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## Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada

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## Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada

### Abstract

Focusing on the Government of Ontario's unwillingness to call a public inquiry into the death of Dudley George, an Aboriginal protester, and the Government of Canada's willingness to interfere with an inquiry into the deployment of Canadian forces to Somalia, this article argues that governments appear increasingly reluctant to support a commission of inquiry into a public crisis even where it can serve as a catalyst for addressing larger and more pressing concerns of institutional and policy reform. It first addresses "start-up problems" associated with the fact that the decision to appoint a commission of inquiry lies within the sole discretion of cabinet. It also canvasses incentives and disincentives on political actors and the media to call for the establishment of a commission of inquiry. It then examines "shut down problems" associated with governmental efforts to prematurely end or restrict a commission's activity. Borrowing several features from the Independent Counsel and the Inspector General Models in the United States, the article proposes that the Law Commission of Canada act as a permanent base of operations for federal commissions of inquiry, and suggests that commissions of inquiry adopt non-confrontational methods and procedures that encourage governments and other parties to sit down and engage in a constructive exercise of fact-finding, polity formulation and structural reform.

### Keywords

Law Commission of Canada; Governmental investigations; Government accountability; Canada

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# SECURING ACCOUNTABILITY THROUGH COMMISSIONS OF INQUIRY: A ROLE FOR THE LAW COMMISSION OF CANADA<sup>©</sup>

BY ROBERT CENTA\* AND PATRICK MACKLEM\*\*

Focusing on the Government of Ontario's unwillingness to call a public inquiry into the death of Dudley George, an Aboriginal protester, and the Government of Canada's willingness to interfere with an inquiry into the deployment of Canadian forces to Somalia, this article argues that governments appear increasingly reluctant to support a commission of inquiry into a public crisis even where it can serve as a catalyst for addressing larger and more pressing concerns of institutional and policy reform. It first addresses "start-up problems" associated with the fact that the decision to appoint a commission of inquiry lies within the sole discretion of cabinet. It also canvasses incentives and disincentives on political actors and the media to call for the establishment of a commission of inquiry. It then examines "shut down problems" associated with governmental efforts to prematurely end or restrict a commission's activity. Borrowing several features from the Independent Counsel and the Inspector General Models in the United States, the article proposes that the Law Commission of Canada act as a permanent base of operations for federal commissions of inquiry, and suggests that commissions of inquiry adopt non-confrontational methods and procedures that encourage governments and other parties to sit down and engage in a constructive exercise of fact-finding, policy formulation and structural reform.

À l'aide de deux cas, (soit le refus du gouvernement ontarien d'enquêter la mort du manifestant chrétien Dudley George, et l'empressement du gouvernement canadien de s'ingérer dans une enquête du déploiement des forces armées canadiennes en Somalie), cet article propose que les gouvernements semblent être de moins en moins disposés à encourager l'enquête d'une crise même si cela pourrait servir de catalyseur pour adresser des problèmes de réforme institutionnelle et de politique. L'article aborde d'abord les difficultés initiales découlant du fait que la décision d'ordonner une enquête revient uniquement à la discrétion du Cabinet. L'article touche également aux facteurs qui à la fois motivent et ont un effet dissuasif sur les médias et les acteurs politiques revendiquant la création d'une commission d'enquête. L'article examine par la suite les difficultés terminales associées aux efforts du gouvernement à restreindre ou conclure les activités d'une commission. S'inspirant de plusieurs éléments des modèles du "Independent Counsel" et du "Inspector General" des États-Unis, cet article propose que la Commission du droit du Canada devrait jouer un rôle central quant aux opérations des commissions d'enquêtes fédérales. On propose également que les commissions d'enquête devraient adopter des procédures et méthodes non-confrontationnelles encourageant les gouvernements et autres parties de s'engager à participer à une séance d'information, une reformulation de politiques et une réforme structurelle.

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## I. INTRODUCTION

The commission of inquiry is a time-honoured institutional mechanism for the formulation of public policy in Canada.<sup>1</sup> Statutory provisions for the establishment of commissions of inquiry were first introduced in the Province of Canada in 1846<sup>2</sup> and have become a permanent feature of federal and provincial political life. Since Confederation, the federal government has established over four hundred commissions of inquiry to examine a wide array of matters of public concern, including allegations of wrongdoing by the RCMP, challenges posed by reproductive technologies, and the social, economic and legal circumstances of Aboriginal peoples.<sup>3</sup> Provincial governments have also relied heavily on commissions of inquiry to examine and report on matters of public concern. Since Confederation, Ontario, for example, has established over four hundred commissions of inquiry to investigate matters as diverse as attempts to bribe members of the legislature and the development of the province's mineral resources.<sup>4</sup>

The commission of inquiry has had a lasting presence in Canadian political life because it has performed a number of valuable public policy functions. A commission of inquiry can exercise wide-ranging investigative authority to uncover facts concerning matters of substantial public importance. A commission of inquiry also can inform and educate citizens about such matters.<sup>5</sup> Moreover, commissions of inquiry are often able to

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<sup>1</sup> A commission of inquiry can take a number of forms, including Royal Commissions, inquiries by statutory or regulatory bodies, and departmental and inter-departmental policy studies. See generally M. Trebilcock & L. Austin, "The Limits of the Full Court Press: Of Blood and Mergers" (1998) 48 U.T.L.J. 1 at 7: "[t]hese different forms of public inquiry vary widely in terms of political accountability; political dynamics, participation; visibility; timing; and costs." This paper's primary focus is on commissions of inquiry established pursuant to general enabling legislation, such as the federal *Inquiries Act*, R.S.C. 1985, c. I-11 [hereinafter *Inquiries Act*].

<sup>2</sup> *An Act To Empower Commissions For Inquiring Into Matters Connected With The Public Business, To Take Evidence Under Oath*, 1846, 9 Vict., c. 38 (Prov. Can.).

<sup>3</sup> See G.F. Henderson, *Federal Royal Commissions in Canada: 1867-1966: A checklist* (Toronto: University of Toronto Press, 1967).

<sup>4</sup> See generally Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992) at 7-8 [hereinafter *OLRC*]. See also L. Maillet, *Provincial Royal Commissions and Commissions of Inquiry: 1867-1982: A Select Bibliography* (Ottawa: The National Library of Canada, 1986).

<sup>5</sup> See, for example, S.G.M. Grange, "How Should Lawyers and the Legal Profession Adapt?" in A. P. Gross, I. Christie & J. A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 151 at 155: "I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence

investigate, inform, and educate in ways superior to the mechanisms available to the judicial and legislative branches of government. The judicial process, according to the Ontario Law Reform Commission, tends to assign blame by “fragment[ing] issues into a limited set of categories established by existing norms,” whereas a commission of inquiry enables a broader examination of social causes and conditions.<sup>6</sup> Unlike legislative institutions, commissions of inquiry are, ideally, free of partisan loyalties, better able to devote the appropriate time, resources and expertise, and can take a long-term view of the problem. At their best, commissions of inquiry generate “innovative discourses of development that merge public philosophy with programmatic ideas unlike those attempted, much less produced, by any other institution or organization in the Canadian political system.”<sup>7</sup> Accordingly, commissions of inquiry often perform an important social function, by contributing to “a dramatic transformation in popular perceptions of some previously poorly illuminated aspects of Canadian society and institutions.”<sup>8</sup> Together, these investigative, informative, educational and social functions enable commissions of inquiry to make governments more accountable and responsive to the economic, social and political needs and aspirations of Canadian citizens.

It has become apparent, however, that the capacity of the commission of inquiry to secure governmental accountability is beginning to falter. Fearing adverse political consequences, governments increasingly appear reluctant to establish commissions of inquiry into public crises that merit independent investigation. For example, despite the fact that the incident raises important questions of public policy, the Government of Ontario has stubbornly refused to establish a commission of inquiry into circumstances surrounding the 1995 shooting death by provincial police of Dudley George, an unarmed Aboriginal man who participated in an occupation of a provincial park on disputed Aboriginal territory.<sup>9</sup>

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which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.”

<sup>6</sup> *OLRC*, *supra* note 4 at 11.

<sup>7</sup> N. Bradford, *Commissioning Ideas: Canadian National Policy Innovation in Comparative Perspective* (Toronto: Oxford University Press, 1998) at 159.

<sup>8</sup> *OLRC*, *supra* note 4 at 12.

<sup>9</sup> Resistance to the establishment of a commission of inquiry into politically sensitive matters is not restricted to the provincial sphere, as exhibited by the federal government’s ongoing refusal to appoint an inquiry into the “Grand-Mère Inn scandal,” in which Prime Minister Chrétien lobbied the Business Development Bank of Canada to extend a loan to a hotel adjacent to a golf course in which he held a 25 per cent interest. See “Clouds of scandal gather in Ottawa” *National Post* (24 March

Moreover, governments increasingly appear willing to interfere with the mandates and timing of ongoing inquiries. Although commissions of inquiry in Canada have traditionally been allowed to run their course, the federal government's decision to wind up the work of the inquiry into the deployment of Canadian forces to Somalia, which was upheld by the Federal Court of Appeal in *Dixon v. Canada*, signals that in the future governments may be more willing to interfere in the work of commissions of inquiry.<sup>10</sup>

Commissions of inquiry come in all federal and provincial<sup>11</sup> shapes and sizes, ranging from broad-gauged research commissions to retrospective investigations into specific actions that contributed to a particular public crisis. Commissions of inquiry that focus on retrospective allocations of fault and blame run the risk of being little more than poor imitations of our civil or criminal justice systems. Inquiries that focus on "who did what to whom" invite due process challenges from those under review. Publicity may taint the fairness of any parallel legal proceedings. But, despite the benefits of the former and the flaws of the latter, commissions of inquiry cannot be neatly divided into those that involve matters of public policy and those that investigate alleged misconduct.<sup>12</sup> Most commissions of inquiry perform both functions, and "can be arranged on a continuum with respect to the emphasis given to each aspect of their work."<sup>13</sup> This dual function may be a reason that governments appear increasingly reluctant to support a commission of inquiry into a public crisis even where it can serve as a catalyst for addressing larger and more

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2001) A15.

<sup>10</sup> Nor is interference with an ongoing commission of inquiry restricted to the federal sphere, as illustrated by the decision by British Columbia to terminate a public inquiry into the diversion of approximately \$2 million in bingo profits from legitimate charities to party and cabinet minister accounts. At the time it was terminated, the inquiry had nearly completed its final report. See "Bingogate probe point man slams inquiry shutdown" *Victoria Times Colonist* (30 June 2001) A3.

<sup>11</sup> And sometimes federal and provincial: the Royal Commission on the Ocean Ranger Marine Disaster, established in 1982 when eighty-four workers died after the capsize of a semi-submersible drilling unit in the Atlantic Ocean, was a federal-provincial joint commission.

<sup>12</sup> But see Law Reform Commission of Canada, *Commissions of Inquiry* (Working Paper 17) (Ottawa: Minister of Supply and Services, 1978) and Law Reform Commission of Canada, *Advisory and Investigatory Commissions* (Report 13) (Ottawa: Minister of Supply and Services, 1979).

<sup>13</sup> L. Salter, "The Two Contradictions in Public Inquiries," in Gross, Christie & Yogis, eds., *Commissions of Inquiry*, *supra* note 5, 173 at 176.

pressing concerns of institutional and policy reform.<sup>14</sup> The result is that the utility of the commission of inquiry as an instrument of long-term policy reform is compromised by the short-term fear of adverse political consequences associated with the retrospective allocation of blame.

Given that governments now seem to “know when to hold them, and know when to fold them,” it is worth exploring other mechanisms that can provide policy guidance when governments are reluctant to establish or to support a commission of inquiry. This article explores two American alternatives to the commission of inquiry. The first, made infamous by Kenneth Starr’s obsessive fascination with the sexual life of the president of the United States, is the Independent Counsel model, established post-Watergate, under the *Ethics in Government Act*.<sup>15</sup> The second, less well known alternative is the Inspector General model enacted by the *Inspector General Act*,<sup>16</sup> which authorizes the creation of departmental offices to detect and prevent fraud, waste, and abuse in government. In light of governments’ incentives and disincentives to establish or to shut down independent investigations of governmental actions, we examine both alternatives to determine whether they rely on institutional mechanisms that might enable commissions of inquiry to perform their accountability function more effectively. Finally, we propose a revised mandate for the Law Commission of Canada, which would enable it to serve as a permanent base of operations for commissions of inquiry into matters falling within federal jurisdiction that merit independent investigation. If successful, this reform could serve as a model for provincial law reform commissions in the future.

In light of the circumstances surrounding the death of Mr. George, Part II of the article examines “start up problems,” namely, problems associated with the fact that the decision to appoint a commission of inquiry lies within the sole discretion of the federal or provincial cabinet. It also canvasses incentives and disincentives on the governing party, opposition parties, and the media to establish or call for the establishment of a commission of inquiry. In light of the circumstances surrounding the Somalia inquiry, Part III examines “shutdown problems,” namely, problems

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<sup>14</sup> We do not wish to overstate this point, especially in light of the decision of the Ontario government in 2000 to establish a commission of inquiry with a wide ranging mandate to examine water contamination in the town of Walkerton. See “Rules set for ‘sweeping’ water inquiry” *The Ottawa Citizen* (14 June 2000) A4.

<sup>15</sup> 28 U.S.C. §§ 591-599 (1994).

<sup>16</sup> 5 U.S.C. app. 3 §§ 1-12 (1994).



associated with governmental efforts to end prematurely or to restrict a commission's activity. This Part considers the effect that the decision in *Dixon* may have on governments choosing to shut down inquiries.

Part IV of the article assesses whether two American models provide superior methods of securing political and governmental accountability, specifically, the Independent Counsel model and the Inspector General model. Borrowing a number of features from each model, Part V proposes that an enhanced and expanded Law Commission act as a permanent base of operations for federal commissions of inquiry. It examines a variety of triggering mechanisms that would reduce or eliminate the sole discretion of cabinets to establish commissions of inquiry. In particular, this approach requires that commissions of inquiry adopt methods and procedures that are non-confrontational and encourage governments and other parties to sit down and engage in a constructive exercise of fact-finding, policy formulation, and structural reform.

## II. START UP PROBLEMS

In 1995, approximately twenty-four men, women and children of the Kettle and Stony Point First Nation peacefully occupied Ipperwash Provincial Park at a time when the park was closed to the public. Adjacent to the park was Camp Ipperwash, once used by the Department of National Defence as a military base. But since 1993, it had also been occupied by members of the First Nation. Kettle and Stony Point people have lived in the area since time immemorial and they claimed and continue to claim that both the park and the military base form part of their ancestral territories.

Adjacent to the park is a sand-covered roadway which permits access to a beach bordering Lake Huron. By the evening of 6 September 1995, there was a build-up of Ontario Provincial Police officers at a site approximately one half kilometre west of the park. A tactical operation centre had been set up at that location. The Tactics and Rescue Unit (TRU) was responsible for providing cover for a thirty-two person Crowd Management Unit (CMU). At approximately 10:45 in the evening, the CMU started marching in a cordon up the road towards the Aboriginal protesters from the tactical operation centre.

At this time, the Aboriginal protesters were on the far side of the fence which borders the park and separates it from the sand-covered roadway. The TRU team had moved ahead of the CMU to secure the site. At one point the CMU was advised to split into two groups and to stay low to the ground because of the sighting of what could have been a firearm. Once it was determined that the object was not a firearm, the CMU told the

Aboriginal protesters to get out of the park. The protesters shone spotlights on the officers. Some protesters threw sticks, some which were on fire, stones, and rocks at the CMU. A “go” order was given, and the officers broke formation and began striking the protesters with batons. As one of the protesters was allegedly being beaten by some of the CMU members, at least fifteen of the protesters climbed over the fence and began to fight with the CMU in an attempt to rescue him.

Almost simultaneously a large yellow school bus left the park, hit a garbage dumpster on the way out and drove in the direction of the officers, forcing them to scatter and retreat. A car followed the path taken by the bus. The car hit several CMU officers while others took evasive action. As the bus and car reversed, a number of officers opened fire. The protesters began to retreat and seek cover when the gunfire began. Dudley George, one of the protesters, was injured by gunfire. He was heard yelling out that he had been hit. He was helped to a car by two of his colleagues and was taken to Strathroy General Hospital where he was pronounced dead at 2:00 in the morning, on 7 September 1995. Doctor Michael Shkrum, a pathologist, performed an autopsy the following day. He determined that a bullet had entered George’s left clavicle area, resulting in extensive bleeding. It was subsequently determined that the bullet that caused the death of George was fired from a police issue semi-automatic, Hoeckler and Koch nine millimetre carbine, registered to Sgt. Kenneth Deane, a member of the TRU Sargeant Deane has since been charged and convicted of criminal negligence causing death.<sup>17</sup>

The government of Ontario has steadfastly maintained that it did not interfere with the operations of the Ontario Provincial Police (OPP) and that it “gave no direction” and “had no influence” on the operations of 6 September 1995.<sup>18</sup> However, on 5 September 1995, twenty-three people gathered at Queens Park for a three-hour meeting of the Interministerial Committee on Emergency Planning for Aboriginal Issues. Someone at this meeting reportedly urged the OPP to “get the fucking Indians out of the

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<sup>17</sup> *R. v. Deane*, [1997] O.J. No. 3057 (Prov. Div.) per Justice Fraser. An appeal to the Ontario Court of Appeal was dismissed on 18 February 2000: (2000), 143 C.C.C. (3d) 84; and an appeal to the Supreme Court of Canada was dismissed on 26 January 2001: [2001] 1 S.C.R. 279. The description of the facts in this paragraph and the previous three paragraphs was taken from Justice Fraser’s decision.

<sup>18</sup> J. Rusk, “Harris Called to Testify in Slaying - Premier defends role, denies government interference at Ipperwash” *The Globe and Mail* (19 August 1997) A14.

park.”<sup>19</sup> According to notes obtained by the Canadian Press, that meeting concluded with the agreement that “the province will take steps to remove the occupiers ASAP.”<sup>20</sup> On 6 September, the same group met, and according to minutes obtained by the Canadian Press, the committee concluded that “there will be no negotiations with the Stony Pointers regarding their claim to ownership of the land and that the goal of any discussions would be the removal of the occupiers from the park.”<sup>21</sup> Again according to the Canadian Press, Deb Hutton, a senior aide to Premier Mike Harris, told the meeting that “she had talked to the premier the previous evening and his message had been that he wanted the natives ‘out of the park—nothing else.’”<sup>22</sup> Dudley George was killed less than twelve hours after the 6 September meeting adjourned. If accurate, the minutes and notes of these two meetings make it clear that the political staff to the Premier and other cabinet ministers took an active role in the interministerial strategy developed in response to the occupation.

We recite these events to illustrate the fact that a number of start up problems confront the capacity of a commission of inquiry to serve as an effective instrument of public policy. The death of Dudley George raises a wide range of policy concerns including: the adequacy of existing procedures and protocols addressing potential or actual conflict between Aboriginal peoples and non-Aboriginal people on disputed Aboriginal ancestral territory; the institutional relationship between the Government of Ontario and the Ontario Provincial Police; the authority of provincial police forces over Aboriginal communities and Aboriginal disputes; short and long term causes and remedies for the dispute in question; and the need to determine what preventative measures might minimize the occurrence of a similar chain of events in the future. Despite these compelling policy concerns and the fact that there are no legal barriers to the establishment of a commission of inquiry,<sup>23</sup> the Government of Ontario,

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<sup>19</sup> J. Rusk, “Ipperwash Rife With Unanswered Questions - Aboriginal leaders, opposition politicians renew calls for public inquiry in wake of O.P.P. Officer’s sentence” *The Globe and Mail* (4 July 1997) A4.

<sup>20</sup> R. Mackie, “Tolerance Ended at Ipperwash - The Ontario government stopped a softer policy for Native protests soon after it took power in June, 1995, notes from meetings obtained earlier this week show” *The Globe and Mail* (2 August 1997) A4.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See P. Macklem, Opinion Letter to Ms. Ann Pohl, Coalition for a Public Inquiry into Matters Relating to the Death of Mr. Dudley George (8 September 1993) (on file with authors).

citing its desire to allow legal proceedings to take their course,<sup>24</sup> has consistently refused to hold an inquiry into the circumstances surrounding Dudley George's death.

A. *Current Statutory Provisions Governing the Establishment of Public Inquiries*

Commissions of inquiry may be established by either the federal<sup>25</sup> or provincial governments.<sup>26</sup> The federal statute provides that: "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 public business thereof."<sup>27</sup> A similar provision is found in section 2 of the Ontario *Public Inquiries Act*.<sup>28</sup> Such provisions confer a broad discretion on governments to choose whether or not to set up a commission of inquiry. The only statutory prerequisite to the exercise of this discretion is the subjective belief that such an inquiry is expedient. The exercise of discretion is not limited by a requirement to demonstrate the existence of any particular conditions or the objective reasonableness of the decision to conduct an inquiry.

The decision whether or not to hold a commission of inquiry therefore rests solely within the discretion of the cabinet. As illustrated by the Government of Ontario's refusal to establish an inquiry into circumstances surrounding the death of Dudley George, governments in Canada are not legally required to establish commissions of inquiry upon

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<sup>24</sup> In addition to the criminal trial and appeal of Sgt. Deane, friends and family of Mr. George have filed a civil action against Premier Mike Harris, Attorney General Charles Harnick, Solicitor General Robert Runciman, O.P.P. Commissioner Thomas O'Grady, O.P.P. Superintendent Christopher Coles, and other individuals.

<sup>25</sup> *Inquiries Act*, *supra* note 1.

<sup>26</sup> For example, *Public Inquiries Act*, R.S.O. 1990, c. P.41 [hereinafter Ontario *Public Inquiries Act*]; *Inquiry Act*, R.S.B.C. 1996, c. 224; *Public Inquiries Act*, R.S.A. 1980, c. P-29; *The Public Inquiries Act*, R.S.S. 1978, c. P-38; *Inquiries Act*, R.S.N.B. 1973, c. I-11 and *Corrupt Practices Inquiry Act*, R.S.N.B. 1973, c. C-27; *Public Inquiries Act*, R.S.Y. 1986 c. 137.

<sup>27</sup> *Inquiries Act*, *supra* note 1, s. 2.

<sup>28</sup> "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." Ontario *Public Inquiries Act*, *supra* note 26, s. 2.

the occurrence of any particular event or upon the request of any individual or group. This approach is different from that under the Ontario *Coroners Act*, which requires a coroner to issue a warrant to hold an inquest where the individual died while in police custody, while an inmate of a correctional institute, as a result of an accident occurring during the course of employment in a construction project, mining plant or mine.<sup>29</sup>

If a government decides to establish a commission of inquiry, it is also free to select the members of the commission and set out the commission's terms of reference by an order in council. The terms of reference will usually contain specific objective limits on the scope of the inquiry which may not be altered by the commission and provide some subjective discretion to the commissioners to extend the investigation.<sup>30</sup> Terms of reference guide the commission and some commentators have suggested that terms of reference have "seldom" been used to restrict the activities of inquiries.<sup>31</sup> Under the Ontario *Public Inquiries Act*, the commission or a person affected may state a case to the Divisional Court in situations in which the authority to appoint a commission under the *Act* or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question.<sup>32</sup> Should a government choose to create a commission of inquiry, the scope for judicial review of this decision is, in practice, limited to the narrow grounds of bias or bad faith,<sup>33</sup> or for violations of the constitutional distribution of legislative authority.<sup>34</sup>

### B. Incentives and Disincentives Created by Current Statutory Provisions

Given that there is no statutory requirement for a government to ever appoint a commission of inquiry, what incentives drive governments

<sup>29</sup> *Coroners Act*, R.S.O. 1990, c. C.37, s. 10(4) and (5).

<sup>30</sup> These limits are enforceable in court and subject to judicial interpretation: *OLRC*, *supra* note 4 at 28–29.

<sup>31</sup> N. d'Ombrain, "Public Inquiries in Canada" (1997) 40 *Can. Pub. Admin.* 86 at 94. But see *Re Nelles et al. and Grange et al.* (1984), 46 O.R. (2d) 210 at 221 (C.A.) where the Court of Appeal interpreted the provision in the terms of reference preventing the commission from "expressing any conclusion of law regarding civil or criminal responsibility" to prohibit the commission from naming the person responsible for administering a lethal dose of digoxin.

<sup>32</sup> *Ontario Public Inquiries Act*, *supra* note 26, s. 6.

<sup>33</sup> *OLRC*, *supra* note 4 at 27.

<sup>34</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1935, App. II, No. 5. See, for example, *Starr v. Houlden*, [1990] 1 S.C.R. 1366 [hereinafter *Starr*].

to appoint commissions of inquiry? What are the disincentives that make governments reluctant to appoint commissions? While the particular incentives at play in any particular situation will vary widely, certain patterns and disincentives can be discerned.

### 1. Government Incentives to Call Public Inquiries

One of the strongest incentives for a government to call an inquiry is the belief that appointing a commission will remove an unpleasant controversy from the political agenda.<sup>35</sup> Commissions are most frequently appointed in the wake of a major tragedy, scandal, government misconduct, systemic problems, or other public crises.<sup>36</sup> The government of the day will be under significant pressure to respond quickly to such an episode. Facing the relentless daily pressure of the media, cabinet ministers and caucus members often see a commission of inquiry as a way of relieving intolerable political pressure and changing the "climate of crisis."<sup>37</sup> This incentive may be more powerful when the climate of crisis emerges in the lead up to an election.<sup>38</sup> In short, the decision to appoint a commission of inquiry "is often dictated by the political exigencies of a public controversy rather than as a matter of deliberate executive choice."<sup>39</sup>

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 less when the events in question pre-date its election. However, given the independence of a commission of inquiry, and the unpredictable nature of its investigation, this incentive may not be as strong as it would at first seem. As we discuss in Part III, the Somalia inquiry, commenced by a Liberal government to investigate events that

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<sup>35</sup> P. Desbarats, "The Independence of Public Inquiries: *Dixon v. Canada*" (1997) 36 *Alta L. Rev.* 252 at 253.

<sup>36</sup> C.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 311; D'Ombain, *supra* note 31 at 91.

<sup>37</sup> D'Ombain, *ibid.* at 93.

<sup>38</sup> Some authors have suggested that the Krever Commission was "set up to deflect criticism in the midst of a general election." D'Ombain, *ibid.* at 94.

<sup>39</sup> Singley, *supra* note 36 at 307.

transpired under the previous Conservative administration, highlights the political risks inherent in such an inquiry.<sup>40</sup>

A third incentive is at play when the government feels that it has been wrongly accused of misfeasance or negligence. In such situations rumours and what is perceived by the government as misinformation may seriously damage the political credibility of the governing party. The government may feel that it is simply unable to assert credibly that all is well. The pronouncement of an independent inquiry absolving the government of wrongdoing enjoys a credibility and legitimacy that partisan government protestations will never have. This incentive will be strongest when the government perceives that the likelihood of the commission criticizing its conduct is most remote. This incentive could create a perverse outcome: it could make the establishment of a commission of inquiry most likely in precisely the circumstances where one is needed least.

A fourth incentive is at work when the government is considering establishing a commission to provide *ex ante* policy advice. Examples of such commissions include the Commission of Inquiry Into the Non-Medical Use of Drugs (the Le Dain Commission), the Royal Commission on Taxation (the Carter Commission), or the Royal Commission on New Reproductive Technologies. The public education function of commissions of inquiry creates an incentive to establish a commission in circumstances in which the government wishes to focus the media's and the general public's attention to an important area of public policy. In such circumstances, the government may wish to delay, avoid, or prepare the public for decisions, by appointing a commission of inquiry in controversial or politically unpopular areas of public policy.<sup>41</sup> Commissions of inquiry can prepare public opinion for changes in public policy where change is otherwise unlikely. In fact, the very appointment of a commission of inquiry performs an important signalling function by stamping the commission's focus as one worthy of social attention. In this way, commissions can play an important catalytic role in stimulating public awareness of pressing social problems.<sup>42</sup>

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<sup>40</sup> D'Ombraïn, *supra* note 31 at 104.

<sup>41</sup> D'Ombraïn, *ibid.* at 93.

<sup>42</sup> K. Roach, "Public Inquiries, Prosecutions or Both?" (1994) 43 U.N.B.L.J. 415 at 420; G. Le Dain, "The Role of the Public Inquiry in our Constitutional System" in J. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall, 1973) 79 at 83. See also Singley, *supra* note 36 at 306-307.

## 2. Government Disincentives to Call Public Inquiries

Most, if not all, of the disincentives governments face when deciding whether to establish a commission of inquiry flow from a basic problem: the loss of control over the process and the outcome of the commission. In order to have any credibility as a mechanism of accountability an inquiry must have complete independence from government interference.<sup>43</sup> To be effective, commissions of inquiry cannot be subject to political influence or pressure.<sup>44</sup> Historically, governments have had little, if any, control over the direction or outcome of the inquiry once commissioners are selected and terms of reference are drafted.

This independence limits a government's ability to control the duration of the inquiry and its associated costs. For example, the Krever Commission was directed to report within twelve months. By the time the Krever Commission finally reported, four years later, it had spent \$17.5 million, directly conducted 247 days of hearings comprising 53 lawyers, 474 witnesses, and 175,000 documents.<sup>45</sup> Moreover, the time taken by the Krever Commission may "have undermined the usefulness of the report" as federal and provincial governments elected to implement changes to Canada's blood system without the benefit of the Commission's final report.<sup>46</sup>

A commission of inquiry's independence also limits a government's ability to shape public opinion about the subject matter under investigation. Accordingly, a commission of inquiry is a more unpredictable instrument for the formulation of public policy than a bureaucratic study.<sup>47</sup> The decision to establish a commission of inquiry to obtain *ex ante* policy advice requires the government to surrender a degree of control over its policy agenda and, in particular, "its initiative to identify the issues and to create public expectations ... as to what is a reasonable legislative approach."<sup>48</sup>

Finally, the fear that the commission will not absolve the government from blame or responsibility is another disincentive to

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<sup>43</sup> K. Roach, "Canadian Public Inquiries and Accountability" in P. Stenning, ed., *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) 268 at 277.

<sup>44</sup> Le Dain, *supra* note 42 at 82.

<sup>45</sup> Trebilcock & Austin, *supra* note 1 at 34.

<sup>46</sup> See generally Trebilcock & Austin, *supra* note 1; D'Ombra, *supra* note 31 at 100.

<sup>47</sup> M.J. Trebilcock *et al.*, *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982) at 37-50.

<sup>48</sup> Le Dain, *supra* note 42 at 80.



establishing a commission of inquiry. For example, given that there are no legal barriers to the establishment of a commission of inquiry into the circumstances surrounding the death of Dudley George, the Government of Ontario's refusal to hold an inquiry can only be explained in terms of a politically-motivated unwillingness to subject certain decisions, procedures, and actions to public scrutiny. A commission of inquiry that concludes that state actors did not perform their duties properly "has serious implications for the credibility and legitimacy of the appointing executive."<sup>49</sup> It is much easier for a government to minimize the damage of attacks by members of the opposition as partisan posturing, than to evade the findings of a commission of inquiry.<sup>50</sup> The fear that the government could be embarrassed by revelations at commission hearings or by the release of a commission's report, therefore, serves as a significant disincentive to the establishment of a commission of inquiry.

### 3. Opposition Incentives and Disincentives

Political opponents of any administration frequently find it in their political interest to call for the investigation of "some real, possible or even wholly imagined wrongdoing" by a government actor.<sup>51</sup> The Liberal Party of Ontario and the Ontario New Democratic Party, for example, have consistently called the Government of Ontario to task for its failure to establish a commission of inquiry into circumstances surrounding the death of Mr. George. The fact that opposition politicians so frequently call for commissions of inquiry into government misfeasance is itself evidence that there are strong incentives for them to do so. Moreover, where there is more than one opposition party in the legislature, there is likely a first-mover advantage. This will create incentives to "be out in front of the curve" by being the first opposition voice to demand a commission of inquiry.

In addition, there are political advantages for opposition parties that choose to demand a commission of inquiry instead of appearing to condemn prematurely the government for misfeasance. The opposition

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<sup>49</sup> Singley, *supra* note 36 at 323.

<sup>50</sup> This is not to say the government will not try to do so. Two days after the release of the Report of the Inquiry on the Activities of the Royal Canadian Mounted Police (the "McDonald Commission"), the federal government released two legal opinions that disagreed with several of the McDonald Commission's conclusions with respect to whether criminal offences had been committed. See Roach, *supra* note 43 at 279.

<sup>51</sup> C.R. Sunstein, "Bad Incentives and Bad Institutions" (1993) 86 *Geo. L.J.* 2267 at 2276

may appear to rise above mere partisanship by calling for an inquiry and thereby creating “the appearance of neutrality and statesmanship.”<sup>52</sup> A demand for an inquiry may be buttressed by protestations that all the facts are not yet known and that a commission is the only way to clear the air. In such a situation, the opposition may ask, disingeniously perhaps, how a commission could do any harm?

However, there are also disincentives at work. Most opposition parties believe that they are only one election away from forming a government. They realize, or ought to realize that “the act of appointing an inquiry may then begin a process of self-reflection and self-criticism that can exert influence long after the legal powers of the inquiry to compel accounts has been exhausted.”<sup>53</sup> The appointment of a commission of inquiry today may limit the policy flexibility of tomorrow’s government. This concern probably creates incentives for opposition parties to favour inquiries that focus on historical fact-finding and the allocation of responsibility in respect of alleged scandals. Similarly, there are disincentives for opposition parties to call for commissions that focus on structural or systemic problems within the state or that may make forward-looking recommendations which may limit a future government’s policy flexibility. For example, the Liberal Party of Ontario’s calls for a commission of inquiry into circumstances surrounding the death of Mr. George have focused primarily on the possibility of governmental misconduct, and only secondarily on broader issues surrounding the territorial rights of the Kettle and Stony Point First Nation.

#### 4. Media Incentives

Finally, the media can play an important role in building public support for the appointment of a commission of inquiry. They may call for the appointment of a commission of inquiry directly through editorials<sup>54</sup> or

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<sup>52</sup> *Ibid.* at 2276.

<sup>53</sup> Roach, *supra* note 43 at 276.

<sup>54</sup> See for example “Call Judicial Inquiry Now” *Toronto Star* (28 November 1998) B2 [hereinafter “Call Judicial Inquiry Now”] (calling for an inquiry into alleged police misconduct in relation to protesters at APEC summit in Vancouver). The Commission for Public Complaints Against the RCMP released an interim report in August 2001 calling on the RCMP to “instill in its officers, particularly those at senior levels who could be in contact in their professional work with senior representatives of the government of Canada, that they are to brook no intrusion or interference whatever from government officials as they meet the responsibilities of providing the agreed upon services”: A. McIntosh, “Former aide to Chretien singled out” *National Post* (7 August 2001) at A7.

by publicizing calls for a judicial inquiry by opposition parties<sup>56</sup> or community groups.<sup>56</sup> Editorially, many media outlets will find it “easy to assume the posture of concerned outsider”<sup>57</sup> and call for the appointment of a commission of inquiry because “the nation deserves the truth.”<sup>58</sup>

However, there also exists an economic incentive for commercial media outlets to attract and retain readers, viewers and listeners. To the extent that “corruption sells” there is an economic incentive to pay attention to a “growing scandal or a call for the official investigation” of government misfeasance.<sup>59</sup> As the pace of news distribution quickens with the growth of internet news sources, allegations of government impropriety may be subjected to less rigorous scrutiny than previously.<sup>60</sup> Once established, commissions of inquiry tend to produce new stories out of old ones, providing grist for the publication mill. Commissions of inquiry also make it easier for journalists to do their jobs; investigation is handed over to an entity with the power of subpoena. Public disclosure of documents and cross-examination of witnesses feeds the media’s unfortunate preoccupation with “gotcha” journalism. Moreover, live testimony enables the media to focus more on “human interest dimensions of past tragedies [and scandals] than [on] the strengths and weaknesses of alternative institutional models for the future.”<sup>61</sup> This tendency has the unfortunate effect of focusing the public’s attention on the naming and blaming elements of a commission’s work and away from its prospective policy formation functions.

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<sup>55</sup> See, for example, J. Barker, “Liberals Urge Neo-Natal Care Facilities Probe” *National Post* (30 December 1998) B2; “More Setbacks in Neonatal Care” *Toronto Star* (30 December 1998) A1 (Deputy Leader of Ontario Liberal Party calls for independent inquiry into shortage of neonatal beds in Toronto hospitals).

<sup>56</sup> K. Hudson & C. Mallan, “Trillium Director Quits in Disgust” *Toronto Star* (31 December 1998) A1 (Executive Director of Toronto charity Foodshare demands public inquiry into firing of Executive Director of Trillium Foundation).

<sup>57</sup> Sunstein, *supra* note 51 at 2278.

<sup>58</sup> “Call Judicial Inquiry Now,” *supra* note 54.

<sup>59</sup> See generally the sources cited in Sunstein, *supra* note 51 at 2277.

<sup>60</sup> Sunstein, *supra* note 51 at 2270 (discussing scandal as a form of “cascade,” where “people tend to believe that a scandal is important or real simply because others believe, or appear to believe, that it is important or real”).

<sup>61</sup> Trebilcock & Austin, *supra* note 1 at 51; Sunstein, *supra* note 51 at 2277-79.

## 5. Summary

A government will be under an incentive to establish a commission of inquiry where to do so results in the removal of an unpleasant controversy from the political agenda or focuses on incidents that occurred during the tenure of a previous government. The potential for vindication in the face of allegations of governmental wrongdoing also creates an incentive to establish a commission of inquiry. In addition, a government may want to establish a commission of inquiry to delay or avoid decisions in controversial or politically unpopular areas of public policy, or to prepare public opinion for changes in public policy where such a change is otherwise unlikely. The disincentives governments face when deciding to establish a commission of inquiry—disincentives associated with the inability to control the duration and cost of an inquiry, the inability to shape public opinion in relation to the matters under investigation, and the risks of political embarrassment and findings of governmental wrongdoing—all stem from the fact that a government is relatively incapable of controlling the process and outcome of a commission of inquiry. Opposition parties and the media all face strong incentives to call for commissions of inquiry but, for different reasons, these players tend to focus on exposing possible governmental wrongdoing at the expense of broader systemic issues. To the extent that the commission of inquiry is an institutional mechanism for the formulation of public policy, its statutory framework produces a set of inappropriate incentives and disincentives on political players to contemplate, and to resist, the establishment of a commission of inquiry.

## III. SHUT DOWN PROBLEMS

The Commission of Inquiry into the Deployment of Canadian forces to Somalia was established in 1995 to investigate aspects of the deployment of Canadian peacekeeping forces to Somalia.<sup>62</sup> Part of the impetus behind the creation of the Somalia inquiry was the torture and killing of Shidane Arone, a young Somali man, by members of the Canadian Airborne Regiment in Somalia.<sup>63</sup> The commissioners<sup>64</sup> were

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<sup>62</sup> Established by Order in Council P.C. 1995-442, 20 March 1995 [hereinafter *Commission*].

<sup>63</sup> M.L. Friedland, "Military Justice and the Somalia Affair" (1998) 40 *Crim. L.Q.* 360 at 360.

<sup>64</sup> The Honourable Gilles Letourneau, a judge of the Federal Court of Appeal, was appointed Commission Chair. The other commissioners were Peter Desbarats, former Dean of the Western School of Journalism, and the Honourable Robert Campbell Rutherford of the Ontario Court of Justice (General Division).

appointed to inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions, and decisions of the Canadian forces, and the actions and decisions of the Department of National Defence in respect of the Canadian forces deployment to Somalia. The commissioners were also directed to inquire into nineteen specific issues relating to the pre-deployment period, the in-theatre period and the post-deployment period. This mandate would later be described as one of "extraordinary scale."<sup>65</sup>

The *Commission* was given nine months to complete its work and was directed to file its report no later than 22 December 1995.<sup>65</sup> A little over two months into the mandate, the commissioners realized the report date was unrealistic and applied to the Privy Council Office for an extension of the deadline until 20 September 1996.<sup>67</sup> In response, the Governor in Council extended the deadline to 28 June 1996.<sup>63</sup> On 6 March 1996, the commissioners requested a second extension, until 31 March 1997, citing the development of new and unanticipated issues, the high volume of documents filed with the *Commission*, and the difficulty in obtaining disclosure of essential documents from the Department of Defence.<sup>69</sup> This request was eventually granted on 20 June 1996.<sup>70</sup> In November of 1996, the *Commission* requested a third extension to December 1997. But on 10 January 1996, as the *Commission* began to investigate the roles and responsibilities of high-ranking government officials in a possible cover up of the Arone murder, the Privy Council Office issued a final ultimatum to the commissioners: "Although all scenarios proposed in your workplan were examined, given the Government's desire to pursue solutions as quickly as possible, it was not regarded as being in the national interest to have to wait at least another year to receive the *Commission's* input."<sup>71</sup> The letter further stated that the commission was to complete its work and file its report by 30 June 1997.<sup>72</sup>

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<sup>65</sup> *Dixon v. Canada* (1997), 146 D.L.R. (4th) 156 at 161 (F.C.T.D.) [hereinafter *Dixon* (T.D.)].

<sup>66</sup> Order in Council P.C. 1995-442.

<sup>67</sup> Letter dated 2 June 1995 to Jocelyne Bourgon, Clerk of the Privy Council and Secretary to the Cabinet. See *Dixon* (T.D.), *supra* note 65 at 170.

<sup>68</sup> Order in Council P.C. 1995-1273, 26 July 1995.

<sup>69</sup> Letter dated 6 March 1996 to Jocelyne Bourgon, Clerk of the Privy Council and Secretary to the Cabinet. See *Dixon* (T.D.), *supra* note 65 at 170.

<sup>70</sup> Order in Council P.C. 1996-959.

<sup>71</sup> *Dixon* (T.D.), *supra* note 65 at 172.

<sup>72</sup> Later confirmed by Order in Council P.C. 1997-174, 4 February 1994.

### A. *Two Shut Down Techniques*

The circumstances surrounding the completion of the Somalia Inquiry illustrate a second set of problems associated with securing political and governmental accountability through commissions of inquiry, namely, those that arise from the fact that governments' possess the authority to shut down or restrict a commission's activity in the middle of its mandate. However independent a commission of inquiry may be, ultimately it is the creature of government.

A government can exercise the authority to shut down a commission in at least one of two ways. First, the terms of reference creating a commission of inquiry usually contain a reporting deadline which provides a direct method of controlling delay in reporting and an indirect method of controlling the costs of the commission's work. An externally imposed deadline may also have the effect of limiting the scope of the inquiry's investigation. Commissions of inquiry have routinely obtained extensions to complete their work from the government.<sup>73</sup> Until very recently it was possible to state that reporting deadlines were "largely meaningless" as governments never refused requests for extensions.<sup>74</sup> However, the federal government's actions in relation to the Somalia Inquiry signal that it no longer feels bound by this convention. Indeed, at least one provincial government has now begun to reserve expressly, in its enabling legislation, the authority to "wind up" a commission of inquiry.<sup>75</sup>

Second, the preliminary budget of a commission of inquiry is established by the commission with assistance from the Privy Council Office or Cabinet Office.<sup>76</sup> While government officials will scrutinize budgetary requests and questions of money are negotiated between the commission and these officials, the assumption has been that a commission

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<sup>73</sup> For example, the Commission of Inquiry on the Blood System in Canada (the "Krever Commission"), which began in October 1993, was originally to report within twelve months. Its final report was, in fact, delivered in November 1997. See N. D'Ombra, *supra* note 31 at 94 and Trebilcock & Austin, *supra* note 1 at 20. Similarly, the Deschenes (four extensions), Baird (three extensions), Moshansky (four extensions) and Somalia inquiries all received extensions of their original reporting dates. See D'Ombra, *supra* note 31 at note 15.

<sup>74</sup> D'Ombra, *supra* note 31 at 94.

<sup>75</sup> See *An Act to Establish and Validate the Public Inquiry Into the Administration of Justice and Aboriginal People*, S.M. 1989-90, c. , s.11: "[t]he Lieutenant Governor in Council may ... wind up the commission."

<sup>76</sup> D'Ombra, *supra* note 31 at 94.

will receive resources that it feels are necessary to complete its task.<sup>77</sup> Indeed, it has been suggested that “[a]t all times the financing of the inquiry must be solely within the authority and discretion of the commissioners [because] [t]o do otherwise would be to permit budgetary controls to fetter the inquiry’s independence and affect its ability to fulfill its mandate.”<sup>78</sup>

But this assumption may no longer be valid in light of the federal government’s actions in relation to the Somalia Inquiry. One of the reasons the Somalia Inquiry gave for needing additional time was the difficulty in obtaining timely disclosure of key documents from the Department of National Defence. There is little difference between withholding funding, which governments have yet to do, and refusing to extend a reporting deadline, which, in light of the fate of the Somalia Inquiry, the federal government appears willing to do. The federal government’s willingness to do the latter may signal a willingness to do the former. Either action compromises the capacity of a commission of inquiry to secure political and governmental accountability.

#### B. *The Legality of Shutdowns*

The legality of the federal government’s decision not to extend the Somalia inquiry’s reporting deadline was challenged in *Dixon v. Canada*.<sup>79</sup> John Dixon, a former advisor to then Minister of Defence Kim Campbell, was scheduled to be a *Commission* witness. However, after certain *Commission* documents were released to the public, a Canadian Presswire-service story suggested that Dixon and others may have been involved in a cover-up. On 4 January 1997, Dixon applied to the *Commission* to be granted full standing in order to clarify who in the Minister’s office ‘knew what, and when’ in respect of the killing of Arone. The Commission refused his request because “its mandate had been ‘truncated’ by the government’s decision to end the hearings on or about 31 March 1997 and it would be unable to investigate the role and responsibilities of high-ranking

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<sup>77</sup> Desbarats, *supra* note 35 at 253.

<sup>78</sup> R.J. Anthony & A.R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985) at 42.

<sup>79</sup> *Dixon v. Canada* (1997), 146 D.L.R. (4th) 156 (F.C.T.D.), rev’d [1997] 149 D.L.R. (4th) 269 (F.C.A.), leave to appeal to S.C.C. refused, 8 January 1998, S.C.C. Bulletin, 1998 at 23.

government officials, including...whether there was a cover-up of the Arone murder.”<sup>80</sup>

Dixon applied to the Federal Court for relief. Justice Simpson allowed Dixon’s application for judicial review. She stated the following:

The Governor in Council takes the view that it is entitled to treat the Commission of Inquiry like a government department which can be created, directed and disbanded as the Governor in Council sees fit. There is no question that the Governor in Council can create a commission of inquiry, establish the mandate and appoint the commissioners. It can also set reasonable target dates and terminate a commission of inquiry in a lawful manner. However, in my view, at a minimum, a commission of inquiry is independent when its decisions relate to the manner in which it will carry out its mandate. I am also satisfied that this independence must mean that it is for the Commissioners, in a situation such as this where they are compelled to investigate and report, to decide when they have heard or otherwise received sufficient evidence to enable them to make the findings of fact necessary to support conclusions in their report. In my view, the Governor in Council is not entitled to decide when the Commissioners have received sufficient evidence.<sup>81</sup>

Justice Simpson held the Order in Council requiring the *Commission* to complete its report by 30 June 1997 to be *ultra vires*. In her opinion, the Order in Council breached the rule of law by not respecting the *Commission’s* independence and by requiring the impossible of the commissioners. In her view, the commissioners ought to have been entitled to determine how to carry out their mandate and the point at which their investigation was sufficient to support findings in their report.<sup>82</sup> She suggested that the Governor in Council issue an Order in Council imposing final deadlines that would allow the inquiry the time it reasonably requires to complete its original mandate or an Order in Council that eliminates specified matters from the inquiry’s mandate.

The Federal Court of Appeal, however, allowed Canada’s appeal, quashed the orders and declarations made by the trial judge, and declared that the impugned Order in Council was *intra vires* the Governor in Council.<sup>83</sup> Justice Marceau recognized the importance of the independence of commissions of inquiry, but refused to accept that they could operate except within the confines established by the Governor in Council:

It has often been suggested, expressly or impliedly, especially in the media but also elsewhere, that commissions of inquiry were meant to operate and act as fully independent

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<sup>80</sup> *Ibid.* at 160.

<sup>81</sup> *Ibid.* at 178.

<sup>82</sup> *Ibid.* at 179.

<sup>83</sup> *Dixon v. Canada* (1997), 149 D.L.R. (4th) 269 at 281(F.C.A.), [hereinafter *Dixon* (C.A.)].



adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created. This is a completely misleading suggestion, in my view. The idea of an investigative body, entirely autonomous, armed with all of the powers and authority necessary to uncover the truth and answerable to no one, may well be contemplated, if one is prepared to disregard the risks to individuals and the particularities of the Canadian context. But a commission under section 1 of the Inquiries Act is simply not such a body. It is easy to realize nowadays the tremendous impact that commissions of inquiry, as they now exist, may have on Canadian society, but, in my view, their public importance is not and cannot be the source of a special legal status. *No one disputes the necessity of preserving the independence of commissions of inquiry as to the manner in which they may exercise their powers, conduct their investigations, organize their deliberations and prepare their reports.* The role they play in our democracy has become much too vital to accept that the manner in which they investigate matters and formulate the conclusions and recommendations that they arrive at, can be freely tampered with or influenced by anyone within or outside the government of the day, and that applies to any commission, whether or not its investigations relate to the conduct of government officials. And the fact is, in any event, that the *Act* itself provides for such investigative and advisory independence by explicitly setting out the nature, the general role and the basic powers of commissions of inquiry, even if it does so rather succinctly. *All this, however, does not alter, in any way, the basic truth that commissions of inquiry owe their existence to the Executive. As agencies of the Executive, I do not see how they can operate otherwise than within the parameters established by the Governor in Council.*<sup>84</sup>

Justice Marceau found that courts, unlike commissions of inquiry, have a duty to arrive at a definitive conclusion. Commissions of inquiry, he concluded, have only an obligation to report on what they have found:

The role of the Commissioners is not to decide issues definitively and their report is not intended to pronounce judgment, but merely to explain the results of their work and the opinions (in terms of conclusions and recommendations) which they were able to form given the time and resources available to them; no more, no less. The independence of the Commissioners as to the evaluation of the evidence and the possibility for them to express a view is in no way affected, and their ability to provide a complete and adequate report, in this sense, is indisputable. Again, the right of the Commissioners to decide when they have sufficient evidence to make a particular conclusion or recommendation is certainly not jeopardized by the Governor in Council exercising the right he alone has to decide when it is time to call for the Commission's report and advice.<sup>85</sup>

Justice Marceau concluded that while "it may well be" that the government's decision to terminate the work of the Commission was "motivated by political expediency," such a concern was "simply not the business of the Court."<sup>86</sup>

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<sup>84</sup> *Ibid.* at 277-78 [emphasis added].

<sup>85</sup> *Ibid.* at 280.

<sup>86</sup> *Ibid.* at 279. "It is a well-established principle of law and a fundamental tenet of our system of government, in which Parliament and not the Judiciary is supreme, that the courts have no power to review the policy considerations which motivate Cabinet decisions."

The decision of the Federal Court of Appeal suggests that the judiciary is indifferent to the motives underlying a Cabinet decision to refuse to extend a deadline for the work of a commission of inquiry. The decision did not strictly decide whether the government could step in and shut down a commission of inquiry in advance of the commission's deadline. Nevertheless, the Federal Court of Appeal's decision certainly undermines the conventional wisdom that deadlines imposed on commissions of inquiry are largely meaningless.<sup>87</sup>

#### IV. OTHER APPROACHES

Both sets of problems canvassed in Parts II and III seriously hamper the capacity of the commission of inquiry to serve as an effective instrument for the formulation of public policy. As illustrated by circumstances surrounding the death of Dudley George, the fact that the decision to appoint a commission of inquiry lies within the sole authority of the federal or provincial cabinet enables governments, for purely partisan reasons, to refuse to establish commissions of inquiry into matters that clearly merit independent investigation. As illustrated by circumstances surrounding the Somalia inquiry, the fact that commissions of inquiry, once established, ultimately remain creatures of government may impair their ability to engage in a full investigation of the matter at hand. This Part examines whether there is anything useful to be learned about structuring inquiries from two American institutional alternatives, namely, the Independent Counsel model and the Inspector General model.

##### A. *The Independent Counsel Model*

###### 1. Impetus for Change

Following the Watergate scandal and, in particular, the "Saturday Night Massacre" (the firing of Watergate Special Prosecutor Archibald Cox by acting Attorney General Robert Bork),<sup>88</sup> Congress enacted the *Ethics in*

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<sup>87</sup> One of the Commissioners has characterized the decision in more dramatic terms: see Desbarats, *supra* note 35 at 257. The decision "demolishes the independence of public inquiries under law ... [and] has opened the way for unrestricted government interference with public inquiries".

<sup>88</sup> S. Dash, "Independent Counsel: No More, No Less a Federal Prosecutor" (1998) 86 *Geo. L.J.* 2077: "Cox had refused to obey Nixon's directive to cease his aggressive efforts to obtain the White House Tapes that were alleged to have recorded a criminal conspiracy to cover up the White House sponsored burglary of DNC headquarters in the Watergate."

*Government Act of 1978*.<sup>89</sup> Congress was attempting to achieve several policy goals. First, Congress sought to reassure the public that certain politically powerful individuals would not receive preferential treatment in criminal investigations and prosecutions.<sup>90</sup> Second, it sought to eliminate any appearance of a conflict of interest on the part of attorneys general by sharply limiting their ability to control or prevent the criminal investigation of their colleagues.<sup>91</sup> Third, it attempted to ensure the impartiality of the investigation by placing the appointment of the independent counsel in the hands of judges.

## 2. The Obligations of the Attorney General

Prior to its expiry in June 1999,<sup>92</sup> the *Act* set out a rigid procedure to handle complaints that government officials have violated the law. The procedure required the attorney general to conduct a preliminary investigation "whenever the Attorney General receives information sufficient to constitute grounds to investigate" whether any covered person may have violated federal criminal law. For the purposes of the *Act*, a covered person included, *inter alia*, the president and vice-president, the attorney general, and assistant attorney general. The only factors which were considered by the attorney general when determining whether a preliminary investigation was warranted were the specificity of the information received and the credibility of the source of the information. The attorney general had thirty days to decide whether or not a preliminary investigation was warranted.<sup>93</sup>

If a preliminary investigation was warranted, the attorney general had ninety days before being required to report to the U.S. Court of Appeals (D.C. Circuit), Special Division for Appointing Independent Counsels (hereinafter Special Division). During this time, the attorney general did not have the power to convene grand juries, plea bargain, grant

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<sup>89</sup> Pub. L. No. 95-521, 92 Stat. 1867 [hereinafter *Act*]. The *Act* was re-enacted three times and the last version was at 28 U.S.C. §§591-599 (1996).

<sup>90</sup> J. O'Sullivan, "The Independent Counsel Statute: Bad Law, Bad Policy" (1996) 33 Am. Crim. L.R. 463 at 463.

<sup>91</sup> K.J. Harriger, "Damned if She Does and Damned if She Doesn't: The Attorney General and the Independent Counsel Statute" (1998) 86 Georgetown L.J. 2097 at 2102.

<sup>92</sup> Following Prosecutor Kenneth Starr's confrontations with President Clinton, the *Act* expired and was not renewed. The attorney general now has sole responsibility for appointing outside prosecutors.

<sup>93</sup> *Act*, *supra* note 89, § 591.

immunity, or issue subpoenas. The attorney general could not decline to proceed because the target of the investigation lacked the *mens rea* for the alleged offence unless there was “clear and convincing evidence” of that fact. At the conclusion of the ninety day preliminary investigation, the legislation provided that if “there are no reasonable grounds to conclude that further investigation is warranted,” the attorney general was to notify the court of the attorney general’s conclusion. This brought the matter to a close; if the attorney general decided not to proceed the *Act* stated that “the Court shall have no power to appoint an independent counsel with respect to the matters involved.”<sup>94</sup>

### 3. Appointment of the Independent Counsel

If the attorney general concluded that there were reasonable grounds to believe that further investigation was warranted, then the attorney general was required to apply to the Special Division (to be comprised of three senior or retired circuit judges appointed by the Chief Justice of the United States) for the appointment of an independent counsel. The attorney general’s decision to apply or not to apply for the appointment of an independent counsel was not subject to judicial review.<sup>95</sup>

The Special Division had both the authority to appoint the independent counsel and to define the counsel’s prosecutorial jurisdiction.<sup>96</sup> There were no special qualifications required of the independent counsel except that they have “appropriate experience” and should be able to conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The scope of the prosecutorial discretion to be conferred was broad. The legislation provided that the Special Division “shall assure that the independent counsel has adequate authority to fully investigate the subject matter ... all matters related to that subject matter ... [and] Federal crimes ... that may arise out of the investigation ... including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”<sup>97</sup>

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<sup>94</sup> *Ibid.*, § 592. See also *Morrison v. Olson* (1988) 487 U.S. 654 at 695 [hereinafter *Morrison*]. “We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General...”

<sup>95</sup> *Ibid.*, § 592(c) and (f). See also *Morrison, ibid.* at 695 “...the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment”; and cases referred to in O’Sullivan, *supra* note 90 at n. 14.

<sup>96</sup> *Ibid.*, § 593(b)(1).

<sup>97</sup> *Ibid.*, § 593(3).

Although the independent counsel was subject to congressional oversight and was required to report to Congress, the independence of the independent counsel was virtually absolute. The independent counsel was granted significant independent authority, including all investigative and prosecutorial functions and powers of the attorney general and the Department of Justice.<sup>98</sup> The independent counsel had a “virtually unlimited budget,” as the Department of Justice was required to “... pay all costs relating to the establishment and operation of any office of independent counsel.”<sup>99</sup> There was no time limit set for an independent counsel’s investigation and no time limit on the appointment of a particular counsel. The independent counsel could only be removed from office in two ways: if the independent counsel was impeached and convicted or by the attorney general only for good cause,<sup>100</sup> physical disability, mental incapacity, or any other condition that substantially impaired the performance of such independent counsel’s duties.<sup>101</sup> Otherwise, an office of independent counsel was to terminate only when the independent counsel notified the attorney general that the investigation was complete, or was so substantially complete that it would be appropriate for the Department of Justice to complete such investigations and prosecutions, and file a final report.<sup>102</sup>

#### 4. Evaluating the *Independent Counsel Act*

The *Independent Counsel Act* provides one method of dealing with “start-up” and “shut-down” problems that plague the Canadian institution of the commission of inquiry. The *Act* was designed to curtail severely the discretion of the attorney general. It set out a broad list of “covered

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<sup>98</sup> *Ibid.*, § 594.

<sup>99</sup> O’Sullivan, *supra* note 90 at 467. But see Dash, *supra* note 88 at 2083. The 1994 Act imposed fiscal controls “as tight – and in some respects tighter – as those imposed on the Justice Department”.

<sup>100</sup> J. P. Fleissner, “The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion” (1998) 49 *Mercer L. Rev.* 427 at 435. The likelihood of an Attorney General choosing to sack an independent counsel for “good cause” was reduced, if not eliminated by the memory of Archibald Cox and the Saturday Night Massacre

<sup>101</sup> *ICA*, *supra* note 89, § 596(a)(1). An Attorney General seeking to remove an Independent Counsel was required to a report specifying the facts found and the ultimate grounds for such removal to the Special Division and Congress who were to make this information publicly available: § 596(a)(2). The action of the Attorney General was subject to judicial review at the request of the removed Independent Counsel. Reinstatement was an available remedy: § 596(a)(3).

<sup>102</sup> *Ibid.*, § 596(b)(1). The Special Division was also authorized to terminate the office on its own motion, or at the request of the Attorney General if the same test was met § 596(b)(2).

persons” and required the attorney general to refer cases for appointment if the case met a relatively low standard.<sup>103</sup> Such an appointment could only be avoided where there was a preliminary determination that the charges were not sufficiently credible or specific, or where the attorney general believed there to be no reasonable grounds to believe that further investigation was warranted. However, as we have seen above, there are very strong incentives for both the media and opposition politicians to make and repeat allegations of alleged government impropriety. There is no doubt that demands for an independent counsel became “political weapons” in partisan skirmishes in Washington.

Demands for an Independent Counsel have become political weapons because they not only ensure that allegations of wrongdoing by political allies of the president receive maximum and continuing political press coverage, they also put the administration in a political bind. A refusal to refer the allegations to the Special Division will be good for yet more adverse publicity, and may actually result in a greater political black eye than would a referral and subsequent investigation. One could argue that an Attorney General may, particularly in light of the Whitewater experience, determine that taking a short-term penalty in very high profile cases may be better than inviting a political haemorrhage. In the more ordinary case, however, it seems likely that an Attorney General faced with allegations of wrongdoing by administration officials...may feel pressured to over-refer in order to counter any perception she is obstructing justice.<sup>104</sup>

The politics of scandal has been identified as one of “the most significant phenomena of our time.”<sup>105</sup> As media and partisan political interest in a case grew, it became increasingly difficult for an attorney general to avoid a preliminary inquiry by claiming the allegations were not specific or credible.<sup>106</sup> Moreover, the attorney general may have found it difficult to conclude that there were no reasonable grounds to believe that further investigation was warranted without being able to rely on standard investigative techniques of issuing subpoenas or the ability to use a grand jury.<sup>107</sup>

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<sup>103</sup> It should be noted that the original version of the Act provided the Attorney General with even less discretion to appoint an independent counsel. The original statute amounted to a “hair-trigger” and was severely criticized and amended: K.J. Harriger, “The History of the Independent Counsel Provisions: How the Past Informs the Current Debate” (1998) 49 *Mercer L. Rev.* 489 at 506.

<sup>104</sup> O’Sullivan, *supra* note 90 at 479.

<sup>105</sup> See generally S. Garment, *Scandal: The Crisis of Mistrust in American Politics* (New York: Times Books, 1991).

<sup>106</sup> Sunstein, *supra* note 51 at 2273.

<sup>107</sup> O’Sullivan, *supra* note 90 at 479.

It should be noted that while the *Act* limited the discretion of the attorney general to seek the appointment of an independent counsel, this process was triggered by a very narrow class of allegations against a relatively broad—arguably too broad—list of office holders. While this approach would control one start up problem facing Canadian commissions of inquiry by fettering the otherwise non-justiciable discretion of Cabinet to establish a commission of inquiry, it would do so only on very narrow grounds. If Canada had a mechanism similar to the *Act* it seems unlikely, for example, that an independent counsel would be appointed in the Asia Pacific Economic Cooperation<sup>163</sup> controversy. Would an independent counsel be appointed to inquire into the death of Mr. George? If it were, the inquiry would be narrowly focused on whether or not the premier or another covered person violated the *Criminal Code*. This focus would miss many of the important policy and accountability issues that should properly be the subject of a commission of inquiry.

Another problem with the Independent Counsel model is that the very elements that guaranteed the independence of the independent counsel and avoided “shut-down problems” create unintended negative consequences. First, the virtually unlimited budget ensured that there were no institutional incentives to keep costs down.<sup>167</sup> Second, each independent counsel assembled their entire office from scratch following their appointment. They hired their own staff, leased space, rented computers, installed phone lines and developed their entire infrastructure. The start-up costs of each independent counsel investigation were not insignificant, provided very little value to the investigation, and could not be amortized over subsequent investigations. This approach created additional inefficiencies, as there was no institutional or collective memory in place to promote best practices that could improve results and reduce time and expenses. In both these respects, the Independent Counsel model duplicates problems inherent in the Canadian model of commissions of inquiry.

It is true that the lack of a time limit on the investigation ensured that a Congress allied to the executive member under investigation could not limit the scope of the independent counsel’s work. When compared to a similar investigation conducted by the Department of Justice, however,

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<sup>168</sup> W. Pue, “The Prime Minister’s Police: Commissioner Hughes’ APEC Report” (2001) 39 Osgoode Hall L.J. 165. See also, W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000).

<sup>169</sup> M.R. Bromwich, “Running Special Investigations: The Inspector General Model” (1993) 86 Georgetown L.J. 2027.

the lack of controls on the independent counsel led to vastly disproportionate resources in time and money being expended.<sup>110</sup>

Independent counsels were drawn from the private bar for a one-off assignment. The pool of candidates became dominated by “ambitious individuals who view their appointment as independent counsels as a springboard to recognition, prestige and career enhancement ... [they] view their roles not as fact-finders to determine a balance of justice but as prosecutors out to convict prominent figures.”<sup>111</sup> This led to overzealous prosecutions where targets of the independent counsel became the prosecutorial equivalent of “big-horn sheep”: trophies to be bagged at all costs.<sup>112</sup> It was not easy for an independent counsel to explain a failure to prosecute, and the same political figures that demanded a prosecution criticized as incompetent an independent counsel who did not pursue a prosecution.<sup>113</sup>

Perhaps the element of the Independent Counsel model that is most problematic for ensuring political and governmental accountability is the way in which it criminalizes policy differences between politicians. Attempts to promote accountability through criminal investigations unnecessarily limits the scope of the inquiry. Aside from the very clear division of powers issues raised by such an approach,<sup>114</sup> it requires a focus on whether crimes have been committed. But the purpose of a criminal investigation is not to tell a story, evaluate policy, or promote systemic reform, it is to determine whether an individual has committed a criminal offence and, if so, to attach criminal liability. Except insofar as it attempts to ascertain facts specifically relevant to criminal liability, a criminal investigation is “a very blunt and imperfect instrument for explaining to the public what happened in a series of transactions and sequence of events.”<sup>115</sup> It is even less suited to formulating policy that seeks to ensure that such events do not occur in the future. Any institutional arrangement authorizing the establishment of commissions of inquiry should be careful not to deflect attention away from such substantive issues by turning

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<sup>110</sup> P.B. Heymann, “Four Unresolved Questions About the Responsibilities of an Independent Counsel” (1998) 86 *Georgetown L.J.* 2119 at 2121; see also M.F. Schultz, “Attorney’s Fees Under the ICA: How the Grinch Stole Lyn Nofziger’s Wallet” (1992) 60 *Geo. Wash. L. Rev.* 1311.

<sup>111</sup> N.J. Ornstein, “Doing Congress’s Dirty Work” (1998) 86 *Georgetown L.J.* 2179 at 2192.

<sup>112</sup> *Ibid.* at 2189.

<sup>113</sup> Heymann, *supra* note 110 at 2129.

<sup>114</sup> Consider, for example, *Starr v. Houlden*, *supra* note 34.

<sup>115</sup> Bromwich, *supra* note 109 at 2042.



disputes about policy into allegations of criminality. A commission of inquiry's ultimate relevance does not lie in its ability to ascertain whether or not a politician or police officer may have engaged in activity that violated the *Criminal Code*.<sup>116</sup> It lies instead in assessing the actual effects of policies on people's lives.<sup>117</sup> Reliance on criminal sanctions to ensure governmental and political accountability seems misplaced.

### B. *The Inspector General Model*

Congress enacted the *Inspector General Act*<sup>118</sup> in 1978, the same year as the *Independent Counsel Act*, authorizing the creation of offices "whose mission was to detect and prevent fraud, waste and abuse" in government departments, including the Departments of Treasury and Justice,<sup>119</sup> and in the executive branch of government.<sup>120</sup> Inspectors general initially were concerned with audit functions and the prevention of fraud and abuse. They were described as the "newest component in the government's fight against white-collar crime."<sup>121</sup> However, inspectors general increasingly have been called on to deal with a broader array of misconduct. Offices of Inspector General (OIG) present a starkly different model of ensuring accountability from the institution of the independent counsel:

Like independent counsel, OIGs have the responsibility for conducting special investigations of broad public interest and importance. But unlike independent counsels, OIGs do not exist for the sole purpose of conducting a single special investigation, nor even—given their audit, inspection, and program evaluation functions—just to conduct investigations. OIGs are permanent institutions, have a person at the head of the institution who is politically accountable, are subject to meaningful congressional oversight and, through the budgetary

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<sup>116</sup> R.S.C. 1985, c. C-46.

<sup>117</sup> Sunstein, *supra* note 51 at 2271 "The central question for ... government, almost all of the time, is not whether some official has acted improperly, but whether current policies are making lives better or worse, and how they might be improved."

<sup>118</sup> *Inspector General Act of 1978*, 5 U.S.C. app. [hereinafter *IG-A*].

<sup>119</sup> *Inspector General Act Amendments*, s. 102(e), codified as amended at 5 U.S.C. app. 3531-12.

<sup>120</sup> Bromwich, *supra* note 109 at 2027. One of the few executive branch institutions without an inspector general is the White House. See K. Clark, "Toward More Ethical Government: An Inspector General for the White House" (1998) 49 *Mercer L. Rev.* 553 at 561 (Clinton White House has resisted congressional efforts to impose an inspector general)

<sup>121</sup> M.J. Gates & M.F. Knowles, "The Inspector General Act in the Federal Government: A New Approach to Accountability" (1985) 36 *Ala. L. Rev.* 473 at 510; K.W. Muellenberg & H.J. Volzer, "Inspector General Act of 1978" (1980) 53 *Temple L.Q.* 1049.

appropriations process, have real limits on the resources they can allocate to any specific investigation.<sup>122</sup>

The fundamental purpose of a special investigation of an inspector general is not to lead to criminal prosecutions. Instead, it is to determine what happened and why. One inspector general has convincingly argued that “this explanatory purpose may, in many cases, rival, or even exceed, the imperative to hold individuals accountable, either through the criminal process or through administrative discipline.”<sup>123</sup> Inspectors general are well positioned to make recommendations for improved government operations and “can provide an invaluable aid to good government and prevent future scandals.”<sup>124</sup>

### 1. The Appointment Process and the Selection and Referral of Investigations

According to the *Act*, inspectors general “shall be appointed by the president, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration or investigations.”<sup>125</sup>

The inspector general is appointed for an indefinite term of office, which assures some measure of independence from the appointing executive. While the president (who must provide reasons to Congress) may remove an inspector general from office, inspectors general commonly have enjoyed tenure beyond that of the appointing president.<sup>126</sup> The process of presidential appointment followed by Senate confirmation is different from that of an independent counsel (and a commissioner of an inquiry in Canada). The process of appointing an inspector general guarantees a level of scrutiny and political accountability in excess of that surrounding the appointment of an independent counsel.

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<sup>122</sup> Bromwich, *supra* note 109 at 2028.

<sup>123</sup> *Ibid.* at 2043. This is an unnecessarily narrow approach to accountability. There is no reason that a compelling and factual narrative surrounding a tragedy or government misconduct, accompanied by recommendations to ensure that such events never again occur, is not a form of accountability. See generally, Roach, *supra* note 43.

<sup>124</sup> Clark, *supra* note 120 at 563.

<sup>125</sup> *IGA*, *supra* note 118, § 3(a).

<sup>126</sup> Bromwich, *supra* note 109 at 2029.

The *Act* provides inspectors general with a very broad mandate to conduct and supervise investigations relating to programs and operations within their jurisdiction. Except where investigations could pose threats to ongoing criminal investigations or matters of national security, inspectors general may investigate any matter and gather any necessary evidence during the course of their investigation. Investigations can be triggered by requests from senior management within the department, members of Congress, or may be initiated by the inspector general on the basis of their ongoing work or media reports.<sup>127</sup> The test for determining the appropriateness of an investigation is the “apparent legitimacy of the allegations and the seriousness of the issues raised by the request.”<sup>128</sup> A mere request for an investigation, regardless of the source, is insufficient to trigger an investigation if the matter does not warrant the expenditure of investigative resources. Since the OIG has a finite budget that must cover special investigations as well as a myriad of other ongoing activities, the OIG is required to carefully marshal its resources. These budgetary constraints create an institutional requirement to filter requests for investigation and provide incentives to allocate sufficient resources to an investigation without over-reaching the budget. These structural incentives are largely absent in both the American Independent Counsel and Canadian commission of inquiry models.

Moreover, the inspector general determines the scope of the inquiry and may enlarge its inquiry as it sees fit. Again, this is quite different from the mandate of the independent counsel (which was set by the Special Division) and the mandate of a Canadian commission of inquiry (established by terms of reference set by Cabinet). This institutional freedom permits an inspector general to conduct an investigation that may be different in scope than what was envisioned by the referring agent. This freedom is an important safeguard of independence; it helps to ensure that the work and integrity of the inspector general is not compromised by “management’s view of the investigation as a form of damage control.”<sup>129</sup>

When an OIG launches a special investigation, it is staffed primarily with existing resources. The OIG within the Department of Justice, for example, has a Special Investigations and Review Unit which consists of prosecutors, investigators (with Federal Bureau of Investigation, Immigration and Naturalization Service and Drug Enforcement

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<sup>127</sup> *Ibid.* at 2032.

<sup>128</sup> *Ibid.* at 2033.

<sup>129</sup> *Ibid.* at 2032.

Administration experience), and infrastructure staff. The importance of organizational continuity has been recognized by the inspector general of the United States Department of Justice:

Each additional investigation we conduct increases our experience and organizational knowledge as well as the efficiency of future investigations. These include simple but important tasks, such as developing a system of collecting, logging and preserving evidence, developing protocols for conducting interviews, including the circumstances under which interviews are recorded; establishing routines for supervising pending investigations; and developing the format for presenting special investigative reports. All of these aspects of conducting special investigations improve with the valuable insights gained from each matter we undertake.<sup>130</sup>

Specialized investigators and experienced prosecutors, selected for their investigative experience and writing ability, supplement this core staff as required by the investigation in question.

## 2. Investigative Tools

The ultimate goal of an inspector general investigation is to determine what happened rather than to bring criminal prosecutions.<sup>131</sup> But, subject to several exceptions, an OIG may rely on the investigative tools normally available to criminal and regulatory investigations. First, inspectors general have the statutory authority to obtain any and all records from any component of their agency without a subpoena. The inspector general has no authority to subpoena records from other federal agencies, but such records may be made available cooperatively.<sup>132</sup> Second, inspectors general may use an administrative subpoena *duces tecum* to obtain documents and other evidence from individuals and entities other than federal agencies.<sup>133</sup> Third, inspectors general have “plenary authority” to interview employees including the ability to request the employer to direct the witness to attend for interview. Any statements given by an employee cannot be used against them in any future criminal proceedings and failure to follow an order to appear can result in the imposition of employment-related sanctions up to and including termination of employment.<sup>134</sup>

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<sup>130</sup> *Ibid.* at 2038.

<sup>131</sup> In fact, the investigations of the Inspector General of the Department of Justice have never resulted in criminal prosecution. *Ibid.* at 2037.

<sup>132</sup> Muellenberg & Volzer, *supra* note 121 at 1058-1066.

<sup>133</sup> *IGA*, *supra* note 118, § 6(a)(3).

<sup>134</sup> Bromwich, *supra* note 109 at 2036.

However, there is no statutory authority for the inspector general to obtain testimonial subpoenas.<sup>135</sup>

### 3. Cost Constraints and Legislative Oversight

In any investigation, whether by an inspector general, an independent counsel, or commission of inquiry, there is political pressure to report promptly. There has been widespread criticism of the duration of a number of American independent counsel investigations, including the Walsh inquiry into the Iran-Contra affair and the Starr inquiry, as well as a number of Canadian commissions of inquiry, including the Somalia and Krever Inquiries. Bromwich believes that the duration and cost of inspector general investigations compare favourably to those of the independent counsel.<sup>136</sup> In addition to the institutional incentives to keep costs down, he has identified the factors which he believes accounts for the relative speed and efficiency of the inquiry:

OIG's institutional infrastructure, which does not have to be created from scratch for each new investigation; our commitment to staffing these matters adequately, the commitment of the individuals assigned to these matters . . . to complete them rather than departing before the work is done . . . ; and the established and known methods by which we prepare, review, and publish our reports.<sup>137</sup>

Since the OIG exists apart and beyond the scope of any particular investigation, it has an ongoing relationship with the legislature and congressional committees. The appropriations committee has direct control over the size of the global budget that the OIG has to work with. Since all special investigations are funded out of the OIG's global budget, there is indirect congressional oversight of the level of public resources directed toward specific inspector general investigations. Bromwich comments that he has:

not found that congressional oversight hinders or impedes our special investigations, but we must be prepared to explain and defend the conduct of our special investigations

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<sup>135</sup> IGA, *supra* note 118, § 6(a)(4). This situation has been criticized in R. C. McCann, "Procurement Fraud Investigative Techniques: The Need for Congressional Expansion of the Inspector General Subpoena Power to Include the Power to Compel Testimony" (1987) 16 Public Contract L.J. 470 at 501-510.

<sup>136</sup> Bromwich, *supra* note 109 at 2040-41. Five major Inspector General investigations were completed in twenty-six months at a cost of \$1.5 million, eight months and \$650,000, eleven months and \$1.0 million; eighteen months and \$1.5 million; and, fifteen months and \$750,000, respectively.

<sup>137</sup> *Ibid.* at 2039.

including both the substantive conclusions we reach as well as the duration and cost of such investigations. Although there is always the risk that our special investigations may tap into political agendas and may spur efforts to manipulate what we investigate, this simply underscores the need for OIGs to exercise their own independent and professional judgment in deciding what matters to investigate and what quantity of resources to allocate to particular special investigations.<sup>138</sup>

These budgetary controls could severely undermine the independence of the OIG and the level of political and governmental accountability it can foster. However, they also create institutional incentives to ensure efficient investigations, and provide democratic accountability as well as congressional oversight.

#### 4. Summary

The Inspector General model presents a novel approach to securing political and governmental accountability. It has several features which promote independence from its congressional superiors. An office's independent ability to commence investigations, controls for some of the disincentives governments face when considering appointing a commission of inquiry. Providing the matter rises to the level of importance sufficient to warrant the allocation of resources, the OIG is also prepared to conduct an investigation at the request of the Congress. The fact that the OIG may define the terms of reference for its special investigations helps to ensure that its investigation does not become mere damage control for top management or a partisan wild-goose chase. The fact that the OIG operates on a fixed budget provides institutional incentives to work effectively and efficiently toward a resolution. However, congressional oversight of the OIG budget could lead to an attenuated shut-down problem if the work of the OIG did not meet with the appropriation committee's favour. On the other hand, this legislative oversight provides the OIG with a measure of political accountability and credibility which may be lacking from independent counsel investigations. Finally, the fact that the OIG survives the completion of any single investigation promotes efficient allocation of resources, minimizes start-up costs and delays, and creates a collective memory which may contribute to the adoption of efficient and effective organizational and managerial procedures.

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<sup>138</sup> *Ibid.* at 2042.

## V. A ROLE FOR THE LAW COMMISSION OF CANADA

Currently the decision to appoint a commission of inquiry lies within the sole discretion of the federal or provincial cabinet. Fearing adverse political consequences, governments appear reluctant to establish commissions of inquiry into matters that merit independent investigation. This trend is solidifying at a time when opposition parties and the media are increasingly becoming eager and opportunistic in their demands for the appointment commissions of inquiry to further their short-term political ambitions. Opposition parties and the media are primarily interested in the “fault-finding” function of commissions and less interested in a commission’s role in public policy reform that might make such situations less likely to reoccur.

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. The demands by opposition parties and the media for inquiries on today’s hot-button issue would be better examined and filtered through less partisan lenses. Although cabinet should not be prevented from continuing to have the power to appoint a commission, this power should be shared in cases that merit independent investigation to formulate policy that seeks to minimize a recurrence of a particular public crisis.

Although the Independent Counsel model is flawed in many important respects, it does contain a number of features that merit closer attention in the Canadian context. Most importantly, the model recognizes the institutional disincentives to an administration launching an independent review of its conduct or policies. It limits the discretion of government actors by requiring a full investigation in specified circumstances, and removes from government control the selection of the investigator and the setting of prosecutorial jurisdiction, budget and timeline .

The Inspector General model offers many valuable lessons. The OIG may commence an investigation on its own motion. It also determines the scope of the inquiry itself and may enlarge an investigation as it sees fit. Its finite budget creates an institutional incentive to allocate sufficient, but not excessive, resources to any particular investigation. The Office of an Inspector General is a permanent institution dedicated to explaining what happened and why. This permanence permits efficiency of operations

and minimizes start-up costs and delays. It also places the OIG in a position to make recommendations for improved government operations, and to monitor effectively government's response to these recommendations.

At the federal level, one possible reform would be to permit the Senate to create commissions of inquiry. However, although senators stand somewhat removed from the political fray, the partisan nature of their appointment, combined with an apparent lack of public confidence in the Senate itself, renders this model less than perfect. As we discuss below, the Law Commission of Canada provides a deliberative forum better suited to the exercise of discretion to establish commissions of inquiry and to set their terms of reference.

#### A. *Current Structure and Mandate*

The Law Commission of Canada was established as a corporation by legislation in 1996.<sup>139</sup> The preamble to the *Law Commission of Canada Act* states that it is desirable to establish a commission to provide independent advice on improvements, modernization, and reform of the law based on the experience of a wide range of groups and individuals. The Law Commission is to ensure its work is open, inclusive, accessible, and understandable; multidisciplinary, in that the law and legal system is to be viewed in a broad social and economic context; responsive and accountable through partnerships; and efficient and effective when formulating recommendations, taking into account cost-effectiveness and the impact of the law on different groups and individuals.<sup>140</sup>

The *Law Commission Act* further provides that the purpose of the Law Commission is to study, and keep under systematic review, the law and its effects with a view to providing independent advice on improvements, modernization and reform that will ensure a just legal system that meets the changing needs of society. This purpose includes the development of new approaches to, and new concepts of, law; the development of measures to make the legal system more efficient, economical and accessible; the stimulation of critical debate in, and the forging of productive networks among, academic and other communities in Canada in order to ensure

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<sup>139</sup> *Law Commission of Canada Act*, S.C. 1996, c. 9, s. 2, proclaimed in force 21 April 1997 S.I./97-46, C. Gaz. 1997.II.1501 [hereinafter *Law Commission Act*].

<sup>140</sup> *Ibid.*, Preamble.



cooperation and coordination; and the elimination of obsolete laws and anomalies in the law.<sup>141</sup>

In order to accomplish its broad mandate, the Law Commission is given a number of statutory powers including the powers to undertake and initiate research, publish studies and reports, facilitate cooperative efforts among the Commission, governments, the academic, and legal communities, and expend any money provided by Parliament subject to any terms on which it was provided (including the engagement of staff and temporary specialized assistance).<sup>142</sup> The Law Commission also has the ability to establish a study panel, consisting of persons having specialized knowledge in, or particularly affected by the matter, for the purpose of advising and assisting it with any particular project.<sup>143</sup>

The Law Commission is under a duty to consult with the minister of justice with respect to its proposed annual program of studies and to submit to the minister any reports completed.<sup>144</sup> While it is free to design its own agenda, the Law Commission shall prepare reports requested by the minister. The minister is under an obligation to consult with the Law Commission and to take its workload and resources into consideration before requiring any report to be completed.<sup>145</sup> The Law Commission is accountable, through the minister of justice, to Parliament for the conduct of its affairs.

The Law Commission consists of a full-time president and four part-time commissioners who hold office at pleasure for a renewable term not to exceed five years.<sup>146</sup> The commissioners may be drawn from outside the legal community, and are to receive advice on its strategic directions and long-term programs of study from an advisory council consisting of between twelve and twenty-four members that are "broadly representative of the socio-economic and cultural diversity of Canada" serving three-year terms at the pleasure of the government.<sup>147</sup> The advisory council is also required to review the Law Commission's performance.

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<sup>141</sup> *Ibid.*, s. 3.

<sup>142</sup> *Ibid.*, ss. 4, 16.

<sup>143</sup> *Ibid.*, s. 20(1).

<sup>144</sup> *Ibid.*, ss. 5(1)(a), (c).

<sup>145</sup> *Ibid.*, s. 5(1)(b).

<sup>146</sup> *Ibid.*, ss. 7(1), 7(4), 7(5), 8(1).

<sup>147</sup> *Ibid.*, ss. 18(1), 19.

### B. *Necessary Structural Reforms*

Establishing the Law Commission as a permanent base of operations for commissions of inquiry into matters falling within federal authority that merit independent policy assessment, would require a number of changes to its enabling statute. Specifically, the *Law Commission Act* would have to be amended to ensure: that Law Commissioners are appointed for defined terms, removable only with cause; commissions of inquiry established by the Law Commission possess the same powers available to inquiries under the *Inquiries Act*; and to authorize the Law Commission to establish commissions of inquiry into matters falling within federal authority that merit independent policy assessment. On this last point, one possible approach would be to create an automatic triggering mechanism linked to allegations of criminality. For example, in a manner similar to the Independent Counsel model, the statute could require the Law Commission to appoint an inquiry in situations where credible allegations had been made that federal officials had violated provisions of the *Criminal Code*. Drawing from the American experience, one could easily imagine drafting a list of persons and offences covered by such a statute.

However, such an approach focuses on retrospective issues of criminality at the expense of prospective policy formulation. It would force a commission of inquiry to attempt to perform functions for which it is ill-suited. Such an approach also invites federalism and *Charter* challenges from individuals and organizations who fear criminal retribution. As the judiciary has long maintained, commissions of inquiries should not be used to create a parallel criminal justice system. Such investigations are better left to traditional law enforcement agencies. Allegations of criminal wrongdoing accordingly should not serve as an effective threshold or triggering mechanism.

Instead, the Law Commission ought to be empowered to establish an inquiry into matters falling within federal jurisdiction that merit independent investigation to formulate policy that seeks to minimize a recurrence of the events in question, whether the incident to be investigated involves government misconduct, a disaster, a tragedy, the revelation of systemic problems, or some other public crisis. For example, although complicated by the constitutional distribution of legislative authority,<sup>148</sup> the

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<sup>148</sup> See B. Ryder, Opinion Letter to Ms. Anne Pohl, Coalition for a Public Inquiry into Matters Relating to the Death of Dudley George (12 March 1999) (on file with authors) (expressing opinion that the federal government possesses the constitutional authority to establish a commission of inquiry

purpose of a commission of inquiry into matters relating to the death of Mr. George should not, and legally cannot, be to investigate named individuals and assess their criminal or civil liability. Instead, an inquiry is necessary to identify the causes of the death of Dudley George, to determine whether his death could have been prevented, and to recommend means for preventing the occurrence of similar events in the future. In this case, as in most cases, the focus of an inquiry should be less on "who did what to whom and when," and more on ensuring that such a death never happens again.

### C. Ensuring Efficient and Cost-Effective Commissions

One of the factors that makes governments reluctant to provide commissions of inquiry with the necessary independence to make decisions regarding the scope and duration of their work is the direct relationship between these decisions and the ultimate cost of the inquiry. In an era of significant reductions in the level of federal and provincial program spending, governments are reluctant to provide the "blank check" that nourishes the independence of an inquiry.

Currently, each new commission of inquiry is started from scratch upon appointment and is dissolved entirely following the release of its report. This has two effects: it ensures that each inquiry wastes time and money during its start up phase; and it provides no institutional incentives to keep costs down. The creation of a permanent base of operations in the Law Commission would not only make individual inquiries more efficient but it would make them more effective. It would eliminate the need to develop separate organizational infrastructures. Mundane details, such as office space, computer hardware and software, and telephone lines could exist on a permanent basis and be amortized accordingly. The Law Commission could also be responsible for a group of ongoing administrative functions such as accounting, financial management, hearing scheduling, logistics, and media relations. Core administrative personnel could provide these functions on a permanent basis ensuring a rapid and smooth launch to each inquiry.<sup>149</sup>

Past commissions of inquiry have been compared to elephants in that both are "big and slow moving and tend to sit down and squash things.

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into matters relating to the death of Dudley George).

<sup>149</sup> For a candid account of some of the administrative challenges faced by the Royal Commission on the Ocean Ranger Marine Disaster, see D.M. Grenville, "The Role of the Commission Secretary," in *Commissions of Inquiry*, *supra* note 5 at 51-70.

The only difference is [commissions] don't remember."<sup>150</sup> However, by creating a permanent core organization in the Law Commission, individual inquiries could benefit from a group of social science researchers and investigators with a body of substantive and methodological expertise. Such organizational competency could allow inquiries to produce superior work in less time than presently required. This core group of investigators and researchers would, of course, be supplemented by additional resource persons as required by any particular inquiry.

If the Law Commission is invested with the discretionary power to create commissions of inquiry, then it should also be funded through a generous but fixed publicly-funded budget. Borrowing from the Inspector General model, a global limit on spending would create institutional incentives on the Law Commission to run inquiries efficiently and effectively. It would also require the organization to carefully shepherd its resources to ensure that they are allocated to pressing and substantial public concerns and discipline the organization to focus on areas where it could make a significant contribution to future policy development.

This approach is not without risks. First among them would be that a budget set too low would limit the ability to do justice to any particular inquiry or that the Law Commission would find itself without the necessary resources to launch a needed inquiry that emerged late in the fiscal year. Similarly, a government displeased with the work of the Law Commission in general, or of a specific inquiry in particular, could simply starve the Law Commission's inquiry operations during the next budget process and thus limit its effectiveness.

Assuming that the cabinet retained power to appoint commissions of inquiry on its own initiative, it would be preferable, for similar reasons of efficacy and efficiency, for the cabinet also to utilize the Law Commission's core operations. If this were the case, the design of budget arrangements should ensure that a cabinet request for an inquiry did not consume a disproportionate amount of the Law Commission's budget. One possibility would be to require cabinet to allocate additional funds to the Law Commission to support such initiatives.

## VI. CONCLUSION

Fearing political embarrassment, no doubt governments would be reluctant to cede control over their policy agenda to commissions of inquiry

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<sup>150</sup> D.R. Cameron, "Not Spicer and Not the B & B: Reflections of an Insider on the Workings of the Pepin-Robarts Task Force on Canadian Unity" (1993) 7-8 *Int'l J. Can. Stud.* 333 at 341.

established by an independent agency such as the Law Commission of Canada. This would be true particularly if they do not possess the ability to wind-up a commission before its work was done. But fears of political embarrassment do not justify turning a blind eye to the deaths of Mr. George and Mr. Arone and the need to prevent similar tragedies in the future. Moreover, a government may see some political benefits in being relieved of the decision to establish a commission of inquiry. Instead of shouldering sustained criticism for a failure to call an inquiry, a government could legitimately claim that it is up to the Law Commission to determine whether the circumstances in question merit independent investigation. By designing the process so that it focuses more on forward-looking policy development and less on the attribution of blame, governments can reduce the possibility that independent investigations will result in adverse political consequences.

For starters, any independent agency will have to ensure that the interested parties, including the government, do not view the exercise as inherently adversarial. An adversarial approach to policy formulation seems unlikely to produce desired results. While appropriate to traditional forms of private and public litigation, adversarial stances will only frustrate the work of an inquiry. The government must come to see its role in the process not as akin to a defendant in a quasi-judicial proceeding. Similarly, other interested groups ought to be entitled to participate in a manner more meaningful and equal than our present notions of standing envision. They should be given a greater role within the policy-making function of an inquiry than they presently enjoy. Because the focus of an inquiry's work would be centered on prospective policy discussions in favour of retrospective "fault-finding," participants would be required to take seriously government representations with respect to the fiscal and policy environment in which inquiry recommendations might be implemented. Finally, in order to encourage good faith participation, participants should be given the opportunity to review and respond to any inquiry findings of fact prior to the release of its final report.

Absent meaningful reforms that address the perverse incentives facing governments to start up and shut down commissions of inquiry, the capacity of the commission of inquiry to secure political and governmental accountability likely will continue to erode in the future. If so, Canadians will have lost one of the most effective institutional mechanisms for the formulation of public policy. In this article, we have argued that many of the perverse incentives that governments face in relation to commissions of inquiry can be eliminated by vesting an independent agency, such as the Law Commission of Canada, with the authority to establish inquiries in

certain circumstances on its own motion. If successful, this reform could serve as a model for provincial law reform commissions in the future.