THE LAW OF PUBLIC INQUIRIES IN CANADA

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CHAPTER 9

REPORTING STAGE

A. Preparation of the Factual Report

1. Report Writing Process

Commissioners of inquiry are often called to review very complex issues, hear evidence over many days and review thousands of pages of documentation introduced as evidence before the commission, usually within tight time frames. Depending on their personalities and writing skills, commissioners may want to themselves write significant portions or the entirety of their reports, relying on the assistance of counsel to provide advice on issues such as admissibility and weight of evidence, and to prepare summaries of evidence. Other commissioners will want to have an ongoing involvement in the preparation of their reports, but leave the actual writing to counsel.

A number of recent commissioners of inquiry have retained the services of advisory counsel whose principal task involves report writing. In addition to lessening potential legal risks related to the involvement of inquiry counsel in report writing, the use of advisory counsel will likely be more efficient. Advisory counsel will be able to prepare summaries of evidence or draft sections of the report, and generally provide advice on report writing, as the evidence unfolds. They may also identify uncovered angles or potential gaps in the evidence, which could then be addressed by inquiry counsel in calling evidence while the inquiry is ongoing. Advisory counsel may provide assistance with respect to the issuance of notices of alleged misconduct, e.g. when it appears that a finding of misconduct might be made and that a notice has not yet been issued.

In any case, however, the report of a commissioner of inquiry should be his own,[1] a point that commissioners will want to make publicly clear, either at the inquiry or in their final reports.

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1 *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (1997), [1997] F.C.J. No. 17, 1997 CarswellNat 1368, 1997 CarswellNat 213 at para. 102 (Fed. C.A.); affirmed (sub nom. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*) [1997] 3 S.C.R. 440 (S.C.C.).

2. Systemic, Institutional or Organizational Failures

In many cases, although some individuals may not have met standards expected of them, the root of the problem under review may lay in institutional or organizational failures, the cause of which may be a lack of resources, the inadequacy of systems, procedures or policies, a lack of appropriate oversight, a breakdown in accountability or a flawed institutional culture.[2] Further, the evidence presented before a commission of inquiry may reveal problems that may be systemic in nature and horizontally affect, for example, government organizations, the justice system or industries.[3]

In this context, commissioners should strategically ask themselves whether it is necessary to focus on individual misconduct or whether the emphasis should be on systemic, institutional, or organizational failures. From a public policy standpoint and from a long-term remedial perspective, the factors that encouraged or led to wrongdoing are probably more important than the misconduct of individual persons.[4] In this context, rather than answering the question "who did what to whom," commissioners may want to address "what factors lead to events like this happening."[5] In following the latter approach, commissioners would want to present the facts as they are, without attaching qualifications,[6] and focus on broader issues rather than on individual conduct.[7]

3. Quality of Evidence Required to Make Findings

Although the strict rules of evidence do not apply to the proceedings of commissions of inquiry, this does not mean that the findings of commissioners of inquiry should be based on evidence of poor quality. Commissioners of inquiry should not base their findings and recommendations on speculation, rumours, innuendoes or on unreliable evidence.[8] This is particularly true for findings of miscon-

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2 See Justice Archie Campbell, "The Bernardo Investigation Review" in Allan Manson & David Mullan, eds., *Commissions of Inquiry, Praise or Reappraise* (Irwin Law, 2003) pages 399, 400 [Campbell, Bernardo Investigation Review]; Report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, The Honourable Frank Iacobucci, Commissioner, pages 32, 33, 61 [Iacobucci, Actions of Canadian Officials].

3 Roderick A. MacDonald, "Interrogating Inquiries" in Allan Manson & David Mullan, eds., *Commissions of Inquiry, Praise or Reappraise* (Irwin Law, 2003) page 483.

4 See Liora Salter, "The Complex Relationship Between Inquiries and Public Controversy" in Pross, Christie & Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1998) page 186.

5 *Supra* note 3 at pages 483, 484.

6 Campbell, Bernardo Investigation Review, *supra* note 2 at pages 393, 394.

7 See Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, The Honourable Louise Arbour, Commissioner, The Inquiry Process, page xiii; Iacobucci, Actions of Canadian Officials, *supra* note 2.

8 See Rapport de la Commission d'enquête charge de faire enquête sur la Sûreté du Québec, l'honorable Lawrence Poitras, Me Louise Viau, Me André Perreault, Commissaires,

duct. In making adverse findings, a commissioner of inquiry should rely as much as possible on evidence that would be admissible before a court.[9] Commissioners should be reticent to rely on hearsay evidence when making adverse findings,[10] and should refer to first source evidence or seek corroboration. However, evidence of a lower quality may be accepted to address contextual or systemic issues.[11]

4. Consequences of Refusal to Appear Before a Commission of Inquiry

The refusal of a witness to appear before an inquiry may ultimately lead to adverse inferences being drawn by the commissioner against that person.[12] Although it may be preferable to issue a notice of alleged misconduct to such a person, a good argument could be made that in refusing to appear and to participate at an inquiry, a witness has waived the protection of any duty of procedural fairness that the commission may otherwise have owed to that person.

5. Hindsight

In preparing their final reports, commissioners of inquiry should be mindful that they have the benefit of hindsight. It is easy, in retrospect, to say that systems were inadequate or decisions mistaken. It will therefore be unfair to judge the conduct of persons based on hindsight. Commissioners have the advantage of having all the facts available, which was not necessarily the case for those under examination at the time of the events in question. However, hindsight will be useful for

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1998, Chapitre I : La mission de la Commission d'enquête, pages 28, 29; The Problems Faced by Modern-Day Commissions of Inquiry, Gilles Létourneau, J.C.A., Address at the 13th Conference of Government Jurists, Quebec City, April 3, 1998, page 11 [Létourneau, Problems Faced by Modern-Day Commissions].

9 Report of the Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance, The Honourable Charles L. Dubin, Commissioner, The Process, page xxix. [Dubin, Use of Drugs and Banned Practices]; Report of the Commission on Proceedings Involving Guy Paul Morin, The Honourable Fred Kaufman, Commissioner, pages 6, 7 [Kaufman, Proceedings Involving Guy Paul Morin]; The Public Inquiry: Robert P. Armstrong, "Two Suggestions for Reform" (1994) 43 U.N.B.L.J. 377, page 380.

10 Report of the Royal Commission on Tribunals of Inquiry under the Chairmanship of the Right Honourable Lord Justice Salmon (United Kingdom), November 1966, page 27; Dubin, Use of Drugs and Banned Practices, *ibid.*; Létourneau, Problems Faced by Modern-Day Commissions, *supra* note 8 at pages 7, 11.

11 Kaufman, Proceedings Involving Guy Paul Morin, *supra* note 9 at page 6; Dubin, Use of Drugs and Banned Practices, *ibid.*

12 Report of the Westray Mine Public Inquiry, Volume Two, The Honourable Justice K. Peter Richard, Commissioner, page 600; Report of the Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, Volume 3, Inquiry Process, The Honourable Denise E. Bellamy, Commissioner, pages 81, 82.

determining the lessons to be learned from a particular event or situation, and to the formulation of recommendations for change.[13]

6. Findings of Misconduct — Core Principles

In keeping with the rules of procedural fairness and to minimize the risks of judicial review, commissioners of inquiry should adhere to a number of core principles when making adverse findings or findings of misconduct in their final reports:

- Adverse findings should be made only where required to carry out the mandate of the inquiry[14] and for the purpose of supporting the recommendations with a view of bringing corrective action.
- Adverse findings should not be based on rumours, innuendoes, speculation, guesses, unreliable or hearsay evidence. Rather, adverse findings should be based on "evidence having some probative value"[15] or on "convincing evidence."[16]
- However, adverse findings may be made based on reasonable inferences, which mean making rational connections between proven facts and other facts for which direct evidence is not available.[17]
- Adverse findings should only be made based on norms or standards of conduct in force or in place at the relevant time and not on hindsight.
- Adverse findings should only be made if there was prior issuance of notices of alleged misconduct. Such notices should be adequately detailed and be issued sufficiently in advance to allow a meaningful opportunity to respond.
- If commissioners believe it is essential to cover in their reports additional instances of misconduct revealed in the evidence, or make findings of misconduct which would be broader in scope than the allegations of miscon-

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13 On hindsight, see Campbell, Bernardo Investigation Review, *supra* note 2 at page 397; See Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, The Honourable Patrick J. Lesage, Commissioner, page 5 [Lesage, Trial and Conviction of James Driskell]; The SARS Commission Final Report, Volume II, Chapter One: The Commission's Mandate and Hindsight, The Honourable Archie Campbell, Commissioner, pages 19 and 20; Iacobucci, Actions of Canadian Officials, *supra* note 2 at pages 341, 342.

14 *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, (sub nom. *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*) [1997] 3 S.C.R. 440 (S.C.C.) at para. 53; *Rigaux v. British Columbia (Commission of Inquiry into death of Vaudreuil)* (1998), 155 D.L.R. (4th) 716 at para. 34, Allan J. (B.C. S.C.).

15 *Mahon v. Air New Zealand Ltd.*, [1984] 1 A.C. 808 at pages 820, 821 (New Zealand P.C.); *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 at paras. 44, 46 (Fed. C.A.); *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74 at paras. 28, 29 (Sask. C.A.).

16 See Lesage, Trial and Conviction of James Driskell, *supra* note 13.

17 Iacobucci, Actions of Canadian Officials, *supra* note 2 at pages 337, 338.

duct made in notices of alleged misconduct already issued, additional or revised notices of alleged misconduct should be issued as soon as possible. This would be so even if a commission is deliberating. The recipients of such notices should then be afforded a meaningful opportunity to respond.

- Procedural fairness requires that persons subject to findings of misconduct be provided with sufficient reasons supporting the findings. In that regard, commissioners should mention or make reference to the relevant evidence, either directly in their reports or in footnotes. They should also provide explanations supporting their credibility findings, including the rationale for preferring some evidence over other.[18]

B. Mixed Factual and Policy Inquiries — Considerations

The mandate of a commission of inquiry may call for a division between a factual phase, where witnesses are heard in relation to a particular event or situation, and a policy phase, where the commissioner reviews legislation, policies, procedures, processes or programs, and receives expert advice, with a view of making recommendations for change. The rules applicable to both phases will typically differ. Standing is not granted on the same basis and there may be no evidentiary hearings in the course of the policy phase of an inquiry. Parties and witnesses in the evidentiary phase will typically benefit from enhanced procedural protections as compared with the policy phase.

In this type of mixed inquiry, there may be an overlap between phases due to time constraints or other considerations. The co-existence of investigative and policy phases within the same inquiry may raise issues of procedural fairness and should be managed carefully. Information obtained in the course of the policy phase should not specifically be used to draw conclusions concerning persons in the investigative phase unless tendered as evidence in that phase.[19] It would also be prudent for a commissioner to indicate in his factual report that it is based solely on evidence presented at investigative hearings.[20]

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18 See *Gagliano v. Canada (Ex-Commissioner of Inquiry into the Sponsorship Program & Advertising Activities)* (2008), [2008] F.C.J. No. 1220, 2008 CarswellNat 3077, 2008 CarswellNat 3078 at paras. 133, 134, Teitelbaum D.J. (F.C.); Law Reform Commission of New Zealand, *A New Inquiries Act*, Report 102, 2008, pages 67, 68 [Law Reform Commission of New Zealand].

19 See *Gagliano v. Gomery* (2006), [2006] F.C.J. No. 917, 2006 CarswellNat 1682, 2006 CarswellNat 1606 at paras. 71, 72, Teitelbaum J. (F.C.); affirmed (2007), [2007] F.C.J. No. 467, 2007 CarswellNat 746, 2007 CarswellNat 819 (F.C.A.).

20 See the presumptive impact of such a declaration in *ibid.* at paras. 68, 69 (F.C.).

C. Recommendations

Based on their factual findings, commissioners of inquiry will make recommendations for change to their appointing government. Generally, the success of a public inquiry will be measured according to the following benchmarks: (1) whether the inquiry has fulfilled its mandate publicly, thoroughly, efficiently, timely and within a reasonable budget; and, (2) whether the inquiry has made realistic recommendations for change.

It is tempting for commissioners of inquiry to recommend sweeping institutional or organizational changes. However, implementing change may not come as easily as it may appear. Over the life of an inquiry, commissioners will have reviewed a particular subject matter with the assistance of experts in their fields. However, this does not mean that the commissioners themselves have become experts.

The scope and lifespan of commissions of inquiries are limited. They do not have the advantage of having a broad perspective. Commissioners of inquiry have to be sensitive to political and government policy-making realities — governments or public organizations have years of tradition and culture, policy-making involves the consideration of multiple and often competing interests and there are inevitable budgetary constraints. Those considerations may significantly limit the scope for change. Commissioners of inquiry should therefore approach their mandates with humility and should aim at making recommendations that will be useful to their appointing governments and which may realistically and practically be implemented.[21]

It may be the case that changes will already have been implemented by the time a commission of inquiry completes its mandate. In this context, it is not necessary for the commission of inquiry to engage into an exercise of escalation. It may review and consider changes already made, and if those changes satisfactorily address the situation or problem under review, then the commission may wish to limit the scope of its recommendations accordingly. Finally, commissions of inquiry are advisory and, consistent with that role, commissioners should leave the implementation of their recommendations to other competent authorities:

> There inevitably will be a tendency to conclude that the final measure of the effectiveness of a commission is the degree to which its activities and recommendations are accepted by the other institutions of society and by the public. One must be cautious in employing such a measure.
>
> In particular, one must avoid evaluating inquiries by their success in achieving the execution of policy. Other institutions of government are designed to implement policy. If inquiries were so designed, they would lose most of their unique advantages, such as their detached independence from the political arena and bureaucratic politics, their flexibility and their ability to be self-determining

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21 See Government by Inquiry, House of Commons Public Administration Select Committee (United Kingdom), First Report of Session 2004-05, February 2005, pages 53, 54; Law Reform Commission of New Zealand, *supra* note 18 at page 53.

within the terms of their mandate. Inquiries often should leave their implementation to other institutions.[22]

D. Delivery of Inquiry Reports

Commissions of inquiry should report to their appointing authority under the relevant public inquiry statute, which is the Governor General in Council federally, the Lieutenant Governor in Council provincially or the Commissioner in Executive Council territorially. The letter of transmittal of the report should therefore be addressed to the Governor General, Lieutenant Governor or the territorial Commissioner, as the case may be.[23] In some cases, public inquiry legislation may provide that the report be delivered to a Minister designated in the order in council creating the commission,[24] or to the Attorney General for tabling before the Lieutenant Governor in Council.[25] Departmental inquiries created under Part II of the federal *Inquiries Act* should report to the Minister who appointed the commission.[26] The tabling of the inquiry report before the Legislature by the responsible Minister may be required in legislation.[27]

The report of a commission of inquiry does not belong to the commission, but to the appointing government, which has the power to release it publicly and to determine the modalities of that release.[28] However, under certain inquiry statutes, publication of an inquiry's report is mandatory.[29] Practically, commissioners of inquiry have a substantial say in determining the fate of their reports, including the form of the reports, the length of time between the transmittal of the reports to the government and the public release, as well as the circumstances of their release.[30]

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22 Frank Iacobucci, Q.C. "Commissions of Inquiry and Public Policy in Canada" in Pross, Christie & Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1998) page 28; see also Some Observations on Public Inquiries, The Hon. Associate Chief Justice Dennis R. O'Connor and Freya Kristjanson, Canadian Institute for the Administration of Justice, Annual Conference, Halifax, October 10, 2007.

23 See Harry A. Wilson, *Commissions of Inquiry, A Handbook on Operations*, Privy Council Office, September 1982, page 43.

24 Newfoundland and Labrador *Public Inquiries Act, 2006*, section 4; British Columbia *Public Inquiry Act*, 2007, section 28.

25 New Brunswick *Inquiries Act*, section 10.

26 *Supra* note 23.

27 British Columbia *Public Inquiry Act*, 2007, para. 28(4).

28 See *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, [2008] 3 F.C.R. 248 at para. 34, Noël J. (F.C.).

29 Newfoundland and Labrador *Public Inquiries Act, 2006*, section 4; British Columbia *Public Inquiry Act*, 2007, section 28.

30 Anthony & Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Butterworths, 1985) page 147.