Chapter 5

Constitutional Constraints on Public Inquiries

Ronda Bessner

1. INTRODUCTION

Federal and provincial governments may only create public inquiries into matters within their respective legislative jurisdictions. Section 91 of the *Constitution Act, 1867* specifies that the federal government has jurisdiction over matters listed in that section, such as criminal law, banks, the military and defence.[1] The provinces have jurisdiction over matters listed in section 92 of the *Constitution Act*, *1867*, which include the administration of justice in the province, municipal institutions, and property and civil rights in the province.[2]

In determining the constitutionality of a public inquiry, the courts assess the purpose and effect, or what is also referred to as the pith and substance, of the Order in Council creating the inquiry. It is clear from the case law that, if the pith and substance of the Order in Council relates to a matter within provincial jurisdiction, the inquiry can have an incidental impact on matters that fall within federal jurisdiction and will be held to be constitutional.[3] A review of the leading cases on the constitutionality of public inquiries follows.

2. DIVISION OF POWERS

The Supreme Court of Canada, in a number of important decisions, has delineated the constitutional limitations of public inquiries.

In *Starr v. Ontario (Commissioner of Inquiry)*, the Supreme Court of Canada addressed the division of powers between the federal and provincial governments in the context of the constitutionality of an Ontario public inquiry.

The public inquiry at issue was established by the provincial government in 1989. The background to the creation of this Inquiry was that Patricia Starr, President and Chair of the Toronto section of a national charitable organization, had allegedly engaged in inappropriate relationships with elected and unelected public officials in the Ontario Government. There were allegations that Ms. Starr "made contributions from the coffers of the charity to political parties".[4] It was

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1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No 5, ss. 91(7), (15), (27).

2 *Ibid*., ss. 92(8), (13), (27).

3 Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992) at 67.

4 *Starr v. Ontario (Commissioner of Inquiry)*, (*sub nom.* Starr v. Houlden) [1990] 1 S.C.R. 1366, [1990] S.C.J. No. 30 (S.C.C.) [*Starr* cited to S.C.R.] at para. 2. See, for example,

also alleged that there was a connection between Ms. Starr and Tridel Corporation, a real estate development corporation.[5]

In June 1989, the Executive Director of the Premier's Office tendered his resignation after conceding that Ms. Starr had arranged for him to receive a new refrigerator and to have his house painted free of charge. The next day, then-Premier David Peterson announced that the Ontario Government was creating a public inquiry to investigate the relationship between Patricia Starr, any corporation or person she may have acted for, and any elected or unelected public officials, including the Executive Director of the Premier's Office.

The terms of reference, reproduced in part below, stated that the Inquiry created pursuant to the Ontario *Public Inquiries Act*:[6]

> . . . without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization:
> 1) [would] . . . investigate:
> (i) the nature and extent of dealings between Patricia Starr and elected and unelected public officials;
> (ii) the nature and extent of the dealings between Patricia Starr and private individuals, corporations, unincorporated bodies and charities in relation to elected and unelected public officials;
> (iii) the nature and extent of dealings between Tridel Corporation; companies related to Tridel Corporation; representatives, officers, employees or officials of Tridel Corporation; representatives, officers, employees or officials of companies related to Tridel Corporation, and elected and unelected public officials;
> (iv) the nature and extent of the dealings between Tridel Corporation; companies related to Tridel Corporation; representatives, officers, employees or officials of Tridel Corporation; representatives, officers, employees or officials of companies related to Tridel Corporation and private individuals, corporations, unincorporated bodies and charities in relation to elected and unelected public officials.[7]
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Mr. Justice Houlden was named the Commissioner of the Inquiry.[8]

It was argued by the appellants — Patricia Starr, Tridel Corporation, Giampietri, Ashworth — that the terms of reference of the Inquiry were

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Linda McQuaig, "Charity makes political donations prohibited under Income Tax Act", *The Globe and Mail* (15 February 1989) A1 (Factiva).

5 *Starr*, *supra* note 4 at para. 2.

6 *Public Inquiries Act*, R.S.O. 1980, c. 411. (This was the Act in force at the time.)

7 *Starr*, *supra* note 4 at para. 4.

8 Mr. Justice Houlden was on the Ontario Court of Appeal at this time.

unconstitutional and that the province lacked the jurisdiction to establish this Inquiry.

It is important to reproduce a *Criminal Code* provision that addresses frauds on the government. At the time of the *Starr* case, paragraph 121(1)(b) of the *Criminal Code* stated:

> 121. (1) Every one commits an offence who
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> (b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof which lies on him;[9]

The Supreme Court of Canada held in *Starr* that the Ontario Government had exceeded its jurisdiction. It stated that the pith and substance of the Inquiry was a matter of criminal law, which clearly fell under the jurisdiction of the federal government pursuant to subsection 91(27) of the *Constitution Act, 1867*.[10] Justice Lamer, writing for the majority, found that the provincial public Inquiry was, in effect, a substitute police investigation and preliminary inquiry with compellable accused persons with regard to a criminal offence.[11] In unequivocal words, he stated:

> . . . the inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons. The use of the inquiry in this way, having regard for the ability to coerce those named individuals to testify, would in effect be circumventing the criminal procedure which is within the exclusive jurisdiction of Parliament.[12]

The Court stated that paragraph 121(1)(b) *Criminal Code* had essentially been incorporated into the terms of reference of the Inquiry. The Commissioner of the Inquiry had been directed in the terms of reference to basically assume the role of a judge conducting a preliminary inquiry under the *Criminal Code*, which was constitutionally impermissible.[13]

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9 *Criminal Code*, R.S.C. 1985, c. C-46, s. 121(1)(b) as it read at the time of the *Starr* case, *supra* note 4. The current version of s. 121(1)(b) states: ''Every one commits an offence who. . . (b) having dealings of any kind with the government, directly or indirectly pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which the dealings take place, or to any member of the employee's or official's family, or to anyone for the benefit of the employee or official, with respect to those dealings, unless the person has the consent in writing of the head of the branch of government with which the dealings take place.''

10 *Constitution Act, 1867*, *supra* note 1, s. 91(27).

11 *Starr*, *supra* note 4 at para. 17.

12 *Ibid.* at para. 26.

Justice Lamer made it clear that the Court was not taking the position that the terms of reference of an inquiry can never name specific individuals. The Supreme Court justice explained that, in the *Starr* case, it was the combined effect of naming specific individuals in the terms of reference together with the *Criminal Code* offence in section 121 that rendered the provincial Inquiry unconstitutional.[14] Lamer J. noted that there "seems to be a complete absence of a broad, policy basis" for the public Inquiry.[15] For example, this was not a provincial inquiry into the relationships of charities and public officials.[16] As Justice Lamer wrote:

> There is no express mandate for the Commissioner to inquire into anything other than the specific allegations of the relationship between dealings by public officials with the two named individuals and any benefits that may have been conferred to the officials.[17]

The Court concluded that the Ontario public Inquiry was not anchored in a provincial head of power in the *Constitution*, such as subsection 92(4), (7), (13) or (16).[18] The Supreme Court judges were not persuaded that the Inquiry was established "to restore confidence in the integrity and institutions of government or to review the regime governing the conduct of public officials".[19]

The importance of federal and provincial public inquiries in Canada is discussed in the *Starr* decision. For example, Justice Lamer highlights the independence from government to investigate matters of public concern, educating the public, investigating the administration of government, the public voicing of grievances, and providing the legislature with information with which to develop public policies, as some of the great benefits of public inquiries.[20]

The Court makes it clear that provinces should be given broad scope "within their constitutional competence" to create inquiries designed to investigate, study, and propose "changes for the better government of their citizens".[21] Lamer J. states that the Supreme Court has consistently upheld the

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13 *Ibid.* at paras. 36, 38-39.

14 *Ibid.* at para. 30.

15 *Ibid.* at para. 31.

16 *Ibid.*

17 *Ibid.*

18 *Constitution Act 1867*, *supra* note 1, s. 92(4) (The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers), s. 92(7) (The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals), s. 92(13) (Property and Civil Rights in the Province) and s. 92(16) (Generally all Matters of a merely local or private Nature in the Province).

19 *Starr*, *supra* note 4 at para. 34.

20 *Ibid.* at para. 40.

21 *Ibid.*

constitutionality of provincial inquiries "and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon federal criminal law and criminal procedure powers".[22] The Court discussed cases such as *Di Iorio,*[23] *Keable,*[24] and *O'Hara*.[25]

Di Iorio v. Montreal Jail involved a Quebec Commission of Inquiry established to investigate and report on organized crime in the province, including illegal gaming and betting, extortion, and trafficking in drugs.[26] The Supreme Court of Canada upheld the constitutionality of the provincial Inquiry. Justice Dickson, writing for the majority, stated that the Quebec Inquiry was not exercising criminal jurisdiction and was not acting as a criminal court. Nor was the provincial Inquiry investigating a particular crime. No person was accused. In addition, the proceedings of the provincial Inquiry were "not criminal proceedings in the sense that punishment is their aim".[27]

In *Keable v. Canada (Attorney General)*,[28] a Quebec Commission of Inquiry was given the power to investigate and report on illegal acts committed by police forces including the RCMP. No names were mentioned in the terms of reference of the provincial Inquiry. The focus of the Inquiry was on RCMP methods of investigation and recommendations to ensure that inappropriate conduct was not repeated. The Supreme Court held that the Quebec Inquiry fell within provincial jurisdiction under subsection 92(14) of the *Constitution Act, 1867* (administration of justice in the province) and was, therefore, constitutional. The Court stated that subsection 92(14) should be given a broad interpretation.[29]

In *O'Hara v. British Columbia*,[30] the constitutionality of a public inquiry in British Columbia was challenged. The focus of the Inquiry was on injuries sustained by and the treatment of a named individual by the Vancouver Police. Chief Justice Dickson, writing for the Court, cited the *Keable* decision and stated that subsection 92(14) not only authorizes the creation of provincial public inquiries "but also grounds provincial jurisdiction over the appointment, control, and discipline of municipal and provincial police officers".[31] The Court held that it is not unconstitutional for a province to investigate the nature and reasons for "inappropriate and possibly criminal activities" of members of police forces that

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22 *Ibid.* at para. 20.

23 *Di Iorio v. Montreal Jail* (1976), [1978] 1 S.C.R. 152 (S.C.C.) [*Di Iorio*].

24 *Quebec (Attorney General) c. Canada (Attorney General)* (1978), (*sub nom.* Keable v. Canada (Attorney General)) [1979] 1 S.C.R. 218 (S.C.C.) [*Keable*].

25 *Robinson v. British Columbia*, (*sub nom.* O'Hara v. British Columbia) [1987] 2 S.C.R. 591 (S.C.C.) [*O'Hara*].

26 *Di Iorio*, *supra* note 23.

27 *Ibid.* at 201.

28 *Keable*, *supra* note 24.

29 *Ibid.*

30 *O'Hara*, *supra* note 25.

31 *Ibid.* at para. 19.

are within provincial jurisdiction. The focus of the Inquiry was police misconduct generally. Moreover, Chief Justice Dickson wrote that the fact that such activity may later become the basis of a criminal charge and "engage federal interests in criminal law and criminal procedure, does not, in my view, undermine this basic principle".[32]

The Supreme Court in *Starr* also cited the Ontario Court of Appeal decision in *Nelles v. Grange*,[33] which addressed the powers of a Commissioner of a provincial Inquiry established to investigate deaths of infants in the cardiac ward of a Toronto Hospital. There were allegations that some infants had died due to the administration of an excessive amount of the drug dioxin while the children were patients on the cardiac ward of the hospital. The Ontario Government appointed Justice Samuel Grange as Commissioner of this Inquiry.[34]

The Court in *Nelles* held that the Commissioner was prohibited from making any findings regarding the civil or criminal liability of named individuals.[35] It stated that, although the Commissioner was not allowed to identify persons as legally responsible for the deaths of the children, he was permitted to examine and report on the evidence regarding the circumstances of the deaths and to make recommendations to the government.[36]

The Attorney General made the following statement in the Ontario Legislature at the time the Order in Council creating the Grange Inquiry was announced:

> The purpose of a public inquiry is not to attach criminal culpability. It is not a forum to put individuals on trial. The just and proper place to make and defend allegations of crime or civil liability is in a court of law.[37]

The Court of Appeal noted that the Attorney General's comments regarding the limitations on a public inquiry were accurate and important.[38] The *Nelles* decision was cited with approval by the Supreme Court in the *Starr* case.[39]

Consortium Developments (Clearwater) Ltd. v. Sarnia (City)[40] was decided by the Supreme Court of Canada eight years after *Starr*. The issue before the Court was the constitutionality of a municipal public Inquiry, established by the City of Sarnia, with regard to allegations of conflicts of interest and alleged

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[32] *Ibid.* at para. 22.

[33] *Nelles v. Grange*, 1984 CarswellOnt 354, 46 O.R. (2d) 210, 9 D.L.R. (4th) 79 (Ont. C.A.) [*Nelles* cited to CarswellOnt].

[34] Justice Samuel Grange sat on the Ontario Court of Appeal at this time.

[35] *Nelles*, *supra* note 33 at para. 21.

[36] *Ibid.*

[37] *Ibid.* at para. 8.

[38] *Ibid.* at para. 9.

[39] *Starr*, *supra* note 4 at para. 9.

[40] *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, [1998] S.C.J. No. 26 (S.C.C.) [*Consortium* cited to S.C.R.].

irregularities of particular land transactions in the City. Consortium, a developer, argued that the municipal Inquiry constituted a substitute police investigation, which fell within the federal criminal law power. It took the position that the Inquiry was not directed at concerns regarding "good government" or "the public business".[41]

Sarnia City Council passed a resolution pursuant to subsection 100(1) of the 1990 *Municipal Act*,[42] establishing the inquiry into specific land transactions. As the Court stated, the statutory provision grants broad powers to Ontario municipalities to create inquiries into matters of public concern. The subsection reads:

> 100. (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate any matter related to a supposed malfeasance, breach of trust or other misconduct on the part of a member of a council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business, conducted by a commission appointed by the municipal council or elected by the electors, the judge shall make the inquiry and for that purpose has all the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such investigation as if it were an inquiry under that Act, and the judge shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken.[43]

Mr. Justice Gordon Killeen was appointed the Commissioner of the Inquiry.[44]

Justice Binnie, writing for the Court in the *Consortium* case, noted that, prior to Confederation, municipalities had the authority to create judicial inquiries into matters related to the good government of the municipality, "any part of its public business" and any alleged misconduct connected to these issues. He stated

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41 *Ibid.* at paras. 1, 10.

42 *Municipal Act*, R.S.O. 1990, c. M.45. (This was the Act in force at the time.)

43 *Ibid.*, s. 100(1). The current version of this provision is found in s. 274(1) of *Municipal Act, 2001*, S.O. 2001, c. 25: "If a municipality so requests by resolution, a judge of the Superior Court of Justice shall, (a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality; (b) inquire into any matter connected with the good government of the municipality; or (c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors."

44 Justice Gordon Killeen was a judge on the Superior Court of Ontario at that time.

that section 100 of the *Municipal Act* was essentially the same as the predecessor section in 1866. He highlighted the important role of municipal public inquiries:

> A municipality. . . needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected.[45]

The Supreme Court stated that the constitutionality of section 100 of the *Municipal Act* was "undoubted".[46] It is supported under several provisions in section 92 of the *Constitution Act*, *1867*, including subsection 92(8) (municipal institutions in the province), subsection 92(13) (property and civil rights in the province) and subsection 92(16) (matters of a merely local or private nature).[47]

Binnie J. wrote that the municipal resolution creating the inquiry must be intelligible, it must transmit to the commissioner and other interested persons the subject matter of the inquiry, and it must connect the subject matter of the inquiry with one or more matters specified in section 100 of the *Municipal Act*.[48] Both the scope and limits of the inquiry must be clearly delineated in the resolution, stated the Court.[49]

The Supreme Court in *Consortium* upheld the constitutionality of the municipal resolution. It distinguished this case from *Starr* and held that the municipal resolution in *Consortium* was not directed to specific allegations of criminal conduct by named persons. The resolution was intelligible and it identified not only what was to be inquired into but also the limits of the municipality's interest. The Court held that the subject matter of the Inquiry "was of legitimate municipal concern within the ambit of the matters referred to in section 100" of the *Municipal Act*.[50]

It is clear from the analysis of the case law that public inquiries are prohibited from making findings of criminal or civil liability. The appropriate venue to determine whether a person is guilty of a criminal offence or is responsible civilly is a court of law, not a public inquiry.

Federal or provincial governments that seek to establish public inquiries must also be mindful of their respective jurisdiction under sections 91 and 92 of the *Constitution Act, 1867*. The pith and substance or dominant purpose of the proposed public inquiry must be firmly anchored in a head of power over which the particular government has jurisdiction.

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45 *Consortium*, *supra* note 40 at para. 26.

46 *Ibid.* at para. 47.

47 *Ibid.*

48 *Ibid.* at para. 28.

49 *Ibid.*

50 *Ibid.* at para. 40.

For example, the Somalia Inquiry, which examined the actions and decisions of the Canadian Forces and the Department of National Defence regarding the deployment of Canadian troops on a peacekeeping mission to Somalia, fell within federal jurisdiction under section 91 of the *Constitution Act, 1867* and, in particular, subsection 91(7) (military and defence). The Nova Scotia Westray Mine Inquiry, which investigated a mining explosion in the province, and the Ontario Walkerton Inquiry, which examined the contamination of drinking water in a town in Southwest Ontario, fell within provincial jurisdiction under subsection 92(13) (property and civil rights in the province) and subsection 92(16) (matters of a local nature in the province).

In the following chapters of this book, including Chapter 9 on evidence and Chapter 6 on procedural fairness, the impact of the *Charter of Rights and Freedoms* on public inquiries is discussed, including protections to persons who give evidence at public inquiries.

3. JOINT FEDERAL/PROVINCIAL/TERRITORIAL COMMISSIONS OF INQUIRY

As Wayne MacKay and Moira McQueen state in "Public Inquiries and the Legality of Blaming; Truth, Justice, and the Canadian Way", jurisdictional challenges can be avoided by the co-appointment of a public inquiry by both federal and provincial governments to investigate the federal and provincial aspects of the issues that are the subject matter of the inquiry.[51] For example, in the Blood Commission, created to examine the safety of the blood system in Canada, the Inquiry was co-appointed by the federal government and the Prince Edward Island, Saskatchewan and Ontario provincial governments.[52] This enabled the Inquiry to investigate, hear evidence, and make recommendations with regard to matters that fell within both federal and provincial jurisdiction.

It is worth noting that some public inquiry statutes specifically address this issue. For example, the Ontario *Public Inquiries Act* states that "[t]he Lieutenant Governor in Council may enter into an agreement with the governments of one or more other jurisdictions about jointly establishing a commission and how the public inquiry is to be conducted by the joint commission".[53]

However, as has been observed, such a level of intergovernmental cooperation is not always present.[54] For example, the Commissioner of the Westray Mine Inquiry in Nova Scotia asked the federal minister of justice to co-

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[51] A. W. MacKay & M. G. McQueen, "Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way," in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) ch. 9 at 256.

[52] *Commission of Inquiry on the Blood System in Canada: Final Report*, Catalogue No CP32-62/3-1997E-PDF (Ottawa: Public Works and Government Services, 1997) (Commissioner: The Honourable Horace Krever) Appendix A at 1079.

[53] *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Schedule 6, s. 4.

[54] MacKay & McQueen, *supra* note 51 at 256.

appoint it so that it could enforce subpoenas against executives of mining companies who resided outside Nova Scotia. The federal government refused to carry out this request.[55]

At the time of writing, the federal government was seeking the co-appointment of the public inquiry into Missing and Murdered Indigenous Women and Girls by the provincial and territorial governments. An article in *The Globe and Mail* discusses the consultations of the Liberal government prior to the creation of the national Inquiry, and the need for the Inquiry to have the "authority to make recommendations within provincial and territorial jurisdictions as part of the larger attempt to tackle what the inquiry will determine are the root causes of the issue".[56]

This would enable, for instance, the Commissioners of the Inquiry to examine and make recommendations on matters such as child welfare, which falls within provincial/territorial jurisdiction. The article stated that the provinces, including Alberta and Manitoba, were studying the terms of reference of the national Inquiry and were in discussions with regard to the content of the Order in Council and responsibilities for the costs of the national Inquiry.[57]

On September 1, 2016, the National Inquiry into Missing and Murdered Indigenous Women and Girls was established by the federal government. The provincial governments — Alberta, British Columbia. Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan — as well as the Yukon, Northwest Territories and Nunavut created companion Orders in Council under their respective public inquiry legislation. The terms of reference of this Inquiry, as well as the Alberta Order in Council, are reproduced in this text: see F. and G. in Appendix I.

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55 *Ibid.*

56 Joanna Smith, "Provinces studying terms of reference for missing and murdered inquiry", *The Globe and Mail* (28 June 2016) A3, online: <http://www.theglobeandmail.com/news/national/provinces-studying-terms-of-reference-for-missing-and-murdered-inquiry/article30664711/>.

57 *Ibid.*