
INTRODUCTION

1.1 Purpose of this Volume

In this volume, I begin with an overview of the purposes of public inquiries generally, a discussion of the principles I applied in conducting the Ipperwash Inquiry, and a brief history of how the Inquiry came to be established. I then discuss the strategic, operational, legal, and administrative matters arising in the course of the Inquiry, in some cases offering suggestions on how governments contemplating a future public inquiry, and future commissions, might approach such matters.

This volume is primarily intended to be helpful to governments, commissioners, commission counsel, lawyers, and others who may become directly involved in future public inquiries, but it should also be of interest to the media and the broader public. Ultimately, the taxpayers pay for public inquiries. How and why public inquiries are called and conducted is therefore of public concern.

In approaching the conduct of this Inquiry, I was able to draw upon my prior experience and interest in inquiry proceedings. Some time ago, I acted as counsel for parties with standing in two formal inquiries¹ and I previously served as the commissioner of a public inquiry under the *Police Complaints Act*.² Nevertheless, upon my appointment as commissioner of the Ipperwash Inquiry on November 12, 2003, I began my task by reading everything I could about public inquiries and the experience of others in conducting them. I read judicial decisions,³ texts and articles on public inquiries, and law reform commission reports.⁴ I had discussions with

1 Royal Commission into Certain Sectors of the Construction Industry, Ontario, 1974; Royal Commission into Metropolitan Police Practices, 1976.

2 *Metropolitan Toronto Police Force Complaints Project Act*, S.O. 1981.

3 For example, Supreme Court of Canada decisions *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R.; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 [*Westray*]; *Starr v. Houlden*, [1990] 1 S.C.R. 1366; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada — Krever Commission)*, [1997] 3 S.C.R. [*Blood Inquiry*]; and *Attorney General of the Province of Quebec and Jean Keable v. The Attorney General of Canada and The Solicitor General of Canada*, [1979] 1 S.C.R. 218 [*Keable*].

4 For example, Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003); A.P. Pross, I. Christie, & J.A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990); D.J. Mullan, in *Administrative Law* (Toronto: Irwin Law, 2001) at 389–97; R.J. Anthony & A.R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985); G. Van Harten, “Truth Before Punishment: A Defence of Public Inquiries” (2003), 29 Queen’s L.J. 242; Justice Dennis O’Connor, “The Role of Commission Counsel in a Public Inquiry” (Summer 2003) 22 *Advocates’ Soc. J. No. 1*, 9–11; Ontario, Law Reform Commission, *Report on Public Inquiries* (Toronto: Law Reform Commission, 1992).

other judges who had conducted or were currently conducting public inquiries, and I read many inquiry reports.

Despite the considerable volume of literature and other helpful information and viewpoints available regarding public inquiries in general, in my view, there has been less documentation of the strategic, legal, operational, and administrative issues that arise throughout the process.

My colleague Madam Justice Denise Bellamy, commissioner of the recent Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry, identified a need to document the inquiry process. She did so for municipally organized inquiries, which are rare, for the benefit of the mayor, council, and ratepayers of the City of Toronto, and for others with an interest in the process. Associate Chief Justice Dennis O'Connor included a very useful overview of the inquiry process in his report on the Walkerton Inquiry and expanded on it in subsequent writings. Most other commissioners of public inquiries have also included some information about the process in their reports. However, each inquiry, whether federal, provincial, or municipal, is different, and I believe that increasing the body of information about public inquiries in general is necessary and valuable.

1.2 Purposes of Public Inquiries

Under the *Public Inquiries Act*, the Ontario government has broad powers in creating an inquiry. Under this statute, the Lieutenant Governor in Council has the authority to establish an inquiry to investigate matters affecting the good government of the province, the conduct of public business, the administration of justice in the province, or matters of public concern.⁵

In broad terms, there are two types of public inquiries. One is the investigative inquiry, which examines and reports on a specific incident or series of events. Often, an element of public controversy is attached to the matter under investigation. Indeed, calls for public inquiries in the wake of a controversy or tragedy are not uncommon, particularly from opposition parties or groups who do not have confidence in the ability of governments or other public institutions to regulate or investigate themselves. Regardless of the impetus for them, investigative inquiries are established to conduct an independent, comprehensive, and transparent review of

⁵ *Public Inquiries Act*, R.S.O. 1990. S. 2 states:

Whenever the Lieutenant Governor in Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern and the inquiry is not regulated by any special law, the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry.

the events. The purpose, in general terms, is to find out what happened — to look back. A well-known example of this type of inquiry is the Royal Commission into Certain Deaths at the Hospital for Sick Children (the Grange Inquiry).

The other type of public inquiry focuses on the development of public policy in a specific area of public concern. Often, the need for such an inquiry arises from undesirable events or circumstances. In these cases, the inquiry serves as a means through which the contributing factors can be fully considered. Within that context, the inquiry may make recommendations for measures to prevent recurrence or for systemic improvement — in other words, to look forward. The Romanow Commission on the Future of Health Care in Canada is an example of this type of public inquiry.

Thus, a public inquiry can be an opportunity to look back or to look forward. It can also be both. An inquiry can be called to uncover the truth about a specific matter and, at the same time, to propose policy reform.⁶ The Ipperwash Inquiry was established to meet both of those objectives.

All public inquiries serve a further purpose, however. A public inquiry also informs the public by presenting evidence that, until that point, may only have been given in private, if at all.⁷ It provides a forum for citizens and groups to participate in the resolution of issues and the development of future policies and strategies concerning matters and events in which they may have a genuine stake.⁸

Critics of public inquiries have argued that governments sometimes use them as a politically expedient means of deflecting criticism, or even as a means of abdicating responsibility for dealing with controversial or politically sensitive issues. They also point out that the resulting recommendations may not be immediately adopted, and maintain that inquiries are therefore not an effective use of public resources. Conversely, governments may resist the call for an inquiry in favour of internal mechanisms for review.⁹ While these concerns should not be ignored, and in fact should be considered before the decision to call an inquiry is made, it is also worth considering the extent to which an inquiry contributes to policy debate and to public education. This can prove to be a catalyst for reform in itself, and only manifest itself in legislative or policy change some time after the inquiry is completed.¹⁰

6 Van Harten, *supra* note 4 at 243.

7 Précis of a reflection by Justice S.M.G. Grange on the purposes of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children (Grange Commission).

8 *Commissions of Inquiry: Praise or Reappraise?*, *supra* note 4 at 512.

9 Todd J. Burke, “The Role of Public Inquiries in the Development of Public Policy,” in *Government Briefing* (Ontario Edition), a client newsletter of Gowling Lafleur Henderson LLP, November 2003.

10 *Ibid.*

In my view, what distinguishes the public inquiry from other types of investigations is that it is truly *public*. It investigates a matter of public interest, in public view, and with the participation of the public. This attribute was at the heart of all my decisions affecting the inquiry process.

1.3 Differences between Public Inquiries and Other Proceedings

Public inquiries are established by government, and their objective is to fulfill the mandate set out in an order-in-council, yet they are independent of government. Their role is also distinct from that of the legislative, executive, or judicial branches. Mr. Justice Cory of the Supreme Court of Canada pointed out that public inquiries, as temporary bodies, “are free of many of the institutional impediments, which at times constrain the operation of various branches of government.”¹¹ He further wrote that

[i]nquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally free of partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented.¹²

Despite these institutional distinctions, those observing a public inquiry, and indeed even those directly participating in one, often assume that it is like a trial. This is understandable. Although the specific features of inquiries vary, often the commissioner is a judge, the hearings are usually held in a court-like environment, and evidence is obtained from witnesses who may be examined and cross-examined by lawyers. In the case of the Ipperwash Inquiry, for example, I had powers to summons witnesses to attend, and if necessary to produce documents, and to make findings of misconduct in my report. However, a public inquiry is not a trial, and, generally, a commission is not established to revisit judgments already passed.¹³ While a commission may establish wrongdoing or misconduct, it does not find anyone guilty of a crime, nor does it establish civil liability for monetary damages. To underscore this point, I described these limits in my public statements during the Inquiry.¹⁴

11 *Westray*, *supra* note 3 at para. 60.

12 *Ibid.* at para. 62.

13 Appendix 1, Order-in-Council 1662/2003. See also Supreme Court of Canada decisions such as *Westray* (*supra* note 3 at para. 121) and *Blood Inquiry* (*supra* note 3 at para. 34). See also *Commissions of Inquiry* (*supra* note 4), particularly Iacobucci, at 26, and MacKay & McQueen, Chapter 9.

14 For example, Appendix 14(a), Commissioner’s Remarks at the Hearings on Standing and Funding, April 20, 2004.

Unlike a civil or criminal trial, a public inquiry is more inquisitorial than adversarial, in that the objective of those involved in the process is to uncover the truth rather than to establish liability. Nevertheless, the proceedings can become heated at times. Invariably, a public inquiry involves groups, individuals, or institutions with legitimate and often competing interests that must be explored. And, although an inquiry is not intended to determine guilt or innocence, or fault or no fault, the actions of individuals or institutions may be questioned and misconduct may be found. This, and the fact that the investigation is conducted in public, carries with it the possibility that individual or organizational reputations will be at risk. Counsel have a duty to protect and/or advance their clients' interests, and therefore an adversarial element invariably makes its way into the inquisitorial process. Given this reality, it is imperative that the inquiry process include safeguards that uphold the principles of natural justice and procedural fairness.

Inquiries with both fact-finding and policy mandates also face the challenge of accommodating the sometimes competing interests of lawyers and policy-makers.¹⁵ Lawyers retained by an organization or individual directly involved with or affected by the subject of the investigation are likely to focus only on the interests of their clients. They will therefore support procedural arrangements that afford maximum protection of their clients' legal rights. On the other hand, policy-makers, and lawyers representing parties with a broader policy focus, are likely to seek the broadest possible body of information relevant to the policy debate. They will tend to resist procedural mechanisms that may narrow the scope of the inquiry. The challenge is to put in place procedural and organizational structures that satisfy both fairness in fact-finding and thoroughness in eliciting information to contribute to the policy debate.

Another feature that distinguishes public inquiries from trials is that public inquiries are not strictly bound by the rules of evidence that govern civil or criminal proceedings. Our Rules of Procedure and Practice (the "Rules")¹⁶ stated that "[t]he strict rules of evidence will not apply to determine the admissibility of evidence."¹⁷ The commissioner of a public inquiry may receive any relevant evidence,¹⁸ including evidence that might be inadmissible in a court of law, such as hearsay evidence. However, although hearsay evidence may be admitted at a public inquiry, the commissioner may accord little weight to it.

Academic researchers, law reform commissions, and other observers of public inquiries have noted that the "courts have taken a generally deferential approach

¹⁵ *Commissions of Inquiry*, *supra* note 4, Introduction.

¹⁶ Appendix 2, Rules of Procedure and Practice.

¹⁷ *Ibid.*, Rule 13.

¹⁸ Subject to privilege or other legal restrictions. See *Public Inquiries Act*, *supra* note 5 at s. 11, and Rule 13, Appendix 2, Rules of Procedure and Practice.

to commissions of inquiry and allowed them considerable leeway in determining their own procedures. The courts seem to be aware of the need not to strangle public inquiries with procedures that are more appropriate in a more traditional adversarial setting, such as a civil or criminal trial.”¹⁹ This approach puts an elevated obligation on commission counsel to bring forward not only relevant evidence, but also helpful evidence. “Helpful” has a much broader meaning in a public inquiry than “relevant” has in a trial.²⁰

19 In *Commissions of Inquiry*, *supra* note 4, MacKay & McQueen at 273–274. See also O’Connor, *supra* note 4.

20 Daina Groskaufmanis & David Butt, “Public Inquiries: A Whole New Ballgame” (December 9, 2006) *The Lawyers Weekly*, at 14.