Submissions of Gerlinde van Driel, QC, solicitor for Mr. Todd Stanley, for consideration in respect of the Hearing of Mr. Todd Stanley at the Commission of Inquiry

At all times material to this matter, up to the time of Sanction, Mr. Stanley's role was as a solicitor in the Department of Justice, providing legal services to the Department of Natural Resources.

With respect to the Hearing of Mr. Stanley in this matter on October 22, 2018, we hereby make the following submissions for the consideration of the Commissioner.

1. **Mr. Stanley would not be the one to ask about reviews of cost estimates. The Department of Justice and Mr. Stanley did not have specific communications with Nalcor on project cost estimates for the Muskrat Falls Project because the Department of Justice would not have brought anything to that process, nor had any expertise in those matters.**

   Todd Stanley Hearing Transcript – October 22, 2018 – Page 5

   MR. LEARMONTH: *Did you at any time during your tenure in the Department of Justice have communications with Nalcor on project cost estimates for the Muskrat Falls Project?*

   MR. STANLEY: *Other than it being a one way, where I would have been told what the project cost estimates were, generally, no.*

   MR. LEARMONTH: *Yeah. Now, in – I just wanted – in your interview you said that Nalcor's formulation of its cost estimates for the project was, from a legal point of view, a black box. Do you recall saying that?*

   MR. STANLEY: *Yes, yes.*

   MR. LEARMONTH: *Can you just explain what you meant by a black box?*

   Page 5 MR. STANLEY: *The process whereby Nalcor arrived at various cost estimates by use of the term black box, I mean that there was no transparency from the Department of Justice into that process. That is partially a function of the fact the Department of Justice would have brought nothing to that process, nor possibly had any expertise in what that process involved. And so, as a result, the numbers that came out of Nalcor, we knew that Nalcor was doing cold eyes review, we knew that Nalcor was having various reviews done of the work they had done. But, at the end of the day, we just saw the number, we didn't see anything behind it.*

   MR. LEARMONTH: *You never received any documentation in relation to cost estimates for either DG2, DG3, is that correct?*

   MR. STANLEY: *Not the supporting documentation, no, but I'm not sure I would have expected to as a solicitor.*

2. **The point which Mr. Stanley was making about Nalcor's interaction with government, and that it was at a higher level, often with the Premier, was not intended to suggest that the other departments and relevant people were frozen out of the process. Meetings would occur at the Premier's office but other Ministers, Deputy Ministers, and/or senior personnel from various departments would be in attendance. Mr. Stanley also did not automatically attend all such meetings.**

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MR. STANLEY: *Quite frequently the government's interaction with Nalcor was at a higher level in terms of briefings and on important issues. I think I mentioned in my transcript, the – in my interview – that a lot of times it was Nalcor coming into the Premier's office. And I should clarify that, that a lot of times what would happen would be a presentation by Nalcor, physically in the Premier's office, in the room for that presentation would be representatives from the Premier's office and usually the premier, but also representatives from the various departments involved. So, if it was a Finance matter, ordinarily the minister of Finance, the deputy minister of Finance would be there. If it was a Natural Resources matter – and, frankly, at most times somebody senior from the Department of Natural Resources would be there. But on the bigger issues and the bigger decisions that needed to be made, that would ordinarily be how it would occur as opposed to a presentation to just the Department of Natural Resources and then the Department of Natural Resources carrying the ball within government.*

...

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MR. SMITH: *Yeah. Harold Smith for Edmund Martin. You've testified generally that there were presentations, a number of them, to the eighth floor, I think, was –*

MR. STANLEY: *Yes.*

MR. SMITH: *– where the premier was, right?*

MR. STANLEY: *Yes.*

MR. SMITH: *Would you have sat in on any of those meetings?*

MR. STANLEY: *On some of them, yes, but not as a default. I would have sat in on ones where there were legal issues potentially or negotiations going on, but I wasn't automatically attending.*

...

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MR. STANLEY: *Yes, but I wasn't raising those – that example or any other one to confirm whether or not the minister of Natural Resources would have been at the meeting.*

MS. E. BEST: *Okay have –*

MR. STANLEY: *The issue was that the individuals in the department, two or three levels through the executive down from the minister, when we went to the meeting wouldn't have known what might have been discussed at a meeting even if the minister of Natural Resources was there.*

MS. E. BEST: *Okay, because that's what I want to get to. I mean –*

MR. STANLEY: *Yes.*

MS. E. BEST: *– from the way it came out earlier it made it sound like Natural Resources was either kept out of it or was out of the loop.*

MR. STANLEY: *Yeah. No.*

MS. E. BEST: *And that the premier was dictating to Nalcor and/or vice versa without the minister of Natural Resources or anyone else being involved. But that's not the case is what you're saying, is it?*

MR. STANLEY: *That's not – that's not what – no, that's not what I meant to imply. No.*

3. **Mr. Stanley stated multiple times during the Hearing that the language used in his interview may need some clarification or could lead to misunderstanding his comments. He did not intend to suggest that it was just Nalcor and the Premier communicating and making decisions, with everyone else left out, or to suggest that people were avoided in terms of decisions being made pertaining to Nalcor and the Muskrat Falls Project.**

   Mr. Stanley is also quite clear that he is not backtracking from his comments made during the interview, it was simply a fast moving conversation and there weren't always opportunities or requests to clarify some of the points.

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   MR. STANLEY: *Overall – if I can provide a comment first – our interview was a fairly fastmoving and conversational piece, so there were some topics and some language used in there that, in retrospect in a transcript, may lead to some misunderstanding or could use clarification. The reference at the operational level, such as providing advice to the department, there wasn't a lot of transparency with respect to the individuals at the – you know, at the policy analyst level or otherwise, as to what matters or how matters were perceiving within Nalcor or what they were or were not doing or how they were contemplating dealing with issues. There was no direct operational reporting between Nalcor and the Department of Natural Resources on a detailed level. So the people working in the Department of Natural Resources, who may be working on particular issues, didn't have a good idea of what was going in Nalcor, where Nalcor may have been going on a particular issue, until it, perhaps, came to a head – higher-up.*

   ...

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   MR. BUDDEN: *Okay. You've talked about certain instances, what appears to be almost resistance or pushback to this. Is it fair to say that there was some resistance or pushback or was there not?*

   MR. STANLEY: *Oh, I think it's fair to say that – use an analogy: down in the engine room. There were concerns by people in government who had responsibility for areas and policy responsibility and who cared what they were doing. There were concerns that a model where their advice wasn't obviously always being solicited at first instance might result in government making decisions.*

   Usually, by the time any final decisions were made, because none of this – and none of this was done quickly – everybody's advice and opinions were solicited and heard. So it wasn't like people were completely avoided in making decisions, it's just that at times, especially in the early days, there was a view that there were people that perhaps didn't get a chance to have their say before a discussion occurred.

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MR. BUDDEN: *And then you said, "And Nalcor's response was, this was approved by the premier." So the sense I get from this is that there is a whole chain of communication between Nalcor and the Premier's office, and the departments were utterly outside the loop on that.*

MR. STANLEY: *The instance that we're talking about – and in the early days there were instances where that would be the case. The ultimate resolution of matters – nothing ever came to a final resolution through that process, including the topic that was at discussion at that meeting.*

That – ultimately, as I said, that was a scenario where Nalcor had gotten approval to do it this way that was originally communicated. By the time it was all resolved it was neither – I think using the terminology I used in my statement it was neither A, B or C. That was the ultimate resolution of that matter.

...

MR. BUDDEN: *Okay. You didn't say it quite like that in your transcript.*

MR. STANLEY: *No, I did not. No.*

MR. BUDDEN: *Okay.*

MR. STANLEY: *As I said, my discussion with Mr. Learmonth on the 31st of August was a fastmoving conversation and we didn't get a chance to clarify some of those points.*

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MR. BUDDEN: *Okay and you're backtracking a little bit perhaps?*

MR. STANLEY: *No, I think what I'm saying is consistent with what I said there. I mean that meeting happened. The – that discussion happened at that meeting, but I don't think Mr. Learmonth and I got into a discussion of the ultimate resolution of the issue that occurred at that meeting.*

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MR. LEARMONTH: *Yeah. Now, on – I'd like you to turn – once again I'm going to go over some of this information that we discussed this morning on page 18 of the transcript. The paragraph is – and I'm quoting you again: "So you could have circumstances where Nalcor do – come into government and make a presentation on the eighth floor, go get the instructions and approvals, go back and then they'd call the government departments and tell them what they were doing. And the government departments would find out through Nalcor what had been approved on the eighth floor, and may not necessarily think the eighth floor had all the information in front of them" and they*

should have when they made their decision and not agree with the decision. "So the whole issue of how Nalcor's operating versus how government was operating, and the level of control or insight ... that was a constant issue at lower levels of government than I – than like, sort of, the Premier's office. I'm not sure I'm putting that well." And you say: That was – "There was constantly discussion going on that Nalcor was basically a fiefdom. And we didn't know – always know what was going on over there, you know, at the operational level."

Now, is fiefdom one of those words that you would follow – categorized as flowery?

***MR. STANLEY:** Well, yes, for lack of a better description. But, you know, I stand by its use there. The entire context of that – I'm concerned that there were times when I was talking about my interactions with the department and departmental officials and the interpretation of what I said was in respect of government writ large.*

So the first paragraph of what you just read out to me pretty much is the exact same topic that's on the discussion on the next page, which is a discussion of scenarios where there would be decisions made at the Premier's office. And then departmental officials that I was dealing with in the departments would find out through Nalcor what had been discussed on the eighth floor, and at times, when those decisions came through, would not necessarily think that the Premier's office had had the benefit of the full discussion. I think the clarification I've offered here today is that while that process occurred – and that occurred on and off during the early processes – the decisions that were being made at the Premier's office were not necessarily the final cut at that topic. And by the time the final decisions were made, all the departmental officials usually felt that they had had an opportunity to discuss same and to provide their input.

4. **Mr. Stanley was not on the oversight committee when it was created and was not involved in its' initial constitution. It was not created at his insistence. Mr. Stanley only noted that concerns had been mentioned to him about oversight, not that he had raised any concerns himself.**

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***MR. STANLEY:** So the – I don't have the date in front of me of when the oversight committee was formally constituted, but the – it was originally constituted, I think, as a committee of senior government officials to provide oversight over Nalcor operations. I wasn't on the oversight committee when it was created.*

...

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***MS. E. BEST:** Okay. Your evidence this morning seemed to indicate that you had some concern or criticism maybe with the level of oversight by government. Is that true?*

***MR. STANLEY:** I was – I expressed concerns that were put to me about oversight. I'm not sure I expressed any myself.*

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***MR. STANLEY:** No, I don't – I'm not purporting to say by that, that at some point government had made an irreversible decision that it was going forward with the project no matter what. There were*

a number of steps along the way, steps that I was involved in, such as the conditions precedent for the government federal loan guarantee, that, you know, at that point you had to make a decision as to whether you were going ahead with the project or not. The issue was that there was no question government was a proponent of the project publicly and that – from 2010 onward, and that it would have been an extraordinary decision by government, I think, to, at some point, decide now that we were not going to proceed with this project in some form.

5. **Mr. Stanley's comment that there was no political will for a specific team to oversee, question and vet everything coming from Nalcor on the Muskrat Falls Project is made in reference to the context of the time, that during those years there was a consistent mandate reviewing all government operations for cuts and freezes to the budgets, and so there would have been little to no appetite from government if someone were to then suggest they needed funding for a large oversight group solely to vet Nalcor.**

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MR. STANLEY: *Well, I mean, internally within government when – from about 2010 to 2013, you were in a circumstance where we were looking at or actively reviewing all government operations for budget cuts. So, there was – when I say no appetite, there was – you were completely cutting against the grain to suggest that we needed a significant resource allocation within government to – for an office that would be dedicated to oversight of the Muskrat Falls Project.*

6. **Mr. Stanley did not say that there was no oversight of Nalcor, he said that with the scope of activities they were involved in, it didn't necessarily lend itself to normal oversight and there were some concerns expressed about inability to get information from Nalcor at certain times in the beginning. He was also clear that he wasn't particularly knowledgeable about the subject of departmental oversight and preferred to leave that discussion to Mr. Bown.**

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MR. BUDDEN: *As I take your evidence – and obviously I've read your transcript as well – it appears that the normal oversight role that government might have with respect to a Crown corporation wasn't present with Nalcor. Would you agree with that?*

MR. STANLEY: *I can't say at the top level that the – I don't know if there is a normal oversight when you get into the scope of activities Nalcor was undertaking. There were concerns that government's – as I think I stated, government's desired level of oversight into what was going on at times was – there was an inability to get the information, at least in the beginning.*

MR. STANLEY: *I'd leave the overall departmental oversight comment to – I think Mr. Bown is going to testify at some point here because he would have been – more knowledge of that.*

7. **Any concerns expressed by Mr. Stanley would not have been about communications methods between Nalcor and the government or whether people were getting a chance to give their opinions prior to decisions being made. His concerns would have been with respect to his department and the legal services, whether they'd have the necessary legal resources to meet what was required and finding ways to ensure they had the necessary resources available.**

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MR. STANLEY: *I expressed concerns at times about perhaps the – to my executive, about, not so much the communication methods or what was going on in terms of people not getting a chance to, you know, decisions being made. My concerns that I would have expressed would have been in respect of legal services, you know, as – concerned about our resources, Nalcor's resources, our ability to interact, our ability to keep up, that kind of thing.*

MR. BUDDEN: *And your concern was with respect to legal – to a duplication of services or perhaps services that counter contrasting advice on –*

MR. STANLEY: *No, not so much that. It's just we would regularly have meetings with the Department of Natural Resources who would tell us this is what we think is coming, both in terms of Muskrat Falls Project and otherwise, this is what our legal services – we're going to need in the next six months. This is what could be coming. And we'd have those meetings regularly and then it would be a matter for me to raise with the executives to say, my client, being Natural Resources, looks like we could need this amount of legal resources to get this work done. We're not sure when it's coming or if it's coming, but if it does we're going to have a problem. And then within the Department of Justice, we'd try to find ways to ensure that we have the necessary resources available.*

8. **It is not in Mr. Stanley's area of specialty to speak to cost and financial reviews of Nalcor's proposals. He would not have had any responsibility for such reviews as they would fall outside the legal area.**

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MR. BUDDEN: *Okay. Was it that the civil service lacked the capacity to appropriately review – I'm talking about Finance and Natural Resources – to appropriately review Nalcor's proposals with respect to cost and schedule?*

MR. STANLEY: *I don't know if I can answer that because it wouldn't be in my specialty to know what would be required to actually do such a review. Where it's a, you know, a project finance accounting exercise.*

...

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MR. J. KING: *Okay. And, again, this is something we touched on this morning, but, in terms of your day-to-day duties, you wouldn't have had any responsibility in terms of reviewing the business case for Nalcor, being cost estimates –*

MR. STANLEY: *No.*

MR. J. KING: *– type of stuff.*

MR. STANLEY: *No, that would –*

MR. J. KING: *Okay.*

MR. STANLEY: *– be outside the legal brief.*

MR. J. KING: *Okay. And again, something else from this morning, but Mr. Learmonth mentioned the P-rating, the probability rating which has been discussed throughout the proceeding.*

MR. STANLEY: *Yes.*

MR. J. KING: *That wouldn't have been something that would've come across your desk at the DoJ?*

MR. STANLEY: *No, to my knowledge I never saw that before.*

...

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MR. HOGAN: *Okay. Broadly speaking, I think, can you recall any conversations with any of these individuals, the ministers of Natural Resources or the premiers, about consumer rates and how this project would affect consumer rates?*

MR. STANLEY: *I – no. Direct conversations between me and them on that topic, no. That wouldn't be something I would be talking about.*

MR. HOGAN: *Okay. Well, it – because it wasn't a legal issue?*

MR. STANLEY: *Pretty much, yes.*

9. **Mr. Stanley's comments were not intended to suggest that Nalcor simply dictated to government what would be done and gave them direction. Instead what he has stated is that there was give and take, for example where Nalcor may come in with issues and advise government on what needs to be done to advance the project, and government might then push back on that and eventually a solution would be reached somewhere in between what Nalcor would say they needed and what the government was initially prepared to provide.**

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MR. BUDDEN: *You spoke in your direct evidence about Nalcor coming to government for direction. And I guess I'd suggest to you, would it be more accurate in these years to say that Nalcor was, in many respects, coming to government with directions? This is what we need to do, this is what you got to do, you got to do it now.*

MR. STANLEY: *No. I mean, you may need to distinguish between – at the highest levels and what was being required at departmental levels. Nalcor was coming in to – on a hundred issues on a regular basis to develop how the project was going to be – move forward and to come forward and say, this is what we're going to need to do to advance the project. I don't think that, you know, the tone of that at times may have sounded like they were dictating to government what they needed but, government, usually in frustration with that, would push back and usually the solution that was ultimately arrived upon would be somewhere in between what Nalcor wanted and what government was originally initially willing to give.*

And I think that overall tension was actually very healthy because there was no rubber-stamp engine underway; you know, government wasn't just giving Nalcor what they wanted. At the higher levels,

I'm not sure I would view that Nalcor came in and was dictating to government anything. It was far more of a: This is – in order to prosecute the project, this is what we would need, this is what we're looking at, this is what we're thinking of, do you approve?

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MR. J. KING: *This morning there were some comments made pertaining to, you know, the tail wagging the dog or – you know, Nalcor leading the government – those types of issues. And I take it from your evidence this morning that you don't completely agree with that statement?*

MR. STANLEY: *I think I've used enough flowery language to get myself in enough trouble without adopting anyone else's. I'm not sure I agree with the characterization of the tail wagging the dog in the big picture. 'Cause as I said, some of the statements – some of the evidence in the – about the concerns about tension between the parties and/or Nalcor's hesitation to provide information, or the way Nalcor was or was not engaging with government is down, for lack of a better description, in the engine room. Like the people that – were dealing with Nalcor on a day-to-day basis on issues. I wouldn't expand that to assume that on a government-wide basis, at the highest levels, that you could characterize it as Nalcor – the tail wagging the dog – Nalcor leading government around. I wouldn't go that far.*

MR. J. KING: *Okay. And in your evidence this morning you also made a statement that the message from the executive was always, you know, do your job, double-check what you're looking at –*

MR. STANLEY: *Mmm.*

MR. J. KING: *– in terms of what we're reviewing. Do you stand by that statement?*

MR. STANLEY: *Yes. And I just emphasize, I've never saw a situation where anybody instructed the government officials to say: Give Nalcor what they want.*

MR. J. KING: *Okay.*

MR. STANLEY: *It was: If you don't think Nalcor needs what they want – the encouragement was to find a solution but do it within the parameters that you think is appropriate.*

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MR. FITZGERALD: *You also indicated that – in your evidence, I believe, your words – that the message to civil servants was to do your job and keep check on Nalcor.*

MR. STANLEY: *It was, yes. And I said that just to make it clear that it wasn't to give Nalcor everything that they asked for.*

10. **When Mr. Stanley referred to frustration in the civil service about a lack of information, he wasn't saying that departments like Natural Resources were being cut out of the discussions. Instead he**

refers to the fact that the information did not always trickle down, or would sometimes be slow to disseminate amongst other members of the departments.

> ***Todd Stanley Hearing Transcript – October 22, 2018 – Page 75***
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> ***MR. HOGAN:*** *Okay, so I just – the reason I want some clarification is you were – when you were under cross-examination by a few of the counsel here today, they seemed to – the way I read it was they seemed to raise points that, you know, the minister of the Natural Resources would have attended meetings with – in the Premier's office with Nalcor. The minister, therefore, would have had information about those meetings implying that Nalcor, the Department of Natural Resources, wasn't cut out of the process at all. Now, there is – you do agree with your statement there that there was some frustration in the civil service. So can you square those two positions, I would say?*
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> ***MR. STANLEY:*** *Yeah, the – well, not the misunderstanding – the link is that while there was no question that if there had been meetings in the Premier's office on a particular topic, the minister and perhaps even the deputy minister would have been involved in those meetings. It doesn't automatically trickle down, especially if it's just the minister who was involved in those meetings. The process of dissemination of information inside the department isn't either seamless or potentially very fast. So it is entirely possible you could have a meeting where the minister was – or even the deputy was at meeting where matters were discussed and that information not be disseminated down to the relevant areas of the department, which I was talking about, which I think I clarified was – you know, I'm not talking about at the ministerial level. But that the officials may or may not have gotten the full briefing or the full understanding or any understanding of what happened at that meeting and that, as a result, they would feel frustrated if they were learning things from Nalcor, rather than from their own executive.*

11. **We submit that Mr. Stanley was not afforded the requisite level of procedural fairness due him as a witness to the proceeding. Both the Interpretation of the Terms of Reference by the Commissioner (Page 8 – Principle 6) and the Rules of Procedure for this Commission of Inquiry (Page 1 – Paragraph 5) make reference to the commitment to fairness, and we submit the process by which Mr. Stanley's interview was conducted and the subsequent use of that interview to attack his credibility at the Hearing (as more particularly outlined in Submission #12 below) fell far short of the requisite procedural fairness.**

    Mr. Stanley was provided with an extremely large and voluminous set of documentation (a "dump" of information containing every document with his name in their database, as Mr. Stanley described it) the evening before his interview, which made it virtually impossible to review in advance. He had no discussions with the Commission prior to his interview nor was he represented by his own counsel. He expected to be interview on the subject of water management, only to discover that he would actually be questioned on a wide array of matters pertaining to Nalcor and the Muskrat Falls Project.

    A December 2008 article published in Practical Law (*a copy of which is attached as Schedule "A"*) provided commentary on the issues relating to the commissioning and conducting of investigations and inquiries. With respect to witnesses, it had the following commentary:

    > ***"The procedure followed by the inquiry is vital to its integrity and the investigators are responsible for it. The guiding principles for an inquiry team are fairness and reasonableness above speed and economy.***

> ***Investigators should explain at the outset to witnesses what it is that they have been commissioned to do and how they will go about doing it. Those invited to interview should be sent a letter setting out what it is that they will be asked about. The letter should include the terms of reference and the procedural rules. Witnesses should be offered the opportunity to bring a friend or legal representative to their interview though it should be made clear that the investigators' questions will be directed to them.***
>
> ***Witnesses should be sent the written transcript of their evidence and be given the opportunity to make amendments and additions to it."***

Mr. Stanley was not fully advised in advance about the scope of subjects he would be asked about in his interview. He was not provided with materials in advance in any kind of reasonable timeframe to allow him to properly prepare. Furthermore, not only was he not given an opportunity to amend or clarify his evidence in his interview transcript, his limited attempts to so clarify, and his expressions of regret as to the specific language used in the interview, resulted in an attack on his personal credibility during the public Hearing.

In addition to the commentary from the Practical Law article noted above, Paragraph 26 of the Rules of Procedure for this Commission of Inquiry refers to the need for Commission counsel to provide witnesses with documents in advance that will likely be referred to during their course of testimony and that those documents are to be provided based on the principles of "relevance, fairness and proportionality." Paragraph 27 states that the object of this rule is to prevent witnesses from being surprised with a relevant document they have not had an opportunity to examine prior to their testimony.

Now one may argue that Paragraphs 26 and 27 are intended only to apply to testimony at the public Hearing and not the interview of the witness beforehand. However, we submit that if the interview is going to be used at the public Hearing in a manner so as to attack the credibility of the witness, then fairness dictates they be afforded that same ability and advance notice to prepare for the interview. In this case, Mr. Stanley received no such fairness or consideration.

Mr. Stanley, to his credit, stated that his evidence in the Hearing is not in contradiction to what was discussed during his interview and that he stood by the statements. We submit that the fact that he stands by his statements in the interview is indicative that his credibility should not be in question at all, as that is the exact opposite of what someone would do were they not being credible.

We also submit it is important to note the conditions under which the interview took place and Mr. Stanley's understanding of what that process was going to be. Any discrepancies or clarifications between his evidence at the Hearing and during his interview should be attributed to nothing more than that fact of having had no real opportunity to prepare and/or review documents prior to his interview. It certainly should in no way be viewed as bringing Mr. Stanley's credibility into question, as he was forthright and clear in his responses throughout the Hearing, and, as we have noted above, consistently stood by his statements.

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> ***MR. STANLEY:*** *No, before my interview I was provided with a package of documents that – I don't know how it was developed, but most of them were things that my name was on. But I hadn't had a chance to review all of them before the interview. I think I got them the day before.*

MR. FITZGERALD: *At a time when you had about three months in transitioning from government to private practice at a new large law firm.*

MR. STANLEY: *Yes*

MR. FITZGERALD: *If you had standing or had all those documents beforehand, do you think it could have assisted you? For your interview? In a more wholesome fashion?*

MR. STANLEY: *There were one or two points upon which – after having a chance to reflect and review the documents after the interview – I realized that there could have been more complete answers given to the questions that were asked – I think I raised one of them this morning in respect to the JRP in that, I think in the interview, I said I hadn't or had no memory of commenting on them, but the documents that I was provided – once I had a chance to go through them revealed, I think, I commented on one part. So, yes, I guess.*

MR. FITZGERALD: *And then to be fair to you, I mean, the transcript was put to you this morning and during cross-examination the words were put to you – some colourful, some not colourful –*

MR. STANLEY: *Yes.*

MR. FITZGERALD: *– but I wanted to make sure that the Commission had a full perspective of what you were dealing with at the time of the evidence – the transcript.*

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MS. VAN DRIEL: *Yeah, just a few questions here, Mr. Stanley. This is about your initial interview on August 31. When were you asked to come for an interview? Do you remember the time period?*

MR. STANLEY: *I think it would have probably been early – late July, early August. Because there was some discussion of scheduling dates and I was out of town for most – or part of the middle of August.*

MS. VAN DRIEL: *Right. And when did you receive any documents from Commission's counsel?*

MR. STANLEY: *So, obviously, now not being with government, I didn't have any documents to review. The documents I received from Commission counsel in advance of the interview, I think, came in the night before or the afternoon before.*

MS. VAN DRIEL: *Right. And was that a lot of documents they sent to you?*

MR. STANLEY: *I was sent a couple of hundred documents, probably 2,000 or 3,000 pages of records that I had touched at some point that had come out through, I think, a computer search.*

MS. VAN DRIEL: *And did you have conversations with the Commission for the purpose of the interview?*

MR. STANLEY: *Not with the Commission, no.*

MS. VAN DRIEL: *Did you have conversations with anybody else for the purpose of the interview?*

MR. STANLEY: *Well, I was accompanied to the interview by counsel for the Government of Newfoundland and Labrador. And the primary purpose of the interview was understood to be in respect of the water-management issues.*

MS. VAN DRIEL: *Right. And was counsel for government also your counsel at that time?*

MR. STANLEY: *No, I – it was – I viewed counsel for government being there as being responsible for this – the – holding the privilege of what I could or could not discuss on a solicitor-client-privilege basis.*

MS. VAN DRIEL: *And what was your understanding – before you started to give responses to the questions of Mr. Learmonth, what was your understanding of the information that all of what you would say at that interview be solicitor-client privilege?*

MR. STANLEY: *I think at the time my understanding was that we were having a discussion within privilege and that what we were discussing, and my answers and my responses, were all within the umbrella of solicitor-client privilege.*

MS. VAN DRIEL: *And if you had known that apparently not all of it – certainly, not your observations and impressions of what went on within government, that that type of information would not be privileged, would you have answered differently?*

MR. STANLEY: *I may have been more circumspect in the language that I used in answering the questions, but the answers I've given – the nature of the answers would have been the same.*

MS. VAN DRIEL: *Right. So, today, we've heard a lot of evidence from you in response, particularly, to statements you made and are expressed in the transcript. Is there anything in what you said today that would contradict or is in conflict with what you said at that time?*

MR. STANLEY: *No, I don't think so. I don't think there's anything in the transcript that I didn't – I don't stand by what I said. There are, as I think I noted, a couple of times where the transcript may end without there having been a full discussion or development of a train of thought. I think anyone reading the transcript will see it's fairly conversational and that the transcript may discuss a point, but I think it's come out here possibly once or twice, that wasn't the final resolution of the issue that was involved.*

12. **Mr. Learmonth's aggressive questioning and attack on Mr. Stanley's credibility was wholly unfounded and not in keeping with the professionalism that should have been afforded in this proceeding, and, as we have noted in Submission #11 above, contributed to the lack of procedural fairness afforded to Mr. Stanley throughout this process.**

    There have also been many instances during questioning of other parties in these Hearings in which Mr. Learmonth acted with a great deal more restraint and respect when faced with individuals whose testimony even very clearly contradicted or at a minimum amended their interview testimony (as opposed to Mr. Stanley, who simply expressed regret over his choice of language and clarified points when asked). In none of these situations did Mr. Learmonth attack these individuals' credibility or challenge them to the extent which he did with Mr. Stanley. He instead simply had them explain the discrepancy and moved on with his questioning.

Examples of such testimony from other witnesses:

i. Fred Martin – October 25, 2018, at Pages 2-3.
ii. Darlene Whalen – October 25, 2018, at Page 52.
iii. Andy Wells – October 25, 2018, at Pages 72, 85, 89-90, and 103.
iv. Maureen Green – October 24, 2018, at Pages 26 and 99-100.
v. Tom Marshall – November 6, 2018, at Page 61.
vi. Jason Kean – November 7, 2018, at Page 58.

Excerpts of Mr. Learmonth questioning Mr. Stanley's credibility and Mr. Stanley's Responses

Todd Stanley Hearing Transcript – October 22, 2018 – Page 88-89

MR. LEARMONTH: *Yes. Mr. Stanley has given evidence in response to a question from Ms. Van Driel that he didn't think there were any contradictions between his evidence and his interview evidence on August 31. Well, I take a completely different point of view on that subject. I suggest that there – it's very clear that there were many contradictions between the evidence that Mr. Stanley gave in cross-examination today and in examination-in-chief today and also in his interview. And so I'm – I don't accept this business about – that the differences are as a result of clarifications or expansions of points raised. I don't accept that.*

And so I – therefore, I'm raising an issue about Mr. Stanley's credibility, his personal credibility, in his evidence today in cross examination and the evidence he gave under oath at the interview.

...

Todd Stanley Hearing Transcript – October 22, 2018 – Page 90

MR. LEARMONTH: *Well, what are you saying? I mean, you seem to be – Mr. Stanley, I suggest that you're attempting in your – attempted in your cross-examination to backtrack from some of the evidence that you gave in the interview, and I'm suggesting that the reason you're doing that is not simply because the evidence wasn't true but because you have come to regret some of the things that you said. What's your response to that?*

MR. STANLEY: *I've not come to regret some of the things I've said in that interview at all. I may have regretted the terminology that I used in making those statements in the interview.*

...

Todd Stanley Hearing Transcript – October 22, 2018 – Page 91

MR. STANLEY: *Mr. Learmonth, when I came to do an interview with the Commission, I wasn't – it wasn't clear that I was going to be called as a witness. I knew that I was under oath, no question. The – I came voluntarily as a witness because I wanted to ensure that the Commission had full understanding of the flavour and colour of relationships and situations that may or may not have been going on, or that were going on, between government and Nalcor at the time that wouldn't necessarily be fully apparent in the document review that I knew the Commission had been doing.*

MR. STANLEY: *So I gave descriptions of relationships, descriptions of scenarios, situations. I think I went down one or two or three hypotheticals at the time, some of which I'm not sure are in the transcripts, some (inaudible) – I'm not sure, may have been redacted – to attempt in the interest of ensuring that the Commission had full understanding and fleshing out of the nature and the more human story behind the – behind what was going on at the time – that would necessarily have been apparent from the documents. So I did use the words – there's no question, you didn't put any words to me that I accepted there's language there. In the fullness of time, if I had realized that we'd be sitting here today being cross-examined on those words as a witness, I'm not entirely sure I would've used the exact same words, but I would – I still stand by the statements that were made in the information – or the point that I was making when I used that language.*

...

Todd Stanley Hearing Transcript – October 22, 2018 – Page 94

MR. LEARMONTH: *Well, why didn't you explain it at the interview?*

MR. STANLEY: *Well, now, Mr. Learmonth, I came to an interview where I thought I was going to be discussing water management and got asked a host of questions about the relationship between government and Nalcor. I hadn't seen a government document in four months; I didn't know that these were topics that were going to come up in the interview. And I gave the best interview I could off the top of my head, at that point, in an effort to ensure that the Commission had as much information as it could. But whether or not my answers to this on every point that was asked were entirely complete by rote at the time, I would suggest to you – now, no, there is additional information I could've provided if I had time to prepare, which I now have as a result of it being two months out from the interview.*

MR. LEARMONTH: *Yeah. Well, why didn't you ask for a postponement if you didn't have time to review the documents? Because, Mr. Stanley, I suggest to you that the documents that you did receive contained many subject matters other than water management. So the point being is you knew it wasn't just restricted to water management.*

MR. STANLEY: *I knew I received documents on a whole host of things. I did not know what you were going to ask me about.*

MR. LEARMONTH: *Well, why would we send them to you in advance of an interview if we weren't going to ask you about them?*

MR. STANLEY: *Mr. Learmonth, the documents I received appeared to be a dump of every information – every document in your database that contained my name.*

MR. STANLEY: *I did not ask for a postponement. I came to try to be helpful, to answer the Commission's questions on what I thought was going to be primarily water management.*

...

Todd Stanley Hearing Transcript – October 22, 2018 – Page 102

MR. LEARMONTH: *Okay. Just turning, Mr. Stanley, to page 29 of your interview transcript, the bottom second to last paragraph. You say – well, in – there's something – there's more information*

in your answer earlier, but I'll just focus on this. If you – unless you feel you want to expand it. "Was I party to meetings where people looked at each other and said, you know, should we be doing this? Probably ... they weren't formal ones because this train was leaving the station. It ...already left the station. There was no internal process inside of government where anybody said, okay, we are doing this, now what are we gonna need ... to control costs." Now, I suggest to you, Mr. Stanley, that that statement is completely incompatible or inconsistent or is a contradiction of the evidence you gave in cross-examination wherein you suggested that: While eventually the information came from Nalcor in the final analysis, it wasn't provided to the middle management originally, but eventually it came in. Can you comment on that suggestion, please?

MR. STANLEY: *Mr. Learmonth, I'm not exactly sure what you're alleging 'cause that paragraph doesn't deal with the transmission of information from Nalcor at all.*

MR. LEARMONTH: *Well, it says: "There was no internal process inside of government where anybody said, okay, we are doing this, now what are we gonna need ... to control costs."*

MR. STANLEY: *So recognizing the way this language is framed, the discussion here was that in the context – well, I'm still not sure – I mean, there being no internal process to say, okay, now we're going to do this – I was never in a meeting to say we're gonna do this, now we need to be able to control costs – the concerns regarding controlling costs at the construction level never really came up in any conversations I was in. The idea of the train leaving the station is a reference to the fact that there was – I don't think this is – there was significant momentum behind this project from 2010 onward as being a matter that was likely going to – was being advocated by government, or supported by government, and that the idea – the whole point of that was there was never a formal meeting that I was in to say, let's all look around and see, you know, all right, is this project going to go ahead – as a discussion of what we were going to do. I'm not sure what you're implying that I've contradicted in that.*

MR. LEARMONTH: *Yeah. Well, anyway, you've given your answer and the Commissioner will have to assess your answer.*

Respectfully submitted at the City of St. John's, in the Province of Newfoundland and Labrador, this 9th day of August, 2019.

Gerlinde van Driel QC

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fieldfisher Schedule "A"

Publications

A practical guide to commissioning and conducting investigations and inquiries

By Martin Smith | 02 Dec 2008

This article was first published in Practical Law Company *in December 2008.*

Practice note

This practice note provides an introduction to the substantive issues and law relating to the commissioning and conduct of investigations and inquiries. Ed Marsden (managing director, Verita) and Martin Smith (partner, Fieldfisher).

Investigations and inquiries in context

Investigations and inquiries are an increasing feature of public life. They come in a variety of forms. Some have formal powers while others are carried out on an ad hoc, informal basis. Some are triggered by government policy while others are commissioned at the discretion of the government and/or public bodies.

Certain procedural and legal issues arise in all investigations and inquiries. It is important to get these right so that the investigative process runs smoothly, individuals are treated fairly & lawfully and the budget/timetable is maintained.

This note sets out what these issues are. Organisations intending to commission an investigation or inquiry should seek professional advice and assistance at the outset.

Contents

14. Disclosure
15. Communicating the findings of an inquiry

1. Why is an inquiry needed?

Public bodies commission inquiries as a remedy to a failure/complaint or in response to an act of omission or commission. An inquiry - usually carried out by individuals independent of the body being investigated - is a means of establishing an independent account of the facts, circumstances and reasons as to why something went wrong. Inquiries usually make recommendations about how organisations can improve their performance.

The scale and nature of the inquiry depends on circumstances. Matters of serious public concern may be investigated in a formal and legalistic manner with the inquiry panel headed by a senior lawyer such as a judge, witnesses allowed legal representation and parties permitted to cross-question some witnesses. Although such processes are in fact inquisitorial in nature, they can sometimes appear to be more like normal adversarial court proceedings. This form of investigation is usually commissioned under the Inquiries Act 2005.

Investigation of lesser matters is usually carried in a more informal manner albeit that the investigative procedure is rigorous. Typically, these inquiries are carried out by appropriately qualified, independent individuals who ask questions of invited witnesses in order to establish the facts and circumstances being investigated. Individuals are not allowed legal representation and there is no opportunity to cross-question.

Some inquiries are triggered by government policy/guidance or legislation. For example, local safeguarding children boards commission an independent investigation (serious case review) where children have been killed or seriously harmed. NHS strategic health authorities are obliged by guidance to commission an independent investigation when a patient in the care of mental health services is convicted of committing a homicide.

Public bodies and government sometimes commission investigations in response to public concern expressed by victims, families, relatives, the media and politicians e.g. Bloody Sunday and the sinking of the MV Derbyshire off Japan in 1980. The purpose is to help allay public concern, restore confidence and ensure a proper account is given of a significant event. A change in government also often prompts the commissioning of inquiries into high-profile events that occurred during the life time of the previous administration. Inquiries commissioned by government ministers are usually conducted under the Inquiries Act 2005.

Ad hoc, informal inquiries are sometimes commissioned by public bodies as a substitute for local management action. Generally speaking, this is an inappropriate use of an inquiry and organisations should be encouraged to follow established local policies and procedures instead.

2. Who should commission the inquiry and have they authority to do so?

Most public bodies have the authority to commission an inquiry into their own activities. Legal advisers should be consulted if there is any doubt about the commissioning body's power to do so. Those being asked to undertake the inquiry should first make sure that their commissioning body has such authority as an inquiry which is *ultra vires* may not benefit fully from the qualified privilege usually enjoyed by investigators (see section 12).

Those commissioning an independent inquiry should not be implicated in the matter to be investigated. They should stand aside if they are. Ideally, those commissioning the inquiry should not be material witnesses. Rather the commissioners should be at arms length so as to ensure the integrity of the investigation and to avoid circumstances where those conducting the investigation can be put under improper pressure.

3. Considering the impact of other inquiries

Serious incidents may result in a number of inquiries all with a different remit, for example inquiries by the police, regulators and inspectorates. Those commissioning an inquiry may want to discuss their proposed investigation with these organisations before it gets underway. Where criminal offences are suspected the police are likely to claim primacy and there may be a tension between the need to conduct an effective and urgent inquiry and the possibility of compromising evidence required by the police. With close coordination and cooperation between the various investigation teams, these difficulties are usually avoided. There are national agreements in place between some organisations about these matters. For example the 2006 memorandum of understanding between the National Health Service, Association of Chief Police Officers and the Health Safety Executive entitled *Investigating patient safety incidents involving unexpected death or serious untoward harm: a protocol for liaison and effective communications* and its accompanying NHS guidelines.

4. Does the inquiry need powers to compel production of evidence or not?

Most inquiries rely on the cooperation of organisations and individuals to carry out their work and have no authority to compel the production of documents or the attendance of witnesses for interview. In these circumstances, it is often helpful for the person leading the organisation to make clear to all staff that their cooperation is expected and by these means it is usually possible to carry out an effective inquiry without such powers. The Hutton Inquiry is an example of a high profile, ad hoc public inquiry which proceeded without powers to compel evidence.

Some circumstances warrant an inquiry that has the authority and power to require production of evidence, for example where someone has died as a result of the actions/inactions of an agent of the state or where it is expected that an organisation will not cooperate. In such cases it is best if those commissioning the inquiry grant it formal powers at the outset so that its work can be carried out properly. Granting such powers part way through an inquiry can result in changes to the procedures or the need to appoint a legally qualified chair.

Investigators should discuss any concerns they have about their ability to conduct an effective inquiry with their commissioning body at the earliest opportunity. Failure to carry out an effective investigation can lead to legal challenge. Investigators should discuss any concerns they have about their ability to conduct an effective inquiry with their commissioning body at the earliest opportunity. A practical and effective investigation is a requirement of Article 2 of the European Convention on Human Rights where a person has died possibly as a result of the actions of the state.

Case study

In *Edwards v UK (2002)* 35 EHRR 19, a psychiatrically disturbed prisoner had been placed in a prison cell with another prisoner who was displaying symptoms of bizarre behaviour and he was killed by him as a result of their being locked up together. The state authorities appointed a distinguished panel, headed by a QC, to conduct a private non-statutory inquiry. The ECtHR praised the inquiry report as follows: *"The inquiry report, which ran to 388 pages, reached numerous findings of defects and made recommendations for future practice. It was a meticulous document, on which the Court did not hesitate to rely in assessing the facts and issues in the case".*

However, the ECtHR held that obligations imposed by Article 2 ECHR had not been complied with, in part because the inquiry had not had power to compel the attendance of witnesses. As a result, the inquiry had not taken evidence from two witnesses whose evidence may have been crucial to determining the facts of the case.

5. The Inquiries Act 2005

The Inquiries Act 2005 received Royal Assent on 7 April 2005 and came into force on 7 June 2005. It seeks to create a statutory framework for inquiries into matters of public concern established by ministers. It replaced over 30 different pieces of legislation on inquiries, consolidating much of the current legislation and codifying past practice.

The government has stated that the Act will only be used for inquiries that need to have statutory powers (for example to compel the attendance of witnesses or production of documents). There will, however, still be a place for non-statutory inquiries.

Key provisions of the Act are as follows:

- *Section 1:* Power to establish inquiry
- *Section 3:* To be conducted by chairman alone or chairman plus wing members
- *Section 11:* Power to appoint assessors
- *Section 13:* Minister's power to suspend inquiry
- *Section 15:* Powers to convert another inquiry into an inquiry under the Act
- *Section 17(2):* Power to take evidence on oath
- *Section 18:* Power to compel attendance to give evidence and production of documents
- *Section 37:* Immunity from suit
- *Section 38:* Time limit for judicial review of inquiry decisions reduced to 14 days

- *Section 40:* Power for chairman to reimburse expenses to persons in connection with the inquiry

Examples of inquiries conducted under the Act include the E-Coli Inquiry and the Baha Mousa Inquiry.

Under section 17 of the Act, the procedure and conduct of an inquiry are matters for its chairman, subject to any provision of the Act itself or any rules made under it, the requirements of fairness and the need to avoid unnecessary cost. Procedural rules have been made under section 41 of the Act (The Inquiry Rules 2006) and make provision in respect of the following matters:

- service of documents
- designation of core participants
- legal representation
- evidence
- disclosure
- warning letters
- reports
- records management
- awards in respect of expenses and costs

6. Writing terms of reference

Terms of reference are the foundation stone of a successful inquiry. Terms of reference need to be written and should set out who is commissioning the inquiry and by what authority. They should explain the purpose of the inquiry but also the limitations e.g. if the inquiry has no disciplinary remit then this should be made clear. The terms of reference should make it clear if the investigators are expected to produce a written report with recommendations. They should include a timetable and should say whether the outcome of the inquiry is to be published and whose decision and responsibility this is. Organisations should not commit to full disclosure of the report at the outset of the investigation.

Those doing the inquiry – especially the chair or lead investigator – need to understand their remit and what the commissioners of the inquiry consider to be included in it (and outside it). To that end, it is a good idea to include the chair or lead investigator in drafting the terms of reference.

Those commissioning an inquiry should show terms of reference to their legal advisers before they are finalised.

7. Retrieving and safeguarding evidence

Inquiries rely on documents and testimony to be effective and get to the bottom of what has happened. Finding and securing documentation is a major task at the outset of any inquiry and always made more complex when time has elapsed.

Commissioners or investigators should recover and keep safe all relevant documents and records as soon as possible and particularly in cases where it is believed that documents are at risk of being destroyed or mislaid. This minimizes loss or changes after the event. It avoids the inquiry being delayed and helps ensure that the investigators are able to establish the truth about a matter. A log should be kept of what is recovered and where from. Thought also needs to be given to interrogating electronic systems for documents.

In cases where the investigators need access to personal information e.g. medical records then consent from the individual concerned is needed.

8. Appointing a chair, panellists and expert advisers

It is important to select the members of the inquiry team carefully and with an eye to the skills and expertise needed to carry out an effective investigation. The credibility of the inquiry will depend on these people. Ideally, the chair or lead should be involved in the appointment of the other team members.

In selecting the inquiry team commissioners should ensure that individual members:

- have the necessary skills, knowledge, independence and experience
- do not face a conflict of interest
- have sufficient time available

Each investigator and adviser should be provided with a letter of appointment and a job description. The letter of appointment is likely to need to contain a carefully worded indemnity to protect the investigator from legal proceedings arising from the inquiry.

9. Managing the inquiry process

All inquiries need to be properly managed and administered and people should be appointed to this task. Complex inquiries need to be managed by senior, experienced individuals who understand what is to be investigated and the procedural rules that will apply.

Key tasks in managing the investigative process are:

- preparing procedural rules for the inquiry
- drawing up a budget and timetable
- locating and recovering all necessary documents including relevant policies and procedures
- preparing documents for the inquiry team
- making contact with potential witnesses
- managing and caring for witnesses
- seeking appropriate consents for accessing personal information
- handling all inquiry correspondence
- organising witness interviews including accommodation for these
- arranging recording and transcribing service

- liaising with the commissioning body
- handling media enquiries (with appropriate professional advice)
- preparing the report

10. Managing and caring for witnesses

The procedure followed by the inquiry is vital to its integrity and the investigators are responsible for it. The guiding principles for an inquiry team are fairness and reasonableness above speed and economy.

Investigators should explain at the outset to witnesses what it is that they have been commissioned to do and how they will go about doing it. Those invited to interview should be sent a letter setting out what it is that they will be asked about. The letter should include the terms of reference and the procedural rules. Witnesses should be offered the opportunity to bring a friend or legal representative to their interview though it should be made clear that the investigators' questions will be directed to them.

Witnesses should be sent the written transcript of their evidence and be given the opportunity to make amendments and additions to it. Those criticised should be allowed to see any criticisms and offered the chance to comment on them before the report is finalised. The inquiry team should take proper account of any comments they receive. In some circumstances witnesses should be sent the entire report to comment on e.g. where the whole report reflects on the actions of a senior individual in an organisation. This aspect is discussed in further detail in section 11 below.

11. Salmon letters & Maxwellisation

Following dissatisfaction with procedural aspects of Lord Denning's inquiry into the Profumo Affair, Lord Justice Salmon chaired a Royal Commission on Tribunals of Inquiry. He subsequently published a report setting out his findings in 1966. This contained reference to six cardinal principles of fair procedure under the Tribunals and Inquiries Act 1921 which came to be known as the "Salmon principles".

The Salmon principles

Before any person becomes involved in an inquiry, the tribunal must be satisfied that there are circumstances which affect him and which the tribunal proposes to investigate.

1. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
2. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
   (b) His legal expenses should normally be met out of public funds.
3. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.

4. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
5. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

An aspect of principle 2 above was that following the Salmon Report, letters were commonly issued to those who were participants in an inquiry where there was potential criticism that might be made of their conduct. These letters came to be known was "Salmon letters".

In his subsequent report in to matters arising from the Matrix-Churchill affair, Lord Scott criticised aspects of the Salmon Principles as being more relevant to adversarial processes than an inquisitorial procedure. However, he took the process of warning those concerned of possible criticism (so they would have an opportunity to comment) further than the Salmon letter; rather, he copied adverse passages from his draft report to those concerned, so they had an opportunity to respond and seek to change his mind. This process is known as "Maxwellisation" and derives from practice in investigations under the Companies Act.

Both processes represent aspects of fairness and may be necessary, depending on the circumstances, for an inquiry conducted today.

For inquiries conducted under the Inquiries Act 2005, the Salmon letter procedure has been codified in to a process of "warning letters" (see section 13 of the Act). This provides that the chairman may not include any explicit or significant criticism of a person in a report unless he has sent a warning letter to a person who:

- (a) He considers may be, or who has been, subject to criticism in the inquiry proceedings; or
- (b) About whom criticism may be inferred from evidence that has been given during the inquiry proceedings; or
- (c) Who may be subject to criticism in any report or interim report.

Section 14 of the Act creates a statutory duty of confidence between the recipient of such a letter, the inquiry team and the recipient's legal representative. The duty persists until such time as the inquiry's report is published or the chairman waives the duty.

The contents of warning letters under the Act are set out in section 15. They must:

- (a) state what the criticism or proposed criticism is
- (b) contain a statement of the facts that the chairman considers substantiate the criticism or proposed criticism
- (c) refer to any evidence which supports those facts.
  It has yet to be seen whether the statutory process of warning letters will help speed up inquiries that would previously have followed a Maxwellisation process by dispensing with it, or whether a chairman will consider that fairness requires a "Maxwell" process as well as warning letters under section 13 of the Act

12. Defamation and qualified privilege

The law provides that where a statement is made by one individual about another which is false and damages that person's reputation, that person may commence proceedings for damages on grounds of defamation.

Those conducting inquiries, and those giving evidence in such proceedings are as susceptible to an action for libel (in respect of written statements) or slander (oral statements) as anyone else.

However, where "qualified privilege" attaches to an inquiry it serves to protect the statement-maker where they make a false and disparaging statement in the course of the inquiry providing the statement is made in good faith. This is not the case, though, where the statement-maker is motivated by malice.

For inquiries conducted under the Inquiries Act 2005, section 37 codifies the previous common law understanding of the qualified privilege defence to defamation proceedings. Section 37(3) provides as follows:

- 37(3) for the purposes of the law of defamation, the same privilege attaches to
- (a) Any statement made in or for the purposes of proceedings before an inquiry (including the report and any interim report of the inquiry)
- (b) Reports of proceedings before an inquiry

As would be the case if those proceedings were proceedings before a court in the relevant part of the United Kingdom.

13. Data protection

Those conducting inquiries will wish to reach an early determination on whether or not they are required to register as a "data controller" for the purposes of the Data Protection Act 1998 ("the 1998 Act").

Under section 2 of the 1998 Act, a data controller is defined as a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are or are to be processed.

It is unlawful for personal data to be processed if the relevant data controller has not registered with the Information Commissioner's office (section 17 of the 1998 Act); and any data controller who processes data without registration is liable to criminal conviction of an offence under section 21 of the 1998 Act.

It is easy to register with the Information Commissioner's office and notification forms are available by post, by telephone (01625 545 740) or online. There is a fee of £35.

The key question for the inquiry team to determine is whether they simply process information and data on behalf of their commissioning body – in which case they do not "control" the data and do not need to register – or whether they truly determine the manner and purposes for which data is processed. Answering this question is likely to require consideration of the sources of information

the inquiry is going to consider, whether it constitutes "data" or "sensitive personal data" as defined in the 1998 Act and the degree to which the inquiry is independent of its commissioning body.

The definition of the terms "data", "personal data" and "sensitive personal data" are complex and outside the scope of this practice note. Detailed guidance is available at [PLC ref] and from the Information Commissioner's office.

Whether they are a "data controller" or "data processor", the inquiry team will need to give careful consideration to redaction of personal and sensitive information (for example before making disclosure of documents), to comply with the data protection principles contained in Schedule 1 to the Data Protection Act 1998. Care will often, for example, need to be taken to remove home address details, private telephone numbers and medical information from such documents before making them available to those affected by the inquiry.

Similar careful consideration needs to be given to publication of personal information in inquiry reports, as the following case study demonstrates:

Case Study

R (on the application of Stone) v South East Coast Strategic Health Authority and others [1006] EWHC 1668 (Admin)

The Claimant was convicted of two counts of murder and one of attempted murder. His case had received extensive media coverage and some erroneous reporting because he had a history of mental health problems and psychiatric care. Following his conviction, an inquiry was established by the local health authority to examine his care, treatment and supervision prior to his commission of these crimes. While he had cooperated with the inquiry and consented to the publication of its report to health professionals, the Claimant objected to it being made public.

Davis J held that the publication of a report which made reference to Mr Stone's medical conditions and treatment brought in to play consideration of whether his rights under Article 8 ECHR. In the circumstances of the case, he decided that any interference with these rights was not unlawful. Careful consideration had been given to whether it was possible to redact the report to remove such private information, but Davis J held that "a redacted report of the kind proposed cannot and will not work. it I not practicable to publish a report without disclosing details of Mr Stone's private medical information".

Mr Stone also objected to publication of the report on grounds of breach of his rights under the Data Protection Act 1998 and it was admitted that the decision to publish involved processing sensitive personal data. Davis J held, however, that such processing was justified under paragraphs 7 (necessary for the exercise of functions conferred by or under any enactment) and 8 (necessary for medical purposes undertaken by a health professional) of Schedule 3 to the 1998 Act.

14. Disclosure

The person leading an inquiry will need to consider whether it is necessary for them to disclose the information and documentation they consider relevant to those affected by their work. Timely disclosure of relevant documentation is often an aspect of a fair procedure, for example where a person is to be interviewed or give evidence to the inquiry or where he or she has been asked to make representations to it.

In some cases, where the inquiry decides that fairness requires disclosure of relevant documentation to be made, this requirement can be fulfilled by making the documents in question open to inspection at a certain time and place. Provided the person concerned has been given sufficient notice of their right to inspect the documents, fairness is likely to be complied with, even if the person does not in fact attend to see the documents.

In other situations, a requirement to disclose documents will entail copying the documents to the parties concerned, by hard copy or electronically. In substantial inquiries with voluminous documentation, this can represent a significant task and under section 18 of the Inquiries Act the chairman must take such steps as he considers reasonable to allow the public to view documents provided to the inquiry panel.

However disclosure is performed, it is helpful for the inquiry to maintain an accurate record of what documentation has been made available to whom and on what date, so that any subsequent queries regarding the fairness of proceedings in this respect may be easily checked and answered.

Much of the documentary material considered by an inquiry will be confidential and sensitive. If fairness requires such documentation to be disclosed, those leading the inquiry should consider whether to impose terms about the way in which such information can be seen and restricting its wider dissemination. If they choose to extract undertakings as to confidentiality, early thought should be given to whether and if so to what extent any such undertakings can be enforced.

15. Communicating the findings of an inquiry

The starting point for communicating the findings of any inquiry is a clear, concise, jargon-free written report. No matter how careful the inquiry process, a wordy, badly-drafted report at its conclusion can serve to obscure rather than reveal the facts. It can also lead to misunderstanding and mis-reporting of the inquiry's conclusions.

The content of the report will depend on the nature of the case and inquiry, but typically will include:

- introduction
- executive summary
- terms of reference
- methodology: approach and structure of the investigation
- background and chronology of events
- findings
- conclusions
- recommendations

In addition to circulating the report to internal stakeholders (such as board members, staff and managers), face-to-face presentations are a useful way of disseminating the key findings quickly and starting the process of change set out in the recommendations.

The report will also need to be sent to external stakeholders, such as those with a personal interest in the case (perpetrators and the victims and/or their families, partner organisations, commissioners, etc). When communicating with victims and their families or with the perpetrators, it is advisable for a member of the investigative team to meet with them to go through the report and its findings in person and answer any questions they may have.

Unless there is a good reason not to, most reports will need to be put into the wider public domain (normally timed to ensure internal and external stakeholders have been informed of the findings first).

There are several ways of doing this depending on the likely level of media interest.

For high-profile inquiries that are likely to attract considerable media interest, a press conference is the best way of highlighting key messages and containing coverage within a 24-hour period. Invited journalists are normally asked to attend up to two hours before the press conference starts to give them a chance to read the report.

Briefing a handful of selected journalists on the report - or even breaking the story as an exclusive to a single media outlet - is a lower key option and works well for inquiries that are likely to attract moderate levels of media attention.

For inquiries likely to attract little media attention, it is normally sufficient to submit the report to the board(s) of the organisation(s) involved, make the full report available on the appropriate website(s) and issue a press release to those journalists likely to be interested in the story setting out the key messages. Where no media interest is likely, submitting the report to the board and putting it on the website should suffice.

Section 25 of the Inquiries Act imposes a duty on the relevant minister or chairman to publish the inquiry report.

For further information, please contact Martin Smith.

Footnote

In this practice note we refer both to investigations and more formal inquiries as "inquiries" apart from where the context demands otherwise, investigations are generally smaller pieces of investigative work, while inquiry are usually larger-scale, formal investigations commissioned under the Inquiries Act 2005. Both investigations and inquiries are inquisitorial, not adversarial, in nature.

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