislation and political

²⁷ Tom Brodbeck, "Evidence mounts" *Winnipeg Sun* (13 March 2007) 5. Despite a "backlog" of allegations of governmental malfeasance, the province's office of the auditor general has not been given additional resources in 10 years: Tom Brodbeck, "Give AG the tools" *Winnipeg Sun* (15 March 2006) 2.

²⁸ Also unlike Ipperwash, the same provincial government remains in power in Manitoba as of the time this paper was written.

²⁹ *Krever Commission*, *supra* note 6.

³⁰ "Call inquiry into Crocus," Editorial, *Winnipeg Free Press* (11 June 2005) A14.

³¹ "Disclosure at Crocus," Editorial, *Winnipeg Free Press* (27 December 2004) A16.

³² See Carl E. Singley, "The Move Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and other Matters of Vital Public Concern" (1986) 59 *Temp. L.Q.* 303 at 323: 'Public inquiry commissions have their greatest value in those circumstances in which the actions of government officials fall into those gray areas involving conduct that, though not clearly illegal, is widely perceived to be improper.'

practice, has been well documented. Robert Centa and Patrick Macklem have described several of these "disincentives)! to calling inquiry, noting that:

[T]he fear that the commission will not absolve the government from blame or responsibility is another disincentive to the establishment of a commission of inquiry ... It is much easier for a government to minimize the damage of attacks by members of the opposition as mere partisan posturing, than to evade the findings of a commission of inquiry. The fear that the government could be embarrassed by revelations at commtsston or the release of a commission's report therefore serves as a significant disincentive to the establishment of a commission of inquiry.³³

Another commentator has similarly discussed the potential for "partisan considerations to undermine objective and independent policy analysis."³⁴

The power of an inquiry has also been inappropriately unleashed as a means of diverting attention from a current scandal, or in an attempt to bring a previous administration into disrepute.³⁵ In the end, it need not matter whether a government has refused to heed *bona fide* calls for an inquiry or whether it has called an unnecessary inquiry in bad faith. Both are examples of deliberate misuse of inquiries, and they should not be tolerated. Reform is thus necessary to fix this problem.

III. CHECKS AND BALANCES: A PRELIMINARY INVESTIGATORY BODY

A. How it Works

There is a simple answer to the problem of the politicized process that inquiry establishment has become. As has been discussed, the problem stems from the excessive discretion granted to government without any checks or balances. The solution, therefore, is to either remove that discretion or to install a system

³³ Centa & Macklem, *supra* note 3 at 91.

³⁴ Peter Aucoin, "Contributions of Commissions of Inquiry to Policy Analysis: An Evaluation" (1989) 12 Dal. L.J. 197 at 205.

³⁵ See Tamar Witelson, "Declaration of Independence: Examining the Independence of Federal Public Inquiries" in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 301 at 304: "By on the perceived independence of a public inquiry and its august commissioners, a government can announce its intention to fairly investigate its culpability in a social tragedy when the political heat is on. Then it can turn around and divert a commission's investigation away from the most controversial mandated issues once the inquiry is underway, by withholding resources, investigation time, and ordering the submission of a report before the commission believes the issues have been fully addressed." See also Centa & Macklem, *supra* note 3 at 90: "A government may also have an incentive to establish a commission of inquiry where the incident in question happened on the watch of a previous government. A government may believe that political risks associated with an inquiry are mitigated when the events in question predate its election."

of checks and balances. This can be done through one of two methods.³⁶ First, an independent body could be appointed to determine—free from government manipulation—if an inquiry should be called. A second solution would be to create the same investigative body, but allow the government to have the final say as to whether an inquiry will be called. This option leaves the power to call an inquiry in the government's hands, but it would ignore a recommendation to do so at its own peril because it "would be expected to explain to the public any decision it made to depart from the preliminary investigator's recommendations."³⁷

The first option represents a rapid departure from the current law. Its time may come eventually, but the second non binding preliminary investigation option appears to be a better fit in the interim. The philosophy behind such a move can be summarized as follows:

The decision to hold an inquiry should not be made unilaterally by the government of the day. A more balanced or independent body should decide, or at least be consulted about, the need for an inquiry, the definition of its mandate, the procedures it will use, the selection of the commissioners and their staff, and the safeguards that will be installed to protect civil liberties.³⁸

The creation of a preliminary investigator, who would be able to review the relevant evidence and interview witnesses associated with the subject matter at hand, is crucial to this proposal. This investigation would be followed by a report, which could recommend whether an inquiry is necessary and, if so, what its terms might be.³⁹ From there, "The recommendation of the preliminary investigator would be made available to other political parties and to the public generally."⁴⁰ Given that public and political pressure appears to be one of the few ways a government operating in the current legislative framework has been persuaded to call a public inquiry,⁴¹ an independent report from a credible source that called for an inquiry could be virtually impossible for a sitting government to ignore.

³⁶ These proposals were originally submitted by Bryan Schwartz in his article "Public Inquiries" in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 443.

³⁷ *Ibid.* at 449.

³⁸ *Ibid.* at 455.

³⁹ *Ibid.* at 449.

⁴⁰ *Ibid.*

⁴¹ See, for example, Manitoba's Filmon government, which called an inquiry into allegations that its own party members engaged in vote rigging in three ridings in the 1995 general provincial election after tremendous public scrutiny. The subsequent report of the *Monnin Inquiry* was released in 1998 and it has been noted as one of the factors that led to the Filmon government's defeat in the 1999 Manitoba general election.

There are several options that could be pursued toward the composition of an independent recommendatory committee. Examples include:

- A public official from outside the legislature who could be elected using the same procedural guidelines as the speaker of the House;⁴²
- A public official appointed by the Chief Justice of the province; and
- An all party standing committee.⁴³

B. Support for the Solution

Other commentators have also called for the establishment of an independent inquiry appointing framework. Centa and Macklem have noted that:

If commissions of inquiry are to continue to secure political and governmental accountability, steps should be taken to reduce or eliminate the sole discretion of cabinets to establish commissions of inquiry. Fundamental reform is required to better insulate the process of start-up from short-term and partisan political pressures. A cooler, more deliberate process should supplement Cabinet decisions made in the midst of a real or apparent political crisis.⁴⁴

The authors go on to suggest the now disbanded Law Commission of Canada ("LCC") should assume the preliminary investigator role described above.⁴⁵ While the LCC is no longer an option, Centa and Macklem's idea has merit and deserves future exploration.

Federal Department of Justice general counsel Ann Chaplin also supports this idea, stating that "the notion of a two stage inquiry is one that could yield good results."⁴⁶ Furthermore, she adds, similar models already exist in other countries, including Israel.⁴⁷

The initial investigation process has already found its way into Canadian politics: the 2005 report issued by Bob Rae, *Lessons to Be Learned*, was an initial investigation into whether an inquiry into the 1985 Air India Flight 182 disaster would be appropriate.⁴⁸ Rae's report recommended the establishment of either a

⁴² An initial investigator could be elected by a simple majority vote by all MLAs, mirroring the framework for the election of the speaker. See *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba*, rule 8(8).

⁴³ For example, the committee could consist of two government MLAs, two opposition MLAs and a non-partisan chair who could break any deadlocks: see Schwartz, *supra* note 36 at 449.

⁴⁴ Centa & Macklem, *supra* note 3 at 118.

⁴⁵ *Ibid.* at 121.

⁴⁶ Ann Chaplin, "Commentary: Public Inquiries" in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 461 at 464.

⁴⁷ *Ibid.*

⁴⁸ Bob Rae, *Lessons to Be Learned* (Ottawa: Air India Review Secretariat, 2005) at 3: "This report is not a definitive account of every event related to the Air India disaster but rather an assessment of the issues that need to be examined more fully/"

though it does not necessarily flow from that argument that the legislation should try to ensure that they are independent.⁵⁹

The law reform institute filed the above report some 15 years ago. Since that time, governments have continued to abuse their unchecked discretion by failing to call needed inquiries. The time has thus arrived for legislative reform that ensures the full independence of inquiries. It is time to install measures that would give a significant voice to an independent entity in the establishment of inquiries.

⁵⁹ Alberta Law Reform Institute, *Public Inquiries: Issues Paper No. 3* (Edmonton: Alberta Law Reform Institute, 1991) at 31.