Uniform Public Inquires Act Project Proposal 2002

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UNIFORM PUBLIC INQUIRIES ACT PROJECT

PROPOSAL TO THE UNIFORM LAW CONFERENCE OF CANADA FOR AN INITIAL RESEARCH PAPER AND IDENTIFICATION ISSUES

Alastair R. Lucas, Professor of Law, The University of Calgary June 27, 2002

A Public Inquiries Project in 2002

The timing for a Uniform Public Inquiries Act Project is very promising. When Russell Anthony and I published our *Handbook on the Conduct of Public Inquiries in Canada* (Butterworths) in 1985, there had, over the previous 15 years, been a large number of important and very visible federal and provincial commissions of inquiry. These raised major public policy issues as well as concerns about procedural fairness. They also raised concerns about the large commitment of public funds required. The financial issue, along with related efficiency concerns, was prominent in public discussion of public inquiries in the late 1980's and early 1990's, to the point where some observers (I had doubts among others) predicted the demise of the commission of inquiry as an instrument of public government. This was also the period in which the law reform bodies in Alberta and Ontario mounted very thorough public inquiries projects and produced extensive recommendations for law reform and draft legislation.

Perhaps predictably, these recommendations were generally not implemented by the governments.

However, the late 1990's saw a resurgence of high profile commissions of inquiry including the Nova Scotia Westray Mine Tragedy Commission, and the federal Blood System and Somalia Inquiries. All were controversial, both in process and result, and produced a flush of judicial review actions. This surge has continued, with major commissions such as Ontario's Walkerton Inquiry. Specific areas of controversy remain, but attacks on public inquiries as institutions and instruments of government have largely abated. Clearly commissions of inquiry are being used both federally and provincially and will continue to be used by governments. Addressing uniformity of public inquiries legislation seems both timely and appropriate.

What Research is Required?

The Objective

A first step is to identify to identify issues that require more detailed investigation. More detailed research would then be designed and carried out with a view to producing recommendations that would be the basis for a Uniform Act. This Uniform Act should maximize the fundamental values of public inquiries, namely, effectiveness in investigation and policy development, independence, and relative transparency, while ensuring that affected persons are protected and that some measure of cost effectiveness is maintained.

Focus and Definition of the Research

This research requires definition and focus. In particular, some initial investigation should be directed to assessing the extent to which public inquiries acts might include related types of inquiries. There are many types of related inquiries, including legislative committee inquiries, government departmental or interdepartmental committees or task forces and inquiries by boards or tribunals acting under their empowering statutes. Implications of the common provisions that vest boards and tribunals with the powers of commissioners under public inquiries acts must also be considered. Part of this work could also address the relevance and appropriateness of the distinction between investigative and information-gathering inquiries that was underlined by the Law Reform Commission of Canada in its 1977 working paper on Commissions of Inquiry.

Extent of Constitutional Research

The extent of necessary and useful constitutional law research must also be assessed initially. This research, particularly research concerning potential contravention of Charter rights, is important context for understanding the scope of judicial review of commissions of inquiry. But it is doubtful that a public inquiries act can or should directly address Charter issues. Rather, Charter rights and values must be reflected in the powers and procedures of commissions under public inquiries acts.

Build Upon Previous Law Reform Body Research

The research should build upon existing high quality research, particularly that of the Law Reform Commission of Canada (*Commissions of Inquiry*, Working Paper No. 17, 1977 and *Advisory and Investigatory Commissions*, Report No. 13, 1979), the Alberta Law Reform Institute (*Public Inquiries*, Issues Paper No. 3, November 1990 *and Proposals for the Reform of the Public Inquiries Act*, Report No. 62, November, 1992) and the Ontario Law Reform Commission, (*Report on Public Inquiries*, 1992). Though issues would have to be updated, these studies provide an excellent baseline for the research. They addressed the following broad issues:

- Establishment and Jurisdiction of Public Inquiries Conduct of public inquiries
- Procedural protections Evidentiary powers and privileges Immunities
- Judicial review of public inquiries including administrative law and Charter grounds

This outline is consistent with the more detailed outline of issues in the Alberta Law Reform Institute's *Proposals for the Reform of the Public Inquiries Act*, *supra* (attached) and the outline of my CED 3'd Title, *Public Inquiries*.

Recent Issues and Trends

In addition to building on and updating these law reform body studies, the research should also identify and address more recent trends and issues. These may include:

1. Government authority concerning inquiry budgets, timelines, release of reports and deadlines. (As to timelines, see *Dixon v. Canada (Somalia Inquiry Commission)* (1998), 3 Admin. L.R. (3d) 306 (Fed. C.A.)). This goes to the fundamental issue of inquiry independence.
2. The interface with access to information and privacy legislation (see e.g. *Stevens v. Canada (Prime Minister)* (1997-02-28) FC, T-2419-93 (FCTD).
3. Whether, or the extent to which costs and/or funding for inquiry participants should be addressed in public inquiries acts. (See #4, below).
4. The extent to which public inquiries should be viewed as vehicles for public participation and consultation, and the manner in which this may be reflected in public inquiries acts. An important issue is standing of citizens to participate and another, related matter is whether, and if so how, to provide funding for inquiry participants.

Standing and participant funding have been major issues even in inquiries that appear to be fundamentally investigatory, such as the Walkerton Inquiry (see *Report of the Walkerton Inquiry, Part I, Ruling and Supplementary Ruling on Standing and Funding*, Appendix E (ii) and (iii), January 18, 2002).

5. Baselines for procedural fairness requirements including whether commissions should be required to hold hearings and whether hearings should, as a general rule, be public. Media reporting is an aspect of this public hearings issue. Other controversial procedural issues include witness protection requirements and notice requirements for findings of misconduct against persons (as to the latter, see *Canada (A-G) v. Canada (Commissioner of the Inquiry on the Blood System)* (1998), 48 Admin. L.R. (2d) 1 (SCC), affirming (1996) 207 N.R. 1 (Fed. C.A.); *Walkerton Report Part I*, *supra*.)
6. The appropriate manner in which to address the different evidentiary privileges and immunities. An old issue that continues to arise in modern inquiries is compelling production of public documents. This is part of the broader issue of the role of governments in inquiries.
7. Immunity of commissioners from civil action. Similarly, the position of

commission counsel, witnesses, inquiry staff and consultants should be considered. Much folklore has been generated by inquiry staff on these issues. Not all of the public inquiries acts address this issue.

8. Conduct of inquiries, including public and media access and the role of parties and other participants, including government (#6 above), commission counsel and commission staff and consultants.

9. Availability and nature of judicial review. Certain relevant judicial review developments, particularly theoretical and doctrinal evolution concerning standard of review should be assessed. Case examples include *Benno v. Canada (A-G)*, 2002 F.C.T. 142 and *Morneault v. Canada (A-G)*, [2001] 1 F.C. 30 (F.C.A.), in which a deferential "some evidence" standard of review was applied to commission of inquiry decisions.

10. Potential distinctions between a federal inquiries act on the one hand and an appropriate provincial act on the other. For example, provincial acts must not, either directly or in their implementation encroach on federal constitutional jurisdiction in relation to criminal law and procedure. (*See Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Starr v. Houlden*, [1990] 1 S.C.R. 1366.)

Project Timing

(To be determined)

Alberta Law Reform Institute

Proposals for the Reform of the Public Inquiries Act Report No. 62, November, 1992

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