

Book Review
Compte rendu

The Conduct of Public Inquiries: Law, Policy, and Practice

by Ed Ratushny
Toronto: Irwin Law, 2009, 477 pages

Reviewed by The Honourable E.D. Bayda, Q.C.*
and Robert E. Hawkins**

Canadians are ambivalent about public inquiries. They fret about how much they cost, and how long they take, while at the same time turning inquiry commissioners into the stars of day-time television. Some inquiries have had a significant electoral impact¹ while others appear to have had none at all.² Some have made a notable contribution to public policy development³ while others have been shelved.⁴ Opposition politicians call for an inquiry at even the hint of scandal or disaster; governments treat the prospect of a transparent hearing over which they have little control with trembling. They envy a little the speed and no-nonsense investigative powers of American Senate Committees but are concerned about the politicization of Canadian judges who chair similar inquiries.

Professor Ratushny throws something of a lifeline into this sea of turbulence with the publication of his book, *The Conduct of Public Inquiries: Law, Policy and Practice*. On the book's cover is a picture of the prow of a beautifully built sailing vessel heading into open waters.

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¹ Prime Minister Mulroney's government was re-elected in the 1988 federal election on a platform that adopted the free trade recommendations contained in the 1985 Macdonald Royal Commission report.

² The Somalia inquiry was "shut down" by Prime Minister Chrétien without any apparent adverse political consequences; see Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 21, 31-32.

³ *Ibid.* at 22 where Ratushny cites some random examples of contributions made by public inquiries including universal health care, bilingualism policy, employment equity, and systemic reforms to the criminal justice system resulting from the recommendations of provincial inquiries into wrongful convictions.

⁴ *Ibid.* at 412-13 where Ratushny notes that Prime Minister Harper "essentially agreed" with opposition from a number of prominent citizens to recommendations of the Gomery inquiry that would have substantially transformed our parliamentary system and the doctrine of ministerial responsibility.

The accompanying quote, drawn from a 2006 round table on inquiries, cautions that “launching a royal commission of inquiry is a risky process.”⁵ This book will go a long way towards reducing that risk.

This is a most readable book, exhaustively researched, complete with a useful list of authorizing statutes, a table of recent past commissions of inquiry (together with their websites), a comprehensive table of cases covering Canadian jurisprudence in this area and an index that will be especially helpful to inquiry participants needing to reference inquiry issues. Very few scholars could have written this book. Ratushny’s background as an administrative law professor; his experience as counsel to parties appearing before an inquiry, as an inquiry commissioner, and as counsel to a commissioner; and his training in criminal procedure and evidence, inform the analysis in this book.

Ratushny begins by rejecting the notion put forward by some scholars that “[t]he actual diversity of inquiries may pre-empt any systematic conceptualization of inquiry procedure ...”⁶ His book is designed to provide just such a conceptualization,⁷ one that will re-enforce the important role that public inquiries play in our governmental system and one that will answer the “recurring issues and problems” faced by all commissions of inquiry.⁸ Unlike many who have studied the subject, Ratushny calls for neither the reform nor the abandonment of the institution. Rather, he seeks to promote a better understanding of it: “Inquiries that address their terms of reference in a fair and expeditious manner are quite achievable under the existing legislation.”⁹

Ratushny defines a public inquiry as “a body created ... under Part I of the *Inquiries Act*¹⁰ or corresponding provincial or territorial legislation.”¹¹ A royal commission, on the other hand, is defined as a body created under the Great Seal of Canada. When Cabinet appoints a public inquiry, it exercises delegated statutory authority by way of order-in-council; when it appoints a royal commission, it engages in a discretionary exercise of Crown prerogative by way of royal warrant. Public inquiries are given authority by their various inquiry statutes to compel witnesses to testify or to produce documents; the exercise of Crown prerogative confers no such authority on royal commissions. In

⁵ *Ibid.* at xxix.

⁶ *Ibid.* at 1.

⁷ *Ibid.* at 6.

⁸ *Ibid.* at 32.

⁹ *Ibid.*

¹⁰ *Inquiries Act*, R.S.C. 1985, c. I-11.

¹¹ Ratushny, *supra* note 1 at 11.

order to get around this, the appointment of Canadian royal commissions has been initiated by order-in-council under the *Inquiries Act* and then executed by royal warrant under the Great Seal of Canada.¹²

The terms of reference appointing a public inquiry often give it a formal, often very cumbersome name. An informal short name, frequently adopted by the inquiry itself, usually evolves out of some prominent aspect of the inquiry¹³ or as a result of the profile of the commissioner.¹⁴

While recognizing that there exist a myriad of schemes for classifying public inquiries, Ratushny adopts the bipolar categorization put forward by the Law Reform Commission of Canada in a 1977 working paper.¹⁵ Investigative inquiries are those that concentrate on investigating specific events or the conduct of specific individuals or institutions. They are concerned to find out “what went wrong and why?” In contrast, policy/advisory inquiries engage in more general information gathering in order to examine broader systemic issues of public policy.¹⁶

Borrowing a description from his daughter’s Yale S.J.D. dissertation proposal, Ratushny characterizes the commission of inquiry as a unique “residual institution” of government. It is “residual” because it is established when other governmental institutions and processes are found inadequate.¹⁷ It is “unique” for three reasons. First, its purpose is to investigate and report in accordance with its terms of reference; beyond fact-finding it has no power to make decisions, adjudicate disputes, determine rights or make findings of civil or criminal liability.¹⁸ Second, commissions of inquiry are unique in their diversity; they take many forms and proceed in a variety of ways. This flexibility, inherent in the administrative law principle of fairness, is a strength. It allows for expeditious proceedings while ensuring fair treatment for those who might be adversely affected.¹⁹ Third, a commission of inquiry performs a unique social function by restoring public confidence in the wake of catastrophe, scandal or perceived injustice, not only with respect to the specific situation being investigated but in the process of government as a

¹² *Ibid.* at 24.

¹³ For example, the Le Dain commission or the Marshall inquiry.

¹⁴ For example, the Gomery inquiry.

¹⁵ Ratushny, *supra* note 1 at 14.

¹⁶ *Ibid.* at 15.

¹⁷ *Ibid.* at 20, 23, 33, 105.

¹⁸ *Ibid.* at 11, 27.

¹⁹ *Ibid.* at 2.

whole.²⁰ Through dialogue, research, hearings and final recommendations, a well-run inquiry serves to educate the public.

The characteristics that enable a commission of inquiry to restore public confidence in times of apparent wrongdoing or uncertainty are the independence of the inquiry, its effectiveness in being able to focus entirely on the assigned task to the exclusion of all other obligations, its mandate drawn up to specifically address public concern in a specific situation, its broad statutory investigative powers and, finally, the transparency of its proceedings.²¹ No other investigative governmental institution combines all of these features. For example, legislative committees lack the necessary focus, skills and impartiality to conduct an effective and fair investigation.²²

Near the beginning of his book, Ratushny critiques 23 public inquiries after grouping them under the following five headings: investigative inquiries, policy/advisory commissions, wrongful conviction inquiries, inquiries called to investigate crimes and ongoing inquiry bodies. His observations are fascinating for their anecdotal detail, for their evaluation of the inquiries' substantive conclusions and for their analysis of the inquiries' procedural workings.

We learn, for example, that the first royal commission was the one that authored the *Domesday Book* between 1080 and 1086.²³ Six royal commission reports, including the 1839 *Durham Report* and the 1985 Macdonald Commission on the Economic Union, figure in the *Literary Review of Canada's* list "of the 100 most important Canadian books, chosen by a panel of experts."²⁴ Commissioner Abella's adoption of the phrase "employment equity" in place of the more politically charged term "affirmative action" is described by Ratushny as "a stroke of genius."²⁵ The commissioner of the Walkerton inquiry, and his principal counsel, are praised for recognizing the human impact of the tainted water tragedy by living in Walkerton and by meeting local groups within two months of the inquiry's appointment.²⁶ That inquiry adopted four principles as a kind of "mission statement" to guide its process:

²⁰ *Ibid.* at 16-17.

²¹ *Ibid.* at 16-20.

²² *Ibid.* at 114-121 where the House of Commons Standing Committee on Access to Information, Privacy and Ethics which held unsuccessful hearings into the Mulroney-Schreiber matter are cited as an example.

²³ *Ibid.* at 12.

²⁴ *Ibid.* at 33-34.

²⁵ *Ibid.* at 59.

²⁶ *Ibid.* at 45-46, 164.

“thoroughness, expedition, openness to the public and fairness.”²⁷ The Goudge Inquiry into Pediatric Forensic Pathology in Ontario adopted a version of those principles and added a fifth, proportionality, as an indication that thoroughness was not to be confused with exhaustiveness but was to be balanced with expedition.²⁸ The Le Dain Commission had an informal arrangement with the RCMP which provided that those giving evidence on the non-medical use of drugs would not be investigated or charged.²⁹ On 22 December, 1969, John Lennon and Yoko Ono secretly gave testimony.³⁰ The time lines in the Somalia inquiry “were nothing short of absurd” given the breadth of its terms of reference.³¹ The Macdonald Commission on the Economic Union, Canada’s largest royal commission in terms of size and scope, demonstrated the crucial importance of effective management when running broad policy commissions.³² The inquiry into Donald Marshall, Jr.’s wrongful conviction “opened the door to retrospective scrutiny of the criminal justice system in a way that is not possible through judicial appeals.”³³

Ratushny sets out the legal framework within which Canadian public inquiries operate and explains the legal issues that arise at each point in that framework. The subject matter of an inquiry, as defined by its terms of reference, must, in “pith and substance,” fall within the constitutional jurisdiction of the appointing government. Constitutional issues arise when provincial inquiries are appointed to conduct what amounts to criminal investigations focused on a particular individuals or situations. Despite the fact that criminal law falls within federal jurisdiction, however, so long as a provincial inquiry’s mandate relates to some valid provincial purpose, the incidental possibility that a criminal charge might result from the inquiry’s work will not invalidate the inquiry on division of powers grounds.³⁴

A witness giving incriminating evidence at a public inquiry is protected by sections 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*³⁵ from having that evidence used against him or her. Even

²⁷ *Ibid.* at 44, 184, 202.

²⁸ *Ibid.* at 184.

²⁹ *Ibid.* at 61.

³⁰ *Ibid.* at 62.

³¹ *Ibid.* at 48.

³² *Ibid.* at 64-67. The management of the Goudge inquiry is also praised, *ibid.* at 201; that of the Cornwall inquiry criticized, *ibid.* at 200-01.

³³ *Ibid.* at 72.

³⁴ *Ibid.* at 92-93, 263 where the line of cases arising from *Starr v. Houlden*, [1990] 1 S.C.R. 1366 is explored.

³⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 11(c) of the Charter protects a person charged with an offence from being compelled to be a witness against him or herself. Section 13 protects any

with this protection, a problem arises when a witness applies to have an inquiry delayed on grounds that it risks prejudicing the witness's right to a fair criminal trial. In dealing with such an application, a court will balance the right of the accused to a fair trial against the state's interest in investigating a matter of significant public importance. If the court allows the inquiry to proceed, and the state does go forward with it, the state runs the risk, perhaps not great, that it may jeopardize any subsequent criminal proceedings if adverse publicity affecting the accused, or some other circumstance, renders a fair trial impossible.³⁶

The authority to establish a public inquiry must be found in enabling legislation such as the federal *Inquiries Act*, or the equivalent legislation in each province and territory. The effect of this is that the inquiry, and its commissioner, are "temporary appendages" of the executive branch of government. As a result, the courts have concluded that the appointing government is free to modify the scope of the inquiry's jurisdiction, or to shut down the inquiry altogether, if it so chooses.³⁷

The inquiry's terms of reference, which have the legal character of subordinate legislation, define the inquiry's jurisdiction.³⁸ It is up to the inquiry's commissioner to interpret the scope of those terms. At the outset of hearings, the commissioner should invite the parties, and the government, to indicate where possible ambiguities in the terms of reference exist and to make submissions as to their meaning.³⁹ The commissioner's ultimate interpretation of the scope of those terms is subject to judicial review on a correctness standard for excess of jurisdiction.⁴⁰

Ratushny suggests that it is "perfectly appropriate" for a prospective commissioner, prior to his or her appointment, to discuss draft terms of reference with the responsible minister and/or senior government officials.⁴¹ Matters for discussion include the breadth of the terms of reference and whether the terms are to contain a "basket clause" giving the commissioner unrestricted power to investigate "such other related matters as the commissioner considers relevant."⁴² In determining the appropriate

person who testifies in any proceeding from having any evidence given from being used to incriminate himself or herself in any other proceeding.

³⁶ Ratushny, *supra* note 1 at 40-43, 295-97 where the litigation concerning a possible delay of the Westray inquiry is reviewed.

³⁷ *Ibid.* at 157, 275, 281.

³⁸ *Ibid.* at 281.

³⁹ *Ibid.* at 194, 282.

⁴⁰ *Ibid.* at 130, 141, 309.

⁴¹ *Ibid.* at 150-51.

⁴² *Ibid.* at 135.

breadth of the terms of reference, Ratushny suggests that one ask, “What is the broad public interest that will be served?”⁴³ Other matters for “negotiation” include the dates for reporting and whether they provide sufficient time to accomplish the assigned task,⁴⁴ access to government documents and whether privilege will be waived where this becomes an issue, the inclusion of an explicit provision requiring government cooperation and whether any restrictions on such cooperation is being asserted,⁴⁵ and an understanding with respect to the publication of interim and final reports and whether executive control will be asserted to restrict publication.⁴⁶ Overall Ratushny points out that past commissions offer a “cornucopia of precedents” to guide the drafting of terms of reference.⁴⁷

With respect to the conduct of hearings, it is common for terms of reference to include a provision authorizing the commissioner to adopt “any procedures and methods expedient for the conduct of the inquiry”⁴⁸ and for inquiries to adopt their own rules of procedure. Draft procedural rules are typically circulated in advance of the start of hearings so that all parties can comment on them before their final adoption.⁴⁹ Ratushny suggests that these rules forbid parties and their lawyers from publicly commenting on the evidence submitted at the hearing, and on the credibility of witnesses, while the hearings are ongoing.⁵⁰ The inquiry’s rules of procedure are not legally binding and may best be described as having the status of a policy to assist the inquiry. However, they might create “legitimate expectations” amongst the participants that could form the basis of a judicial review application if they are not followed.⁵¹

The final piece in the legal framework is the administrative law principle of fairness. The inquiry’s obligation to act impartially and fairly run as a leitmotif throughout Ratushny’s book. Dealing first with impartiality, Ratushny notes that the inquiry commissioner’s task is to actively search for evidence from which to draw conclusions about what happened and why.⁵² In order to do this effectively, the commissioner

⁴³ *Ibid.* at 132.

⁴⁴ *Ibid.* at 133 where the Somalia inquiry provides an example.

⁴⁵ *Ibid.* at 135, 154. If the terms of reference are too broad, the government risks finding it difficult to control a “rogue commission” anxious to sail into waters never intended for exploration.

⁴⁶ *Ibid.* at 140.

⁴⁷ *Ibid.* at 137.

⁴⁸ *Ibid.* at 138.

⁴⁹ *Ibid.* at 193-94, 292.

⁵⁰ *Ibid.* at 197, 206-08, 293.

⁵¹ *Ibid.* at 291.

⁵² *Ibid.* at 158.

must avoid any misguided investigative zeal, especially tempting where mandates are broad and investigatory powers are heightened, and any excess of ego, especially enticing given the importance of inquiry topics and the hothouse media attention that they generate.⁵³ Because the evenhandedness of the commissioner will set the tone of the whole inquiry,⁵⁴ selection of the right commissioner is key. Ratushny offers the following advice: "A degree of humility is a good place to start. ... In the appointment of a commissioner, basic human qualities should be taken into account for a role that requires restraint, discipline, sensitivity, and respect for those affected."⁵⁵

Impartiality is also central in defining the role of commission counsel. Commission counsel acts on behalf, and under the instructions, of the commissioner.⁵⁶ He or she is responsible for investigating the material, maintaining communication with the parties, presenting the evidence at the hearings, acting as spokesperson to the media, providing advice to the commissioner and assisting with drafting of the final report.⁵⁷ His or her approach must be balanced.⁵⁸ Commission counsel is an extension of the commissioner and in that sense represents the public interest in all aspects.⁵⁹ The difficulty, as Ratushny explains, arises when commission counsel must test the credibility of a witness. Rigorous cross-examination cannot be impartial.⁶⁰ Participation of commission counsel as both a partisan advocate challenging a party on cross examination, and as an assistant helping the commissioner reach conclusions at the deliberation stage, "could well constitute a reasonable apprehension of bias sufficient to strike down such findings."⁶¹ Ratushny's suggested solution, one adopted in the by-laws of the Canadian Judicial Council (CJC),⁶² is to bifurcate the function of commission counsel by the appointment of two counsel. One, the hearing counsel,⁶³ is lead counsel at the hearing and in that capacity is free to

⁵³ *Ibid.* at 169. Commissioner Gomery's relationship with the media is discussed.

⁵⁴ *Ibid.* at 164.

⁵⁵ *Ibid.* at 147. In the same passage, Ratushny remarks on the different preoccupations of the Gomery inquiry and the Walkerton inquiry.

⁵⁶ *Ibid.* at 217.

⁵⁷ *Ibid.* at 217, 219, 239. Ratushny credits the list to an article by former Commissioner Dennis O'Connor entitled, "The Role of Commission Counsel in a Public Inquiry" (2003), *Advocates' Soc. J.* 9.

⁵⁸ Ratushny, *supra* note 1 at 217.

⁵⁹ *Ibid.* at 220.

⁶⁰ *Ibid.* at 222.

⁶¹ *Ibid.* at 227.

⁶² *Ibid.* at 232-33.

⁶³ *Ibid.* The CJC refers to this counsel as "Independent Counsel."

cross-examine and to make final submissions in public. He or she is not, however, permitted to discuss the credibility of the witnesses or the merits of the arguments with the commissioner in private. The other, the advisory counsel,⁶⁴ carries a silent brief during the hearings but is available, in complete confidence, as a sounding board to advise the commissioner and participate in drafting the final report.⁶⁵

The other aspect of fairness is procedural. We live in a blaming culture. The public and the media are often more interested in an inquiry fingering a scapegoat than in recommendations for future improvements.⁶⁶ Although inquiries cannot make findings of civil or criminal liability, they are entitled to make findings of misconduct.⁶⁷ Ratushny suggests that any conclusion that “reflects adversely” on an individual, and especially on his or her reputation, amounts to such a finding.⁶⁸ Common law rules of procedural fairness, codified in many jurisdictions by notice provisions in the various inquiries acts, require that any person subject to a potential finding of misconduct receive notice and be given an opportunity to respond prior to such a finding being made.⁶⁹ Ratushny suggests that this process will be assisted if full disclosure is made by commission counsel to parties prior to the hearing and that adverse testimony be heard first in order to permit the person implicated to answer.⁷⁰ In this way, if a formal notice of potential adverse findings is issued at the end of closing submissions, the notice may be largely redundant or, if not, any further right of response can be handled through written submissions.⁷¹ In any event, failure to proceed fairly by providing notice of potentially adverse findings, and an opportunity to respond, will constitute a jurisdictional error subject to judicial review on a correctness basis.⁷²

Ratushny’s book contains many “how-to” summaries including advice for government on whether to appoint a public inquiry as opposed

⁶⁴ *Ibid.* at 233. The CJC refers to this counsel as “Counsel to the Inquiry Committee.”

⁶⁵ *Ibid.* at 235-36.

⁶⁶ *Ibid.* at 369, 386.

⁶⁷ *Ibid.* at 374-75.

⁶⁸ *Ibid.* at 370, 378, 389.

⁶⁹ *Ibid.* at 389; see *Inquiries Act*, *supra* note 10, section 13: “No report shall be made against any person until reasonable notice has been given to the person of the charge and the person has been allowed an opportunity to be heard in person or by counsel.”

⁷⁰ Ratushny, *supra* note 1 at 390.

⁷¹ *Ibid.* at 394-95.

⁷² *Ibid.* at 408.

to adopting an alternate investigative process.⁷³ There are recommendations to commissioners on hiring staff and on the early development of a “game plan” for guiding the work of the commission,⁷⁴ on the dangers of speaking to the media,⁷⁵ on the content of the statement that opens the hearings,⁷⁶ on report writing,⁷⁷ and on everything in between. Similarly, there is practical instruction for hearing counsel on obtaining government documents,⁷⁸ on avoiding the need for oral evidence through the use of “factual overview” and “institutional” reports,⁷⁹ and on the order for calling and examining witnesses.⁸⁰ Whole areas of law as they relate to public inquiries are concisely summarized including the law on standing and intervener funding,⁸¹ on compelling testimony and contempt,⁸² on evidence,⁸³ on *in camera* hearings,⁸⁴ on national security confidentiality claims,⁸⁵ and on privilege against testifying.⁸⁶

This book focuses primarily on investigative inquiries. At various points, however, and then in more detail in the final chapter, Ratushny examines policy/advisory inquiries. Indeed, many investigative inquiries, having identified in their first phase “what happened and why,” turn in their second phase into policy/advisory inquiries in order to provide recommendations for reform. A policy/advisory inquiry is a different sort of inquiry than an investigative one. Rather than focus on a narrow set of events, it usually is concerned with a broader matter of public policy, one often associated with some long-standing societal problem. Policy inquiries gather information by consulting experts, researchers, interest groups and community members. They are meant to educate the public. They usually leave significant commissioned research. Seventy volumes of research were published as supplements to the Macdonald Commission on the Economic Union; 100,000 copies of these volumes were sold.⁸⁷ Policy inquiry recommendations are often the

⁷³ *Ibid.* at 114-30.

⁷⁴ *Ibid.* at 173-85.

⁷⁵ *Ibid.* at 173, 177-79, 206-07.

⁷⁶ *Ibid.* at 196-98.

⁷⁷ *Ibid.* at 355-69.

⁷⁸ *Ibid.* at 242-48.

⁷⁹ *Ibid.* at 250-53.

⁸⁰ *Ibid.* at 255-57; 316-20.

⁸¹ *Ibid.* at 185-93.

⁸² *Ibid.* at 311.

⁸³ *Ibid.* at 321.

⁸⁴ *Ibid.* at 329.

⁸⁵ *Ibid.* at 337.

⁸⁶ *Ibid.* at 340.

⁸⁷ *Ibid.* at 51, 436.

result of compromise made by large panels of commissioners, compromises necessitated by the desire to find some political acceptance for recommendations that are more a matter of value judgment than of judicial reasoning.⁸⁸

Gathering and organizing the detailed information that Professor Ratushny has assembled so successfully is a daunting task. His book will repeatedly be consulted by everyone having anything to do with Canadian public inquiries. With its publication, it becomes the leading authority on this important “residual institution” of government.

⁸⁸ *Ibid.* at 50, 441.