

APPENDIX O

UNIFORM PUBLIC INQUIRIES ACT

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UNIFORM PUBLIC INQUIRIES ACT

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Short title

1 This Act may be cited as the *Uniform Public Inquiries Act*.

Commentary: Public inquiries are unique instruments. They are flexible, easily created, independent or perceived to be independent of government and they carry weight in the public and thus in government policy making. Inquiries may be responsive to public concerns, but they are also political instruments in the hands of government. Though inquiries have been criticized, most criticisms have focused on cost, time spent and potential interference with rights of citizens - issues of rights protection and inquiry management - rather than their appropriateness and relative effectiveness.

All of this led the Uniform Law Conference to conclude that there is a continuing role for public inquiries and that there is value in harmonizing Inquiries Acts across Canadian jurisdictions by means of a Uniform Inquiries Act. Canadian public inquiries and their benefits and problems, as well as the more specific issues involved in crafting appropriate and effective public inquiries legislation are discussed in the Public Inquiries Act Issues paper that preceded this Uniform Act. A tabular comparison of public Inquiries Acts that exist in the provinces and territories and at the federal level is appended to the Issues Paper.

Both the Issues Paper which is available on the conference website @ www.ulcc.ca and the Uniform Act and specific commentaries that follow make it clear that the challenge for drafters and legislators is to strike an appropriate balance between flexibility and efficiency of public inquiries and protection of the rights of individuals affected by inquiry processes.

Definitions

[2 In this Act

“adverse employment action” means

- (a) a disciplinary measure,**
- (b) demotion,**
- (c) termination of employment, and**
- (d) any measure that adversely affects a person’s employment or working conditions; (“mesure portant atteinte á l’emploi”)]**

Commentary: This definition specifies the employment action against which protection is provided to inquiry participants by section 26. It is appropriate for employees of both public bodies and private employers. The brackets indicate that this definition and its operative provision is presented as an option because of the policy and practical issues raised. See Commentary on section 26, below.

“commission” means a commission of inquiry established under Part I; (“commission”)

Commentary: This definition identifies traditional commissions of inquiry and distinguishes them from other inquiries that may be established and structured for particular purposes by governments under Part II.

“commissioner” means a person appointed as a commissioner under subsection 3(2); (“commissaire”)

“court” means the superior court of the [enacting jurisdiction]; (“cour”)

Commentary: This is the court that has jurisdiction in judicial review of decisions by provincial or federal public bodies.

“court of criminal jurisdiction” means a court of criminal jurisdiction as defined in the *Criminal Code* (Canada); (“cour de jurisdiction criminelle”) and

“minister” in reference to an inquiry, means the minister designated by the Lieutenant-Governor in Council as responsible for the inquiry. (“ministre”)

Commentary: “Minister” is defined in relation to inquiries as opposed to responsibility for the Act.

PART I
COMMISSIONS OF INQUIRY

Commissions of inquiry

- 3(1) The Lieutenant-Governor in Council may by order establish a commission of inquiry to inquire into and report on a matter that the Lieutenant-Governor in Council considers to be of public concern.**
- (2) Where a commission is established under subsection (1), the Lieutenant-Governor in Council shall in the order**
- (a) appoint one or more persons as commissioners in accordance with section 22;**
 - (b) set the terms of reference for the inquiry;**
 - (c) designate the minister responsible for the inquiry; and**
 - (d) fix a date for the termination of the inquiry and for the delivery of the commission's report.**
- (3) Where it is in the public interest, the Lieutenant-Governor in Council may by order revise the terms of reference for the inquiry and revise the dates set for the termination of the inquiry and delivery of the commission's report.**

Commentary: Scope of potential public inquiry subjects is defined as broadly as possible. Power to establish inquiries as instruments of public government is explicitly given to the Executive Council. Transparency and accountability are fostered by making clear the Executive's power and responsibility in setting terms of reference, appointing commissioners, designating the responsible minister and establishing a time limit for each inquiry. In the interest of transparency and accountability, subsection (3) specifies Executive powers to change terms of reference and reporting dates. The objective is to spotlight the balance between the authority of the Executive to establish and empower inquiries and the relative independence of inquiries once established in carrying out their functions.

Reporting

- 4(1) A commission shall deliver its report in writing to the minister by the date fixed for delivery of the report under section 3.**
- (2) The minister shall release the report to the public.**

Commentary: Duties are placed on commissions to deliver reports in a timely manner and on ministers to make reports public. Compliance by ministers with relevant privacy legislation will protect persons affected by commission reports. It will have to be determined if a commission or inquiry falls under a jurisdiction's public sector privacy legislation, and if not, whether that privacy legislation should be extended to apply to the commission or inquiry.

Participation at inquiry

- 5(1) A commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.**
- (2) A commission shall determine whether a person can participate in an inquiry and the manner and extent of their participation, after considering**
- (a) whether the person’s interests may be adversely affected by the findings of the commission;**
 - (b) whether the person’s participation would further the conduct of the inquiry; and**
 - (c) whether the person’s participation would contribute to the openness and fairness of the inquiry.**
- (3) A person who is permitted to participate in an inquiry may participate on his or her own behalf or be represented by legal counsel [or a representative] of his or her choice and where an opportunity to appear before the commission is provided, may accompany and appear with his or her legal counsel [or representative].**

Commentary: Participation in inquiries will be determined by commissions in the exercise of a discretion intended to balance individual participatory rights and the public interest in the effectiveness of an inquiry.

Subsection (3) Representation of participants by other than legal counsel will be subject to jurisdictional restrictions relating to the practice of law.

Allegation of misconduct

- 6 A commission shall not make a finding or report that alleges misconduct by a person unless reasonable notice of the allegation has been given to that person and the person is given an opportunity to be heard in person or by legal counsel [or representative].**

Commentary: These enhanced participatory rights for persons likely to be the subject of adverse findings in investigative inquiries are consistent with the functional approach for determination of procedural fairness content outlined by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. This provision is based on the right in s. 13 of the federal *Inquiries Act* and several provincial Acts, to be “heard in person or by counsel.” However, the opportunity to lead evidence and examine witnesses is in the discretion of commissioners as part of their general powers and responsibilities for managing inquiry processes.

Participant funding

- 7(1) A commission may recommend that the government of the [enacting jurisdiction] provide funding for legal counsel and other expenses of a person who is permitted to participate in an inquiry.**

- (2) Where a commission makes a recommendation under subsection (1), the minister shall consider the recommendation and advise the person concerned of the decision of the government and the level of funding to be provided, if any.**

Commentary: This section provides commissions with an explicit process for bringing participant funding requests before government.

Public hearings

8(1) A commission may decide whether evidence presented to the inquiry or a representation to the inquiry is to be oral or in writing and may set its own procedures for the conduct of the inquiry.

- (2) Where a commission holds an oral hearing it shall be conducted in public, but a commission may exclude the public from a hearing, or from part of it, where it decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of any person to a fair trial.**

Commentary: Commissions have power to establish their procedure for receiving evidence, and for this purpose may determine the nature of hearings they decide to hold. If oral hearings are chosen, the general rule is that they should be public, subject to a balancing test. Under s. 9, the same considerations apply to media restrictions.

Proceedings

9(1) A commission may arrange for the publishing or broadcast of its proceedings.

- (2) A commission may by order restrict or prohibit the public reporting of its proceedings and the publishing of any evidence at the inquiry where the commission decides that the public interest in reporting or publication is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of any person to a fair trial.**

Witnesses

10(1) A person who appears before a commission to give testimony has the same immunities as a witness who appears before the court.

- [(2) A person who appears before a commission is considered to have objected to answer any question asked him or her on the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings.]**

- [(3) An answer given by a witness before a commission shall not be used or be receivable in evidence against him or her in any trial or other proceedings against him or her, other than a prosecution for perjury in giving that answer.]**

- (4) A person who is summoned to appear before a commission shall be paid for his or her appearance and any travel and other expenses reasonably incurred in relation to that appearance out of the Consolidated Revenue Fund in accordance with rules established by the Lieutenant-Governor in Council under section 32.**

Commentary: Rights of witnesses before inquiries are assimilated to those of witnesses before courts on the basis that similar protection is appropriate. In particular, there would be protection against self-incrimination that should encompass the principles established by the Supreme Court of Canada in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97. Like witnesses before courts, inquiry witnesses who are summoned should be entitled to an appearance fee.

This provision does not include specific “use immunity” for inquiry participants, that is, protections against incrimination in subsequent proceedings based on inquiry evidence. Section 13 of the *Canadian Charter of Rights and Freedoms* provides fundamental self-incrimination protection and this is supported by provincial and federal Evidence Act provisions. Inquiries Act use immunity provisions could merely add to the existing array of protective provisions and introduce unnecessary complexity and potential uncertainty.

However, the bracketed provision is included as an option on the basis that the limits of s.13 protection for inquiry participants are not completely clear; nor is it clear that Evidence Act protections apply to all proceedings. Explicit use immunity would support inquiry proceedings by reassuring persons who may be disinclined to offer evidence that is important for full and effective inquiries. Such provisions are included in a number of existing provincial Inquiries Acts.

Power to compel evidence

11 A commission may by summons

- (a) require a person to attend as a witness and give evidence, orally or in writing, on oath or by affirmation; and**
- (b) require a person to produce to the commission or a person designated by the commission all documents, records and things in their custody or control that may relate in any way to the subject of the inquiry.**

Commentary: These are the classic investigative powers in aid of inquiry, that may be used by commissioners where necessary to achieve inquiry objectives.

Power to inspect

12(1) Where a commission believes it is reasonably necessary to the conduct of an inquiry, a commissioner, or a person authorized by the commission, may

- (a) at reasonable times enter a premises to view or inspect the premises;**

- (b) **require the production of records, documents or other things relating to the subject of the inquiry and may examine those records, documents or other things or remove them for the purpose of making copies of them; and**
 - (c) **make inquiries of a person on the premises into all matters relating to the subject of the inquiry.**
- (2) **Where a commissioner or another person removes records, documents or other things under paragraph (1)(b), the commissioner or other person shall give to the person from whom those items were taken a receipt for those items and shall immediately make copies of those items where possible and return the originals to the person who was given the receipt.**

Commentary: These are the classic investigative powers in aid of inquiry, that may be used by commissioners where necessary to achieve inquiry objectives.

Power to search with warrant

- 13(1) **Where a commissioner, or a person authorized by the commission, is refused or denied entry onto a premises or the commission is of the opinion that entry without notice is necessary, and the commission has reasonable grounds to believe that entering and searching the premises will assist in the conduct of an inquiry, the commission may apply to a court of criminal jurisdiction in the [enacting jurisdiction], without giving notice to any other person, for an order permitting the commission or a person named in the order to do those things referred to in section 12.**
- (2) **A judge of the court that receives the application who is satisfied on oath or affirmation that there are reasonable grounds for believing that entering and searching the premises will assist in the conduct of an inquiry, may issue a warrant authorizing a commissioner or a person named in the warrant to enter the premises and search for and inspect anything that will assist in the conduct of an inquiry and to do all those things referred to in section 12.**

Commentary: These are the classic investigative powers in aid of inquiry, that may be used by commissioners where necessary to achieve inquiry objectives.

Evidentiary privileges

- 14 **A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as the person would have in relation to the same disclosure and production in a court.**

Commentary: In principle, the same values – civil rights protection and maintenance of process integrity – that underlie evidentiary privileges in other legal proceedings should apply to inquiries.

Contempt of commission

15(1) A commission may state a case to the court where a person without lawful excuse,

- (a) does not attend on being summoned under section 11 as a witness at an inquiry;**
 - (b) while in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the commission to be taken or made, or to produce any document, record or thing in his or her custody or control legally required by the commission to be produced to it, or to answer any question to which the commission may legally require an answer;**
 - (c) contravenes an order of the commission under section 9 with respect to public reporting of its proceedings or the publishing of evidence; or**
 - (d) does any other thing that would, if the commission had been a court having power to commit for contempt, have been contempt of that court.**
- (2) A judge of the court may, on the application of the commission, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in the same manner as if he or she had been guilty of contempt of the court.**

Commentary: Considerations of fairness and legitimacy support the approach that powers to address contempt, whether in the face of the inquiry or not, should be invoked, not directly by commissioners, but by the court upon application by commissioners.

Request for direction

16(1) A commission may apply to the court for direction on a question of law or on the jurisdiction of the commission.

(2) There is no right of appeal from a decision of a judge made under this section.

Commentary: Provision to seek directions is intended to facilitate inquiry planning and process. Limitation of appeal ensures finality and thus promotes stability of expectation and facilitates implementation of inquiry recommendations. It also underlines the policy development and recommendatory functions of inquiries.

PART II
OTHER INQUIRIES

Order directing inquiry

- 17(1) The Lieutenant-Governor in Council may order that there be an inquiry under this Part into a matter that the Lieutenant-Governor in Council considers to be of public concern.**
- (2) In an order made under subsection (1), the Lieutenant-Governor in Council shall direct how the inquiry is to be conducted, including**
- (a) appointing one or more persons in accordance with section 22 to carry out the inquiry and submit a report;**
 - (b) specifying the mechanisms by which the inquiry is to be conducted, which may include**
 - (i) interviews and surveys,**
 - (ii) public or private meetings,**
 - (iii) research studies,**
 - (iv) inspections and investigations,**
 - (v) calling for written submissions, and**
 - (vi) informal or formal hearings;**
 - (c) designating the minister responsible for the inquiry; and**
 - (d) specifying the nature and scope of the report to be submitted by a person appointed to conduct the inquiry and the extent to which the report will be made available to the public.**

Commentary: Part II gives the Executive flexibility to establish inquiries and equip them with jurisdiction and specific powers appropriate for their particular functions. Inquiries that are essentially policy studies (e.g., inquiries into the management of a particular natural resource, into economic strategies or into regulation of an industry) may not need the powers to hold hearings and compel evidence. It is recognized that in practice, the need for public processes and formal evidence production may become apparent only after an inquiry has commenced. This may result in some Part II inquiries being defined in nature and scope that differs little from traditional commissions of inquiry under Part I.

Reporting

- 18 A person appointed to conduct an inquiry under this Part shall deliver a report in writing to the minister.**

Designation of powers

19 The Lieutenant-Governor in Council may, in an order made under section 17,

- (a) direct that persons who believe they have an interest in the subject of the inquiry have a right to apply to participate in the inquiry, and where so directed, section 5 applies to the inquiry as if it was a commission;**
- (b) direct a person appointed under section 17 may make recommendations about participant funding and where so directed, section 7 applies to the inquiry as if it was a commission;**
- (c) direct whether a person appointed under section 17 is to receive evidence and representations in writing or orally, and whether subsection 8(2) applies;**
- (d) direct that a person appointed under section 17 may arrange for the publishing or broadcast of any proceedings held under this Part, and where so directed, subsection 9(2) applies to the inquiry as if it was a commission;**
- (e) direct that the persons appointed under section 17 have the powers of a commission to compel the production of testimony and evidence under section 11, and where so directed, sections 10 and 15 apply to the inquiry as if it was a commission;**
- (f) direct that a person appointed under section 17 has the powers of a commission to conduct inspections under section 12, and where so directed, subsection 12(2) applies to the inquiry as if it was a commission;**
- (g) direct that a person appointed under section 17 has the powers of a commission to apply for a warrant to search under section 13; and**
- (h) direct that a person appointed under section 17 has the powers of a commission to apply to the court for direction under section 16.**

Allegation of misconduct

20 A person appointed under section 17 shall not make a finding or report that alleges misconduct by another person unless reasonable notice of the allegation has been given to that person and the person is given an opportunity to be heard in person or by legal counsel [or representative].

Commentary: Where Part II inquiries are given powers to compel production of testimony and evidence and to make findings or allegations of misconduct, affected persons have the same procedural protections as in the case of Part I commissions of inquiry.

Evidentiary privileges

21 Section 14 applies to an inquiry held under this Part as if it was a commission.

Commentary: Civil rights of participants in Part II inquiries with potentially intrusive investigatory powers require the same protection as those of participants before Part I commissions of inquiry.

PART III OTHER MATTERS

Appointment

22(1) Members of a commission or a person appointed to conduct an inquiry under Part II shall be appointed on terms and remuneration set by the Lieutenant-Governor in Council in the order of appointment.

(2) The Lieutenant-Governor in Council may terminate an appointment made under this Act.

(3) A person appointed under this Act may resign by giving written notice to the Lieutenant-Governor in Council.

(4) The Lieutenant-Governor in Council may by order replace a person appointed under this Act who has resigned or whose appointment has been terminated.

(5) Where more than one person is appointed as a commissioner or to conduct an inquiry, the Lieutenant-Governor in Council may by order appoint one of them as chair.

Commentary: This section provides explicit Executive power to appoint commissioners, specify terms of appointment and to replace commissioners.

Commission funding

23(1) Where an inquiry is to be held under this Act, the minister shall prepare a budget for the conduct of the inquiry in consultation with the commission or a person appointed to conduct an inquiry under Part II.

(2) The minister shall submit the budget for approval in the manner set by the Act respecting the financial administration of the [enacting jurisdiction].

(3) Where the budget is approved, the expenditures incurred within that budget shall be paid out of the Consolidated Revenue Fund without further approval, except that the commission and a person appointed to conduct an inquiry under Part II shall comply with any guidelines for expenditures by departments and agencies of the government of the [enacting jurisdiction] and any rules made by the Lieutenant-Governor in Council in respect of the inquiry under section 32.

- (4) Where the terms of reference for the inquiry or the dates set for termination of the inquiry or delivery of the commission's report have been revised, the minister may prepare a revised budget and submit it for approval in the manner described in subsections (1) to (2), and subsection (3) applies to the further expenditures where the budget is approved.**

Commentary: This is a flexible process provision. The objectives are transparency, accountability and promotion of inquiry effectiveness. It is not intended to mandate certain funding for inquiries. Differences in the budget process in different jurisdictions will have to be taken into account if this provision is enacted.

Staff

24(1) A commission or a person appointed to conduct an inquiry under Part II may engage the services of

- (a) counsel, clerks, reporters and assistants; and**
 - (b) other persons having special technical or other expertise or knowledge.**
- (2) A person engaged under subsection (1) may be authorized to inquire into a matter that is within the jurisdiction of the commission or inquiry.**
- (3) A person authorized under subsection (2) has the same privileges and immunities given to persons under section 25.**

Commentary: Inquiry efficiency and effectiveness requires authority to retain necessary staff and to delegate certain inquiry functions to staff members.

Immunity

25(1) A commission, commissioners, a person appointed to conduct an inquiry under Part II and legal counsel to the commission or inquiry engaged under section 24 have the same privileges and immunities as a judge of the court for any decision or action or failure to act in carrying out an inquiry under this Act.

- (2) A person authorized to inspect or search under section 12, 13 or 17 has the same privileges and immunity as a commission or a person appointed to conduct an inquiry under Part II would have in conducting the inspection or search.**

Commentary: This immunity is intended to promote independence and impartial analysis, conclusions and recommendations. In the absence of this provision, commissioners may be entitled only to qualified privilege. Commission counsel are included, on the ground that they are an integral and visible part of inquiry processes.

Protection of employees

[26 Adverse employment action shall not be threatened or taken against an employee of any person because the employee has in good faith made representations as a participant or has disclosed information, in oral testimony, by the production of records, documents or other things or otherwise, to a commission, to a person appointed to conduct an inquiry under Part II or to staff or representatives of either of them.]

Commentary: This provision reflects an intent to facilitate information gathering by inquiries without resorting to coercive powers, while providing protection to information sources. Enforcement may be available under Provincial Offences Acts.

It is bracketed as an option because there is uncertainty about the necessary and appropriate scope of this kind of protection, particularly whether it should cover information disclosed by employees prior to establishment of inquiries. There is also uncertainty about enforcement. Provincial Offences Act provisions may be available, but prescribed penalties are minor.

Review of actions

27 A decision or action taken by a commission or by a person appointed to conduct an inquiry under Part II is final and conclusive for all purposes and

- (a) shall not be challenged, reviewed, prohibited, restrained or quashed in any court; and**
- (b) is not subject to any proceedings or process of any court.**

Commentary: This privative clause promotes inquiry effectiveness by underlining intention that inquiries should be authoritative in their findings and recommendations, with limited judicial supervision. Even in the absence of explicit privative clauses, courts have in cases such as *Morneault v. Canada (Attorney General)*, [2001] F.C. 30 (Fed. C.A.), concluded consistently that deferential standards of review apply to inquiries.

Joint inquiries

28 Where the scope of an inquiry to be conducted under this Act includes matters within the jurisdiction of the government of another province, territory or of Canada, the minister may enter into an agreement or arrangement with that government about the joint establishment of a commission or inquiry and the manner in which the inquiry is to be conducted by the joint commission or inquiry.

Commentary: Joint inquiries may be established under agreement to address constitutional limitations, avoid duplication and facilitate interjurisdictional cooperation. The intention is that participating jurisdictions in joint inquiries should have reasonably equivalent inquiries legislation.

Preservation of records

29 The Lieutenant-Governor in Council shall provide for the preservation of the records of a commission or inquiry and shall protect information that is confidential or privileged.

Commentary: Ensuring preservation of inquiry records promotes the public interest in dissemination of inquiry results and maintenance of public information for future research.

Other Acts giving powers of commissioner

30 Where another Act confers upon a person or body the powers of a commissioner or commission under this Act, unless otherwise ordered by the Lieutenant-Governor in Council,

- (a) the powers conferred on the person or body are those powers given to a commission;**
- (b) the person or body has the same privileges and immunities as a commission; and**
- (c) a person who appears before the person or body has the same immunities and privileges as a person who appears before a commission.**

Commentary: It is common practice to confer on various statutory authorities the powers of commissioners under Inquiries Acts. This creates the risk that incorporated inquiry powers may not be precisely tailored to the needs of particular authorities and that doubts may arise as to what powers were granted. Consequently, this section specifies the powers that would be included in such an incorporation in the absence of specific provisions. It is a “heads up” for legislators and their counsel, underlining the need to carefully consider the suitability of powers that may be incorporated.

Publication of orders

31(1) An order made under this Act shall be published in the Gazette and made available to the public through another method determined by the minister.

(2) Notwithstanding subsection (1), the minister may exclude from publication and public release those portions of the order setting out the terms of appointment and remuneration for commissioners or a person appointed to conduct an inquiry under Part II.

Rules

32 The Lieutenant Governor in Council may, either generally by regulation, for all commissions established and inquiries held under this Act, or by order for a specific commission or inquiry, make rules about

- (a) remuneration of commissioners and of a person appointed to conduct an inquiry under Part II;**
- (b) remuneration of witnesses;**
- (c) allowances to witnesses for travel and out of pocket expenses;**
- (d) other expenditures for services and facilities; and**
- (e) other administrative matters.**

Commentary: Lieutenant Governor in Council rulemaking power is limited to administrative matters. Inquiries are intended, subject to the specific powers that may be given to Part II inquiries, to determine their own procedure.