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# Recovering the Promise of Public Truth: Juridification and the Loss of Purpose in Public Inquiries

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RECOVERING THE PROMISE OF PUBLIC TRUTH: JURIDIFICATION AND THE LOSS OF  
PURPOSE IN PUBLIC INQUIRIES

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A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL  
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## **Abstract**

My intention in this work is to investigate the apparent disconnect between the intended social purposes of inquiries and the impact pressures of juridification have had on them, and consider what steps inquiries may take to resist these pressures. Public inquiries, formerly relied on as an alternative to criminal and civil proceedings and as a means to engage the public on issues of policy, now seem to exhibit more intense procedures akin to those found in the alternative processes they were designed to resist. Under increasing juridification pressures, what function should public inquiries fulfil? In short, my aim is to explore our understanding of public inquiries and the implications of the trend towards juridification is having on the ability of public inquiries to fulfil their social and policy functions.

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## Introduction

Public inquiries have a long and influential history in Canada. Generally viewed as productive and positive process with the potential to have a profound impact on policy development, inquiries are often turned to in the wake of scandal and tragedy to provide the public with answers. Inquiries such as the often praised Berger Inquiry from the 1970s and more recently the Walkerton Inquiry are examples of inquiries that not only provided the government with useful and impactful recommendations but also succeeded in engaging and informing the public.

Not all inquiries have, however, been able to achieve the same success. Inquiries increasingly face new and complex pressures from the public for more transparency and involvement and from the legal profession to ensure the rights and privacy of those involved. As a result, inquiries are becoming more complex and it is becoming more difficult for inquiries to find the appropriate balance between achieving their mandate efficiently and comprehensively while balancing juridification pressures.

The challenges faced by recent inquiries, such as the Missing Women Commission of Inquiry<sup>1</sup>, are not exceptions, rather they reflect only a few of the increasing number of difficulties and criticisms that inquiries have faced in recent years. While inquiries are often lauded for their flexible and less court-like nature, these advantages are also a

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<sup>1</sup> The author of this thesis was Research Counsel for the Missing Women Commission of Inquiry from October 2010 until August 2012. Additionally, she worked on the Braidwood Commissions of Inquiry as a Law and Policy Researcher from August 2008 until December 2009. Although work on these inquiries provoked the author's interest in the topic of public inquiries, this thesis was based solely on research conducted for this thesis. All opinions expressed are solely those of the author and based on research of publicly available sources and are cited throughout the paper.

significant area of criticism for many observers. Many inquiries looking in to tragic or controversial events will often require some investigation and review of the actions of individuals and organizations. The coercive powers of inquiries undoubtedly infringes on the personal lives of individuals involved in an inquiry, however, they do so without the protections generally associated with criminal trials and civil litigation.

My intention in this work is to investigate the apparent disconnect between the intended social purposes of inquiries and the impact pressures of juridification have had on them, and consider what steps inquiries may take to resist these pressures. Public inquiries, formerly relied on as an alternative to criminal and civil proceedings and as a means to engage the public on issues of policy, now seem to exhibit more intense procedures akin to those found in the alternative processes they were designed to resist. Under increasing juridification pressures, what function should public inquiries fulfil? In short, my aim is to explore our understanding of public inquiries and the implications of the trend towards juridification is having on the ability of public inquiries to fulfil their social and policy functions.

In order to accomplish that goal, the approach I intend to adopt in this work is as follows. In Part 1, I will examine the historical evolution of public inquiries and draw out the conceptual and practical divide that has occurred as a result of the juridification process. Specifically, I will trace the development of public inquiries as the alternative to criminal and civil trials so as to promote public participation and social education. In Part 2, after setting up the problem this way, I will turn my attention to the trend towards juridification in administrative law and public inquiries in particular. Drawing on the historical

example of criminal trials, I will examine the slow, yet visible shift in public inquiries towards a greater reliance on criminal and civil trial procedures.

In Part 3, I will provide two case studies of recent public inquiries. First, the Walkerton Public Inquiry called in 2000 to investigate and report on the contamination of the city's water supply. The provincial inquiry involved both investigative and policy components. Although it faced many challenges it is often considered a success, especially in relation to the strong community support the inquiry was able to develop over the course of its work. The second public inquiry examined will be the recent Missing Women Commission of Inquiry. Like Walkerton, the Missing Women Inquiry was a provincial inquiry called in the wake of tragedy. The inquiry was established to examine and report on the Vancouver Police Department and the Royal Canadian Mounted Police's investigations into missing and murdered women from Vancouver's Downtown Eastside. The inquiry faced significant challenges from its inception and despite many similarities provides numerous interesting contrasts to the Walkerton Inquiry. Finally, in Part 4, I intend to utilise the insights gained from the first three parts in looking forward. In view of the disconnect that has arisen between the original aims of public inquiries and the increasing juridification pressures facing them, the question becomes whether inquiries should be resisting these pressures.



## Part 1 – Purpose of Public Inquiries

This part will examine the unique purpose and process of public inquiries and their role in Canadian society. Public inquiries are neither civil nor criminal trials and should not be analogized to either. Rather, as will be developed below, their role in the judicial and social landscape of Canada is one of public education and policy development.

Royal commissions of inquiry, a long-standing part of the English system of government, were primarily established to investigate special problems that captured the attention of the public and government. The first Royal Commission in Britain is claimed to have taken place anywhere between 1080 and 1517.<sup>2</sup> The uncertainty of dates results from the fact that various writers have interpreted the term “royal commission” differently.

### History of Public Inquiries

The early inquiries were established by British monarchs to assist them in governing: “the source of royal commissions is to be found in the generally assumed right of the Crown to appoint officials to perform duties temporarily or permanently on behalf of the King.”<sup>3</sup> Ratushny notes that while Royal Commissions were evolving, parallel events were occurring in relation in the criminal trial.<sup>4</sup> Following the Revolution of 1688, the political centre of gravity in Britain shifted from the Crown to Parliament and as a result the legal basis for Royal Commissions was removed. Legislative committees, in

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<sup>2</sup> J.C. Courtney. (1964). *Canadian Royal Commissions of Inquiry, 1946 to 1962: An investigation of an executive instrument of inquiry*, p. 7

<sup>3</sup> Ratushny, Ed. *The Conduct of Public Inquiries: Law, Policy, and Practice*. Toronto: Irwin Law, 2009, p. 12 quoting Thomas J. Lockwood “A History of Royal Commissions” (1067) 5 Osgoode Hall L.J. 172 at 179.

<sup>4</sup> Ratushny, p. 12

comparison, were used liberally to inquire into a wide range of subjects that in the past would have been performed by Royal Commissions.

The Canal Commission<sup>5</sup> was the first Canadian royal commission of inquiry report was published in 1871, however, it is clear that inquiries also existed in Canada pre-confederation. Research suggests the first statutory provisions for the establishment of commissions of inquiry were introduced by the Province of Canada in 1846.<sup>6</sup> At the time of the passage of the British North American Act in 1867, Great Britain was experiencing the “Great Era of Commissions.”<sup>7</sup> The considerable use made by British governments of royal commissions during the nineteenth century can be directly related to the post-1832 social and political reform. In 1907, Josef Redlich, writing about the extensive use of royal commissions in Britain commented that “almost all the great reforms of the nineteenth century in internal administration, taxation, education, labour protection and social questions, have been based on the full investigations made by royal commissions.”<sup>8</sup>

Defining the purpose of commissions of inquiry is a challenging exercise given the broad range of functions and forms they take. A commission can apply its wide-ranging investigative authority to ascertain facts concerning matters of substantial public importance as well as inform and educate citizens in ways judicial and legislative

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<sup>5</sup> Royal Commission to Inquire into the Best Means for the Improvement of the Water Communications of the Dominion and the Development of the Trade with the North-Eastern Portion of North America

<sup>6</sup> Robert Centa and Patrick Macklem. “Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada.” (2001) 39 Osgoode Hall L.J. 117-160, at 117

<sup>7</sup> JC Courtney “In Defence of Royal Commissions,” (1969) 12 *Canadian Public Administration*, no. 2, 198-212 at 208, quoting Hugh McDowell Clokie and J. William Robinson, *Royal Commissions of Inquiry: The Significance of Investigation in British Politics* (Stanford, 1937), p. 54.

<sup>8</sup> Courtney p. 208.

processes cannot. Broadly, commissions may be defined as “sites of sense-making” through a social process where defenders of the status quo can engage proponents of alternatives to the status quo.<sup>9</sup>

Many commissions are also established to examine retrospective allocations of fault and blame. These commissions run the risk of being little more than poor imitations of the civil or criminal justice system. Such inquiries often draw criticisms about due process. Despite the benefits of the former and the flaws of the latter, commissions of inquiry cannot be neatly divided into those that involve matters of public policy and those that investigate alleged misconduct. Most inquiries perform both functions.<sup>10</sup>

Some authors have suggested that rather than attempting to separate the two functions, a better approach is to view inquiries on a continuum with respect to the emphasis given to each aspect.<sup>11</sup>

Though defining public inquiries is somewhat challenging, it is clear that the intention of parliament from early on was for inquiries to have open and transparent processes.<sup>12</sup> In 1921 the English Parliament enacted the *Tribunals and Inquiries (Evidence Act)*.

Significantly, the Act included a presumption that an inquiry should be held in public.

Section 2(1) provided:

A tribunal to which this Act is so applied as aforesaid... shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest so to do

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<sup>9</sup> G. J. Inwood and Johns, C. M., & Canadian University Presses E-books (OCUL) - York University. (2014). *Commissions of inquiry and policy change: A comparative analysis*. Toronto [Ontario]: University of Toronto Press.

<sup>10</sup> Centa p. 118

<sup>11</sup> Centa p. 118

<sup>12</sup> Jason Beer, James Dingemans, and Richard Lissack. *Public Inquiries*. Oxford ; New York: Oxford University Press, 2011 at p.8.

for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.

In addition, as in the current legislation governing inquiries in Canada, the 1921 Act did not include any provisions regarding the procedures to be adopted by the tribunal or the making of rules of procedures or practice.

Justice Grange, commissioner of the Inquiry into Certain Deaths at the Hospital for Sick Children, commented on the importance of ensuring that an inquiry is open to the public.

He said:

I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries... I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.<sup>13</sup>

Following the activities and subsequent judicial reviews of two public inquiries in Ontario, questions were raised as to the fairness and utility of public inquiries. As a result, in May 1990 the Law Reform's Commission *Report on Public Inquiries* was initiated with Professor Kent Roach appointed as Project director to examine the utility of public inquiries and whether the benefits of public inquiries outweigh their costs.<sup>14</sup> The Law Reform Commission of Ontario identified six principal functions of commissions of inquiry: (a) they enable the government to secure information as a basis for developing or implementing policy; (b) they serve to educate the public or legislative branch; (c)

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<sup>13</sup> S.G.M. Grange, "How should lawyers and the legal profession adapt? In Paul Pross, Innis Christie, and John A. Yogis, eds. *Commissions of Inquiry, Dalhousie Law Journal*, vol. 12 (1990), 151 at pp 154-155 (emphasis in original).

<sup>14</sup> Ontario Law Reform Commission. *Report On Public Inquiries*. Toronto: The Commission, 1992 at p. 1. ("LCO Report")

they provide a means to sample public opinion; (d) they can be used to investigate the judicial or administrative (police, civil service, Crown corporations) branches; (e) they permit the public voicing of grievances; (f) they enable final action to be postponed.<sup>15</sup>

These functions place public inquiries in a unique and powerful public policy role. While the multi-purpose and indeterminate nature of the policy objectives of inquiries make it difficult to assess an inquiry's effectiveness, many continue to note that the key function of public inquiries is preparing an "equitable solution to the problem submitted to it."<sup>16</sup>

Following their comprehensive review of inquiries, the Commission put forward a number of recommendations. Among the recommendations were four guiding principles. They included: (a) the independence of public inquiries from the executive and the Legislature should be recognized and protected; (b) the prejudice suffered by individuals affected by public inquiries should be minimized; (c) public inquiries should facilitate public involvement; and (d) efforts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence and participation.<sup>17</sup>

In his dissenting opinion of the judicial review regarding the Westray Mine Inquiry, Justice Peter Cory elaborated that inquiries, which are also born of scandals and disasters, have a further purpose:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth"...In times of a public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining

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<sup>15</sup> Ratushny p. 16

<sup>16</sup> LCO Report p. 10

<sup>17</sup> LCO Report, p. 214

to a worrisome community problem and to be part of the recommendations that are aimed at resolving the problem.<sup>18</sup>

The Federal Court of Appeal, examining the issues surrounding the Inquiry on the Blood System<sup>19</sup>, referred to Cory, J.'s judgment in the SCC's decision of the judicial review of the Westray Mine Inquiry to highlight the importance and limits of the inquiry system to the democratic culture of Canada:

This respect for the institution that the creation of a commission of inquiry has come to be in Canada must not, however, amount to blind respect. However legitimate and important the objective may be, it does not justify all the means that might be used to achieve it. The search for truth does not excuse the violation of the rights of the individuals being investigated. Individuals whose conduct is being scrutinized at a public inquiry conducted under Part I of the Act are so vulnerable and so powerless that the courts must not allow an inquiry to continue when a commissioner is ostensibly abusing his powers and transforming his role from investigator into inquisitor. The considerable powers of commissioners and the ready, numerous and often tempting opportunities for abuse make it particularly necessary that the courts be vigilant. As Mr. Justice Cory observes [in *Westray*, supra, at pages 139 to 140]:

... [there is] the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action.<sup>20</sup>

Through fact-finding, analysis and recommendations, public inquiries facilitate the restoration of public confidence and act as checks on partisan or institutional politics.

Ratushny notes that the "social function" of public inquiries transcends the policy recommendations by "serving an educative function and by transforming public opinion

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<sup>18</sup> *Philips v. Nova Scotia (Commissions of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para 62.

<sup>19</sup> *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, 1997 CarswellNat 213, 1997 CarswellNat 1368 (Fed. C.A.)

<sup>20</sup> *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, 1997 CarswellNat 213, 1997 CarswellNat 1368 (Fed. C.A.) at para. 32.

through a form of dialogue.”<sup>21</sup> Ratushny highlights the independence and effectiveness of public inquiries in restoring public confidence in the institution or institutions investigated as well as government as a whole. Further, the transparency of public inquiries encourages confidence in a commission’s ability to effectively determine the facts associated with the issue. The process of conducting open and public hearings is an important component of the process of restoring public confidence.<sup>22</sup> The result of the unique functions, powers and processes granted to inquiries has generally led to significant and important policy recommendations that have helped shaped Canadian society.

### **Development of Public Inquiries in Canada: Provincial and Federal Legislation**

The present law of public inquiries in Canada is composed of the provisions in the various provincial acts governing inquiries<sup>23</sup>, the *Inquiries Act*<sup>24</sup>, judicial decisions interpreting those Acts, judicial decisions regarding the common law governing the review of agencies including public inquires, and several constitutional provisions defining the limits of the public inquiry process.

In 1971 the *Royal Commission into Civil Rights*<sup>25</sup> led to significant changes of the legislation governing public inquiries in Ontario. The 1971 amendments clarified the “rights and responsibilities of persons who may be brought before public inquiry” and

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<sup>21</sup> Ratushny p. 16

<sup>22</sup> Ratushny, p. 18.

<sup>23</sup> Currently all provinces have enacted legislation governing public inquiries for matters under their jurisdiction.

<sup>24</sup> R.S.C., 1985, c. I-11

<sup>25</sup> Royal Commission. *Royal Commission Inquiry Into Civil Rights*. Ottawa: Queen's Printer, 1968.

“the procedure to be followed by a commission in the conduct of that inquiry”.<sup>26</sup> Prior to 1971, Ontario followed the model adopted by many jurisdictions, which granted a commissioner the same power to enforce the attendance of witnesses and to compel testimony and produce documents as powers held by the court in civil cases.<sup>27</sup> The Commission’s recommendation led to amended provisions that limited and clearly set out the powers of inquiries to summons witnesses and to produce documents. Similar amendments were eventually integrated in many jurisdictions across Canada.

The Law Reform Commission of Canada emphasized the distinction between commissions that primarily advise and those that primarily investigate:

Broadly speaking, commissions of inquiry are of two types. There are those that advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And there are those that investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government. Many inquiries both advise and investigate... But almost every inquiry primarily either advises or investigates.<sup>28</sup>

While this thesis is primarily focused on investigative inquiries, it should be noted that, as the Law Commission Report observed, investigative inquiries also often implicitly “advise” through fact finding by making recommendations or highlighting systemic failures that require remediation.

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<sup>26</sup> Hon. A.F. Lawrence, in Ont. Leg. Deb., 4<sup>th</sup> Sess., 28<sup>th</sup> Leg. (June 24,1971), at 3179. (taken from LCO report p. 9)

<sup>27</sup> See the *Public Inquiries Act*, R.S.O. 1960, c 323, s. 2

<sup>28</sup> Law Reform Commission of Canada, *Administrative Law: Commissions of Inquiry*. Working Paper No. 17 (Ottawa: The Commission, 1977) at 13.



## Characteristics of Public Inquiries

As previously mentioned, public inquiries come in all federal and provincial shapes and sizes, ranging from far-reaching research commissions to reflective investigations into specific actions that contributed to a particular public crisis. This section examines the characteristics of these two types of inquiries, what their goals are and what processes they adopt to reach those goals.

Though federal and provincial statutes share many common features regarding the establishment and conduct of public inquiries, the Inquiry Act in BC is one of the few that clearly distinguishes between investigative (or hearing) and policy (or study) inquiries. The Act clearly distinguishes the powers of each type of inquiry. While other jurisdictions have chosen not to codify the distinction, a general discussion of the two types of inquiries is useful in examining the difference between their powers, functions and uses as whether explicitly recognized as such or simply used in these two ways the distinction is pervasive across the country. The distinction is especially important given the experience of a recent inquiry in BC. The Missing Women Commission of Inquiry, which will be examined in greater detail below, experienced significant challenges as a result of this distinction. Rather than viewing the two functions of the inquiry as complimentary, a number of organizations, individuals and interest groups viewed the policy study as inferior and as a result, boycotted the process.

## Policy Inquiries

Policy or advisory inquiries are focused almost entirely on public policy formulation. While they involve some of the general purposes of inquiries set out above they also engage the “social function” through the education of the public, which in turn often influences policy formulation. Participation and process have a significant impact on the outcome of inquiries of this kind. Often, policy inquiries involve gathering and conducting research as well as consulting “experts” in several relevant fields.<sup>29</sup> Policy inquiries are able to bring together diverse views and, as a result, hopefully elevate the level of discussion. Their interdisciplinary nature generally reflects the reality that the societal problems rarely fall into a single discipline.

Commentators have suggested that policy inquiries are often required to be more “political” than their investigative counterparts if their recommendations are to be adopted.<sup>30</sup> This means that policy inquiries will not only have to consult the public but, at the same time, raise the level of public discussion by educating the public. Public interest groups representing many narrow “interests” must be heard from and their information balanced against the consequences potential changes may have upon stakeholders.

As policy inquiries are, most often, focused on broad issues, the recommendations and policy changes that are developed are often incremental in nature and their impact is not often felt immediately. The secretary to the Macdonald Commission noted:

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<sup>29</sup> Ratushny, p. 50

<sup>30</sup> Ratushny, p. 50

I would not suggest that the main test of the usefulness of a commission is to tally up the recommendations that were adopted by government within the next five years and those that were not. Far more important is, “did the work of the commission influence the course of public policy?” a much more difficult question to answer. It is a deeper question and it relates to values and to public policy formation.<sup>31</sup>

While specific events may be the catalyst leading to the creation of policy inquiries, their origins have much deeper roots, requiring a more fundamental approach.<sup>32</sup> Some examples of policy inquiries that have taken place in Canada include:

- The tragedy of families being unable to afford medical treatment during the Great Depression, leading to a comprehensive system of public “medicare”<sup>33</sup>;
- The crisis in Confederation arising out of the political developments in Quebec in the 1960s leading to policies of bilingualism and multiculturalism<sup>34</sup>;
- Systemic discrimination in employment leading to policies of affirmative action in the form of “employment equity” and corresponding legislation<sup>35</sup>; and
- Social, economic and political issues relating to Aboriginal Peoples in Canada, in particular, the issue of self-government.<sup>36</sup>

Because specific events may stimulate the formation of an inquiry, many investigative inquiries also have a policy component, however, these tend to be more narrow and directly related to the specific event or conduct under investigation. For example, the Braidwood Inquiry investigated the tragic events that led to the death of a Polish immigrant at Vancouver’s international airport. However, it was also directed to inquire into and to report on the use of conducted energy weapons (Tasers) in British Columbia,

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<sup>31</sup> J.G. Godsoe, Q.C. “Comments on Inquiry Management” in A.P. Pross, I. Christie, & J.A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) at 72.

<sup>32</sup> Ratushny, p 417

<sup>33</sup> Royal Commission on Health Services (1961-1964)

<sup>34</sup> Royal Commission on Bilingualism and Biculturalism (1963-1967)

<sup>35</sup> Rosalie S. Abella and Canada. Royal Commission on Equality in Employment. *Equality in Employment: A Royal Commission Report*. Ottawa, ON: Supply and Services Canada, 1984.

<sup>36</sup> Royal Commission on Aboriginal Peoples (1991-96)

and to make recommendations respecting their appropriate use.<sup>37</sup> It has been suggested that inquiries “can be arranged on a continuum in terms of how they balance policy-making and investigation.”<sup>38</sup>

Research is the foundation of a policy inquiry.<sup>39</sup> As observed by Gerald LeDain the fact that policy inquiries serve of a broader “social function”, rather than investigating an act, that may be their most important contribution:

[A] commission... has certain things to say about government but it also has an effect on perceptions, attitudes and behaviours. Its general way of looking at things is probably more important to the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitude and responses of individuals at the various places at which they effect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction... Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process in the social sphere. The phenomenon is changing even while the inquiry is in progress.<sup>40</sup>

Policy inquiries are rarely focused on the actions of a specific individual or determining whether “misconduct” occurred. Rather the policy inquiry process provides an opportunity for the public to experience “direct democracy” through participation in the development of policies together with those who will most directly be affected by those policies.

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<sup>37</sup> Braidwood Commission on Conducted Energy Weapon Use (B.C.), T. R Braidwood. *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons*. Victoria, B.C.: Braidwood Commission on Conducted Energy Weapon Use, 2009 and Braidwood Commission on the Death of Robert Dziekanski (B.C.), et al. *Why?: The Robert Dziekanski Tragedy*. Vancouver, B.C.: Government of British Columbia, 2010.

<sup>38</sup> Liora Salter, “The Complex Relationship between Inquiries and Public Controversy” in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) at 186.

<sup>39</sup> Ratushny, p. 434

<sup>40</sup> Gerald E. Le Dain, “the Role of the Public Inquiry in our Constitutional System” in Jacob S. Ziegel, ed, *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973), at 85.

## Investigative Inquiries

Investigative commissions of inquiry are often established to investigate issues resulting from a tragedy or a political scandal. Unlike policy inquiries, investigative inquiries have the much more narrow focus of determining the facts of an event and, oftentimes how to prevent such an event from occurring in the future.

In BC, the *Public Inquiries Act* governs commissions of inquiries. Under this Act, the provincial government may appoint a commissioner by Order in Council to conduct an inquiry into and report on:

- (a) the state and management of the business, or any part of the business, of that ministry, or of any branch or institution of the executive government of British Columbia named in the order, whether inside or outside that ministry, and
- (b) the conduct of any person in the service of that ministry or of the branch or institution named, so far as it relates to the person's official duties.<sup>41</sup>

The commission of inquiry is empowered to investigate matters relevant to its mandate as defined in the Terms of Reference set out in the Order in Council, and to report its findings and recommendations (if required) to the government. To exceed the mandate, or to violate the requirements of the Act, is an error of jurisdiction on the part of the commission. A commission must also be aware of and operate within the bounds of other statutes, the common law<sup>42</sup> and the *Charter*. Its decisions are subject to judicial review.

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<sup>41</sup> *Inquiry Act*, R.S.B.C. 1996, c. 224, s. 1

<sup>42</sup> For example, the rules of natural justice have been held to apply in inquiries: *Re Yanover and Kiroff and the Queen* (1974), 6 O.R. (2d) 478 (C.A.) and *Fraternite Inter-Provinciale des Ouvriers en Electricite v. Office de la Construction du Quebec* (1983), 148 D.L.R. (3d) 626 (Que. C.A.) at 641-42

The Supreme Court of Canada opined on the functions of inquiries in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*. Specifically, it noted:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover “the truth”. Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.<sup>43</sup>

The inquiry envisioned by the Supreme Court above most closely resembles an investigative inquiry that is fact driven and generally conducted in public. In such an investigative inquiry the appointed commissioner is expected to get to the truth. There is an expectation amongst the public and government that the commissioner will use his or her powers to ensure that an inquiry is both comprehensive and impartial.<sup>44</sup>

In the context of the Westray Mine disaster, Justice Cory said: “Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of

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<sup>43</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 (S.C.C.) at para. 62.

<sup>44</sup> Gus van Harten, “Truth Before Punishment, A Defence of Public Inquiries.” (2003), 29 *Queen’s L.J.* 242- 282 at 245.

healing therapy for a community shocked and angered by a tragedy.”<sup>45</sup> Inquiries into the death of babies at Toronto’s Sick Children’s Hospital not only opened the issue up to the public but also highlighted the problems the state faced in attempting to solve the mysterious deaths and allowed the public to assess the effectiveness of the state’s actions.

As established above, some of the most common features of investigative inquiries are open hearings driven by the goal of fact finding. Generally these inquiries involve a greater participation of counsel, both on the part of the commission as well as for participants and witnesses. Additionally, as these inquiries often focus more on the actions of individuals and organizations there tend to be greater procedural protections demanded and put in place.

The nature and purpose of study and investigative inquiries are, as described above, different, unique and need to be taken into consideration when determining what the end goal of an inquiry is. Although many issues may require aspects of both study and investigative inquiries, it is important to ensure that the unique features of both are respected and utilized to their best potential. For example, investigative inquiries that rely on hearings to adduce evidence serve an important social function, namely providing the public with an open and transparent recording of evidence. Although it will be up to the Commissioner to determine the facts, the public testimony provides the public with some sense of the events that took place and may also provide more opportunity for community organizations and groups to ask questions of those involved.

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<sup>45</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 (S.C.C.) at para. 117.

The rules and procedures adopted by hearing commissions, especially in relation to the recording of evidence, tend to be more formalized. Study commissions, on the other hand, do not rely on evidence taken under oath and as a result are able to operate in much less formal way. Although related, it is important to recognize the distinct roles these two types of inquiries play, especially when discussing the rules and procedures which they employ.

### **The Roles of Public Inquiries in Canadian Society**

As described above, public inquiries perform a unique function in Canadian society. Public inquiries are unique in their design for despite having a political genesis they are still, independent and flexible. That said, there are a number of alternatives to public inquiries that governments may consider when deciding whether or not to establish a public inquiry.

The sections below examine alternatives to the establishment of a commission of inquiry to address problems with a high profile issue that has disturbed public confidence.

### **Legal alternative to criminal trial**

Many examining public inquiries have noted that the most common alternative to a public inquiry is a criminal trial.<sup>46</sup> Investigative inquiries and criminal trials are similar in

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<sup>46</sup> van Harten, p. 246



that both involve the exercise of coercive powers by agents of the state to investigate and reach conclusions about past events. However, inquiries differ from the criminal process insofar as their primary focus is not to determine a person's culpability, but to determine what happened and how to prevent such an event from happening again. Generally, inquiries have a broader mandate, and while they may look at a specific event, the objective is to look into the cause of past breakdowns and/or to make recommendations for future reform. This is reflected in the requirement that there be reasonable and probable grounds for commencing a criminal prosecution, and in the objective of criminal sentencing: to denounce unlawful conduct, to deter the offender and others from committing offences, to separate offenders from society, to rehabilitate and to make reparations for harm done.<sup>47</sup>

Justice Krever, in his Report of the Commission of Inquiry into the Confidentiality of Health Information, acknowledged the distinctive purpose of the criminal justice system, and consequently recommended that those whose conduct he criticized should not be prosecuted. He said:

Prosecutions would involve a diversion of energy from the main and important task at hand, namely that of the fostering of sensitivity in order to ensure that the infractions that were committed in the past are not repeated in the future ... To undertake prosecutions would smack of a search for scapegoats despite the fact that the climate in which the activities described in detail in these pages, and which have been carried on until recently, is something for which all of us should feel responsible.<sup>48</sup>

Issues of timing may arise, however, where there is both a criminal investigation and a commission of inquiry. Consequences vary depending on the path chosen by the

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<sup>47</sup> van Harten, p. 246 and fn 19

<sup>48</sup> Ontario, *The Hon. Horace Krever, Commissioner, Report of the Commission of Inquiry into the Confidentiality of Health Information, vol. 1* (Toronto: Queen's Printer, 1980) at 5.

inquiry. For example, in the Air India case, the time lost while awaiting completion of the criminal proceedings reduced the scope of the Commission's mandate.<sup>49</sup> The Supreme Court held that a compelling public interest required the commission of inquiry to proceed in spite of concurrent criminal proceedings.<sup>50</sup>

### **Political alternatives to governmental decision making**

Many public inquiries also serve an advisory function. While this is especially true of policy inquiries, investigative inquiries also often produce recommendations for policy reform.

Parliamentary committees are often put forward as an alternative to the policy functions of inquiries. Used since the late seventeenth century, parliamentary committees have a longstanding history of examining less controversial and time-consuming topics.

While they have a number of benefits, Parliamentary Committees are not without their faults. The committees are only established for the length of a parliamentary session and are made up of Members of Parliament or Members of the Legislative Assembly with many other demands on their time and who may also face pressure from their parties depending on the subject matter being examined.

A second policy alternative is to rely on the civil service to research and develop policy. This method has the advantage of utilizing a bureaucracy that likely has a significant amount of experience in drafting and implementing policy on a wide range of topics.

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<sup>49</sup> Ratushny, p. 122

<sup>50</sup> *Philips v. Nova Scotia (Commissions of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97

That said, critics have argued that the bureaucrats work under significant time constraints and may not be in touch with public opinion. Also, as they are employed by the government of the day, they may also have difficulty in developing policy contrary to the political mandate of the ruling party.<sup>51</sup>

Alternatives to both the investigative and policy functions of inquiries, while useful in certain contexts, rarely offer all of the functions of inquiries. This demonstrates the unique function public inquiries offer to governments. Not only can they provide an independent examination of a controversial issue, they are also able to investigate, research and develop policy alternatives to address the issues before them. In addition, the public nature of inquiries also serves the added functions of educating and involving the public. The flexibility and nimbleness of inquiries is crucial to their continued contribution to Canadian society. This is especially true of investigative or hearing commissions. Without flexible procedures in areas such as the collection of evidence and participation inquiries would, in essence, mimic courts, albeit without findings of liability.

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<sup>51</sup> Roberts, Tim, British Columbia. Legal Services Society. Schools Program, British Columbia, and Canada. *The Inquiry Process: Uranium Mining in British Columbia*. Vancouver: Schools Program, Legal Services Society of British Columbia, 1982 at p. 10

## Part 2 – Juridification and Due Process

The tendency towards an increase in formal law and process, or juridification, has had a significant impact on the development of administrative law, and law generally in Canada. Juridification has been described as being “the proliferation of law,” “the monopolization of the legal field by legal professionals,”<sup>52</sup> “the construction of judicial power,” and the “expansion of judicial power.”<sup>53</sup> Juridification has been noted as the hallmark of a constitutional democracy, a representation of the triumph of the rule of law over despotism.<sup>54</sup>

One of the primary characteristics of the past forty years of administrative law in Canada can have been the proliferation of the demand for due process. Commentators have gone so far as to characterize it as a “due process explosion”.<sup>55</sup> Developments in common law have led to a significant increase in procedural protections the State is required to provide to those with whom it deals.<sup>56</sup> Generally, the greater focus on procedural fairness in administrative processes has been regarded as a positive development as it is an indispensable part of sound administrative practices. However, concerns have also been raised regarding the extent to which procedural fairness

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<sup>52</sup> See Penny Brooker, “The Juridification of Alternative Dispute Resolution”, *Anglo American Law Review*, Vol. XX (1999), pp. 1-36, p. 1 n. 1 from Blicher, Lars Chr. and Anders Molander “What is Juridification?” Working Paper. No. 14, March 2005 Centre of European Studies.

<sup>53</sup> See Alec Stone Sweet, “Judicialization and the Construction of Governance”, in Martin Shapiro and Alec Stone Sweet *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002, p. 71: “I will use the term ‘judicialization’ as shorthand for... the construction of judicial power.” from Blicher, Lars Chr. and Anders Molander “What is Juridification?” Working Paper. No. 14, March 2005 Centre of European Studies.

<sup>54</sup> Blicher, Lars Chr. and Anders Molander “What is Juridification?” Working Paper. No. 14, March 2005 Centre of European Studies.

<sup>55</sup> A term coined by Henry J. Friendly in “Some Kind of Hearing” (1975) 123 U. Pa. L.Rev. 1267.

<sup>56</sup> Mullan, p. 2

obligations have been imposed on or adopted by some decision-makers.<sup>57</sup>

Commentators have pointed out that tribunals are almost indistinguishable from regular courts in their procedures and that they function in the manner of a traditional adversarial adjudicative model.<sup>58</sup>

In Part 1 I examined the unique purpose and process of public inquiries. Specifically, I highlighted the fact that inquiries are neither a civil nor a criminal trial, nor should they be analogized to either. Justice Cory elaborated on this difference:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.<sup>59</sup>

Given that the administrative law process, and public inquiries in particular, was initially envisioned as an alternative to the traditional adversarial court process to ensure greater accessibility, timeliness and efficient decision-making, questions have been raised as to whether procedures designed and adopted in adversarial proceedings compromise these goals. Have the procedurally bound tribunals and inquiries come to a point where their intended purpose is being hampered?

This part will explore the history of the increase of due process in criminal and administrative law. First, the juridification of criminal law will be reviewed. Though

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<sup>57</sup> Mullan, p. 3.

<sup>58</sup> Mullan, p.3.

<sup>59</sup> *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, para 34.

criminal law may seem like an odd comparison with administrative law, its development from a trial by ordeal to the adversarial process we are familiar with today provides a good example of the impacts of juridification on the legal system. The second topic examined in this part will shift back to administrative law and look at the trend towards juridification in many areas of administrative law. The part will then explore some of the key features of the juridification of public inquiries, specifically adversarialism and the rise of lawyers, the role of evidence and the role of the commissioner. Finally, three public inquiries will be examined with a focus on the challenges they faced in these areas.

### **Juridification in other areas of law**

From a historical perspective, the trend towards juridification in administrative law is not unprecedented. The criminal trial underwent a similar evolution in the late eighteenth century, shifting from a lawyer-free process to one dominated by lawyers and more stringent procedures. Throughout history public inquiries and criminal trials have overlapped. Often in cases in which a tragic event has taken place there is also an element of criminality. While the criminal deed is examined and adjudicated by the courts, the larger issue of preventing future incidents often remains.

Public inquiries may be seen as a something of a historical response to the juridified criminal trial. Public inquiries provide a public arena for the community to examine the issues that a criminal trial is unable to address – the questions of why the event happened and how to prevent it from happening again. Given the tendency towards

juridification in administrative law and the close connection between criminal trials and public inquiries, the development of the adversarial criminal trial provides an interesting comparison to the juridification of public inquiries. Below, the evolution of the criminal trial is used as an example of how the juridification of the criminal hearing process came to be dominated by lawyers. This provides an interesting comparison for inquiries as lawyers are becoming increasingly involved in many aspects of inquiries and are, like in criminal trials, changing the way in which evidence and information is being provided and portrayed. Relying on the work of legal historian John Langbein, the following section examines lawyer-free English criminal procedure of the sixteenth and seventeenth century transition to the adversarial criminal procedure that developed in the eighteenth century and the English civil procedure that was permeated with lawyers, evidence intensive, and passive.

### **Evolution of the Criminal Trial**

English criminal procedure was, for centuries, organized around the principle that the accused should not be represented by counsel. The whole process was, in fact, designed to be lawyer free. In many cases the victim of the crime served as the prosecutors, or in cases of homicide either the victim's family or the local coroner would stand in. The form of altercation imagined in this trial procedure, as described by Langbein, is one in which the victim, acting as the prosecution, testifies under oath to his version of events. The accused, speaking unsworn, replies to the accused

testimony, although not as a witness.<sup>60</sup> At the conclusion of the altercation between the accuser and the accused, the trial judge, generally with little instruction, left the decision to the jurors. Into the 1690s, criminal trials in England forbade the presence of defence counsel for serious crimes, including treason and felony. Prosecution counsel was permitted in all cases, but generally was only employed for treason cases. By the 1790s, the criminal trial had undergone dramatic transformation, as counsel for the defence and prosecution had become primary characters.<sup>61</sup>

The rule against defense counsel in felony trials was a matter of fact, rather than law. Initially developed around the “accused speaks” ethos where it was thought that the accused, if innocent, would clear himself through “the Simplicity and Innocence” of his responses.<sup>62</sup> The courts of the eighteenth believed that denying defense counsel promoted truthful outcomes and avoided the artificial defences that would result in having others speak for the accused. Criminal defendants were, in theory, permitted to engage counsel to make submissions of law at the pleadings or arraignment phases. In general, pleading was about law and trials focused overwhelmingly on facts.<sup>63</sup> The trial judge was often tasked with noticing legal flaws in criminal prosecution as so few defendants chose to engage counsel. Coke suggested that this process was, in fact, superior to one in which the accused relied on counsel, stating that “it is far better for a prisoner to have a Judge’s opinion for him, than many counsellors at the Bar. The Judges... have a special care of the indictment and to see that the same be good in all

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<sup>60</sup> Langbein, p. 14

<sup>61</sup> Langbein, p. 2

<sup>62</sup> Langbein, p. 2

<sup>63</sup> Langbein, p. 26



respects; and that justice be done to the party.”<sup>64</sup> The judge’s role as a sort of counsel for the accused was, however, problematic when one considers the judge’s other responsibilities, such as ruling on matters of law, probing suspect defensive evidence, advising the jury as to how to apply the law and summing up the evidence to the jury.

Treason cases, however, saw much less assistance being offered to defendants by judges. Langbein points to a number of reported treason cases of the sixteenth and seventeenth centuries in which Judges were sometimes callous in their treatment of defendants.<sup>65</sup> Judges, who held office at the pleasure of the crown, were faced with very partisan prosecutions. When John Udall asked for assistance at his trial regarding his right to challenge jurors, the judge is said to have replied: “Nay, I am not to tell you that. I sit to judge, and not to give you counsel.”<sup>66</sup> By the end of the seventeenth century, the bias against defendants by the subservient bench in treason trials provoked palpable discomfort in the political classes. For the most part, judges who presided over treason trials were handpicked for the particular trial. Furthermore, the trials most often took place in London and under the close eye of the crown who had a direct interest in the outcome of the trial.<sup>67</sup> The fear that judges could not be trusted to be impartial in treason cases was a precipitating factor in the movement to enact the *Treason Trials Act* of 1696, which allowed treason defendant to have the assistance of trial counsel. This would be the first crack in the rule against defense counsel.<sup>68</sup>

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<sup>64</sup> *R. v. Walter Thomas*, 2 *Bulstrode* 147, 80 *Eng. Rep.* 1022 (K.B. 1613) from Langbein, p. 28.

<sup>65</sup> Langbein, p. 32

<sup>66</sup> *R. u. John Udall*, 1 *St. Tr.* 1271,1278 (Croydon Assizes 1590) from Langbein p. 32

<sup>67</sup> Langbein, p. 33

<sup>68</sup> Langbein, p. 33

The adversarial criminal trial procedure involving defense counsel was initially designed as a special-purpose procedure employed by the wealthy to defend against “trumped-up” charges of treason.<sup>69</sup> In a relatively short amount of time, defence counsel became commonplace at trials. As Langbein notes, the judges who initiated the process by admitting defense counsel into the felony trial did not intend to start a revolution, rather their plan was to allow defense counsel for the limited purpose of helping the accused examine and cross-examine witnesses. The judges believed that by continuing to prevent defense counsel from stating the defendant’s case or interpreting the evidence to the jury, the “accused speaks” trial would be preserved. Defense counsel, however, worked a structural change in the criminal trial by breaking up the two roles of defending and speaking the merits, both of which had previously been the responsibility of the accused. Defense counsel articulated and enforced the prosecutorial burdens of production and proof and as a result largely silenced the accused. As a result of these developments, the privilege against self-incrimination and the beyond-reasonable-doubt standard of proof were established.<sup>70</sup> While the old altercation trial had been understood as an opportunity for the accused to speak in person to the charges and evidence against him, the adversarial criminal trial became an opportunity for defense counsel to test the prosecution. The emergence of strict rules of evidence at this time, a development that I will address below, was likely a result of the pressure placed on the courts by the developing role of lawyers.

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<sup>69</sup> Langbein, p. 3

<sup>70</sup> Langbein, p. 5

As a result of the shift away from the altercation trial where the accused and the victim were two of the central figures of the process, the function of the criminal trial also changed. While the punitive and social order functions remained, that is, the accused, if found guilty continues to face consequences for his actions, the opportunity for the alleged victim to be involved in the process has been greatly diminished. The result has limited the functions that criminal trial is able serve. No longer is it an opportunity for the accused to speak to the community which they are alleged to have harmed.

Due to their adversarial nature, criminal prosecutions did not always provide the best means to settle a dispute. It was not long before it became evident that the criminal and civil trial format was not conducive to all areas of dispute resolution. Administrative law and the tribunal system arose as an alternative to the juridified court system, offering flexible and less stringent procedures.<sup>71</sup> Unlike courts, administrative bodies were intended to be able to formulate and apply alternative dispute resolution processes. The result of the juridification and the more limited functions of the criminal trial meant that inquiries were now one of the few institutions that could offer the community an opportunity to hear more information about an issue or event and have the opportunity to be involved. Commissions, with their more flexible processes and procedures were able to provide an open forum for information to be presented and exchanged.

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<sup>71</sup> Laverne Jacobs "A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation." (2010) 28 *Windsor Y.B. Access Just.* 285.

## The “due process explosion” in administrative law

Administrative processes thus offered themselves as a kind of alternative to the strictures of the criminal trial. Designed to be more flexible, accessible, expeditious and informal than court proceedings, the earliest adjudicative tribunals were given broad powers to conduct inquiries and were relieved from the obligations to follow the strict rules of evidence.<sup>72</sup> In recent years, however, a similar process of juridification has also befallen that alternative system. In 1971, a shift in administrative law occurred when Ontario introduced the *Statutory Powers Procedure Act*. The Act provided for an adjudicative, adversarial form of hearing in the style of regular courts, though without all of the procedural requirements. Instead, it employed processes more akin to standard administrative processes, including flexible rules of evidence, the concept of official notice and the ability to restrict representation by counsel.<sup>73</sup> A result of recommendations from the McRuer Commission, a study of government law and institutions in Ontario, the Act applied to administrative tribunals that at the time would have been characterized as more adjudicative than administrative in nature.<sup>74</sup> Furthermore, applying the standard of natural justice and procedural fairness, judicial review urged administrative tribunal procedure back to the adversarial court-like model.<sup>75</sup>

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<sup>72</sup> Ballagh, Margot M.D. “The Benefits and Challenges of Active Adjudication: Best Practices for Tribunals with Inquisitorial Model, Using Non-adversarial Models.” *Advanced Administrative Law and Practice*. Sheraton Hotel, Ottawa, Ontario. October 30, 2013. Conference Presentation, p. 10.

<sup>73</sup> Mullan, p. 4

<sup>74</sup> James McRuer. Ontario, Royal Commission of Inquiry into Civil Rights (Toronto: Queen’s Printer), 1968

<sup>75</sup> Ballagh, p. 9.

The “due process explosion” was not isolated to statutory developments and criminal law; administrative law has also undergone a dramatic shift towards greater procedural protections. In 1979 the Supreme Court of Canada held that a probationary police constable was entitled at common law to procedural fairness before he was dismissed. In *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, the Supreme Court lowered the common law’s threshold for being able to assert a claim to procedural fairness, thus creating an easier process for making complaints about procedural fairness. The impact of this decision rippled through a number of areas where procedural fairness claims on the basis of interest did not previously exist, including: immigrants seeking status in Canada,<sup>76</sup> inmates<sup>77</sup>, parolees<sup>78</sup> and those seeking tenure at universities.<sup>79</sup>

The doctrine articulated in the 1979 *Nicholson* case implies a “right to present one’s point of view” when some interest is threatened. *Nicholson’s* overall ambition was the recognition that common law hearing entitlements should be more broadly allocated. It also suggested a concurrent acceptance that, within the new world of procedural fairness, a concept of “one model fits all” could not prevail and requirements of specific decision-making contexts must be reflected in a flexible approach to the scope of procedural rights.<sup>80</sup>

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<sup>76</sup> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177

<sup>77</sup> *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.

<sup>78</sup> *Gough v. Canada (National Parole Board)* (1990), 45 Admin. L.R. 304 (F.C.T.D.), aff’d. (1991), 47 Admin. L.R. 226 (F.C.A.).

<sup>79</sup> *Ruiperez v. Lakehead University* (1981), 130 D.L.R. (3d) 427 (Ont. Div. Ct.), aff’d. (1983), 147 D.L.R. (3d) 154 (Ont. C.A.).

<sup>80</sup> Roach, p. 9

*Nicholson's* recognition of the need to adapt procedures, the process and the purpose of that process to the situation is at the foundation of administrative law. The administrative tribunal system was designed as a more efficient and less technically complicated alternative to the traditional civil and criminal court system. Unfortunately, it appears as though administrators are less willing to embrace this notion of flexibility. When the Board resumed its consideration of Nicholson's status, despite being equipped with the discretion to proceed in writing, the Board afforded Nicholson an in-person hearing at which he was entitled to be represented by counsel, to cross-examine witnesses and to present evidence.<sup>81</sup>

More specific examples of the courts contribution to the "due process explosion" can be seen throughout a number of judicial review decisions. In *Napoli v. British Columbia (Workers' Compensation Board)* the courts confirmed a requirement that all relevant adverse material was to be accessible.<sup>82</sup> The *Stinchcombe*<sup>83</sup> rules of full pre-trial discovery have been accepted or implemented by some courts and agencies where there is some similarity to the charging of a person with an offence.<sup>84</sup> In Ontario, for example, the Human Rights Commission is obliged to follow these rules.<sup>85</sup> The in-person or oral hearing is increasingly becoming the norm whenever there are issues of credibility. Additionally, the presence of lawyers along with the extent of their involvement has also increased. As processes are becoming more complex, individuals are less confident in navigating administrative processes alone. This despite the fact

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<sup>81</sup> See the facts as recorded in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1983), 11 O.A.C. 65, at para. 3 (Div. Ct.)

<sup>82</sup> *Napoli v. British Columbia (Workers' Compensation Board)* (1981), 126 D.L.R. (3d) 179 (B.C.C.A.)

<sup>83</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

<sup>84</sup> David Mullan "Tribunals Imitating Courts – Foolish Flattery or Sound Policy?" (Spring, 2005) 28 *Dalhousie L. J.* 1

<sup>85</sup> David Mullan "Tribunals Imitating Courts – Foolish Flattery or Sound Policy?" (Spring, 2005) 28 *Dalhousie L. J.* 1

that the Ontario *Statutory Powers and Procedure Act* and the Alberta *Administrative Procedures Act*, along with other similar legislation across the country, required administrative adjudications to provide reasons for the ultimate decision, a requirement confirmed by the Supreme Court confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*.<sup>86</sup>

Throughout the “due process explosion” discussed above the courts continued to suggest that the requirements of procedural fairness were flexible. In *Irvine*, the court explained that the predominantly functional nature of procedural fairness and natural justice is underlined by the fact that they apply, depending on the circumstances. Specifically it noted that “fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved.”<sup>87</sup> As far back as 1940 the American courts recognised that the origins and objectives of most administrative agencies should “preclude wholesale transportation of the rules of procedure, trial and review which have evolved from the history and experience of courts”.<sup>88</sup>

However, as evidenced by the examples above, despite the Court’s recognition of the flexibility of fairness the general trend in administrative law has been towards more regulated processes. In the wake of *Nicholson* the tone of administrative adjudication changed. Informality was less acceptable as many participants chose to be represented by counsel, and demanded stricter rules of disclosure and evidence, and

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<sup>86</sup> *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

<sup>87</sup> *Irvine v. Restrictive Trade Practices Comm. (Can.)*, [1987] 1 S.C.R. 181, 24 Admin. L.R. 91, 34 C.C.C. (3d) 481, 15 C.P.R. (3d) 289, 41 D.L.R. (4th) 429, 74 N.R. 33 at S.C.R. 211 (per Estey J.).

<sup>88</sup> Mullan, p 9, quoting *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 at 143 (1940).

more formal oral or in-person hearings. Lawyers, familiar with civil and criminal litigation, insisted on the adherence or, at least a reference, to those standards.<sup>89</sup>

It would be inaccurate to suggest that all of these developments have had a negative impact on administrative law and/or procedural fairness. Some changes, such as the duty to give reasons, were long overdue. However, the degree to which many agencies and governments have adopted the courts prescription for procedural fairness has resulted in the foundation of administrative law, namely its flexibility, being eroded. Administrative bodies and tribunals are now in a position where they are either required or strongly encouraged to follow formal procedures, similar to those of courts, without the same support mechanisms and training.

In recent years, there has been a growing recognition on the part of many administrative bodies as to the challenges facing those involved in administrative processes, in particular access to justice (cost, time, legal assistance) and power imbalances often evident at tribunal proceedings. As a result, there has been a notable swing away from the adversarial models by many tribunals seeking a model that reduces the impact of these challenges. The new model views tribunals as the adjudicative segment of a broader administrative process for implementing policy, the purpose of which is to achieve right decisions efficiently.

Tribunals, in large part, are moving back toward less formality, more flexibility, facilitation of party participation, use of any special expertise effectively, and less delay through “active adjudication.” Essentially, as Ballagh points out, tribunals while

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<sup>89</sup> Mullan, p. 8



recognizing the procedural fairness requirements and Western tradition of adversarial procedures are looking towards a more inquisitorial model.<sup>90</sup> Furthermore, tribunals are increasingly rejecting the adversarial/inquisitorial dichotomy and instead seeking a “third way.”<sup>91</sup> As Green and Sossin highlight, the “third way” or active adjudication is both non-adversarial and non-inquisitorial, instead the goal is “problem-solving” and fulfilling the tribunal’s statutory mandate rather than “truth-seeking.”<sup>92</sup> Tribunals across Canada have begun using a combination of adversarial and inquisitorial processes in part as a response to access to justice concerns and power imbalances in administrative proceedings. Both tribunals and inquiries struggle with the balance between appropriate control of the proceedings and descending too deeply into the arena. The courts have indicated that, in general, an adjudicator’s conduct will be determined on the traditional reasonable apprehension of bias test, specifically whether a decision maker appears to have either taken sides or prejudged facts, evidence or credibility.<sup>93</sup>

A question is therefore raised as to what degree can public inquiries employ active adjudication when their mandate is most often focused on truth-seeking? Inquiries are faced with many of the same challenges as administrative tribunals, however, exist for a different purpose.

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<sup>90</sup> Ballagh, p. 10.

<sup>91</sup> Lorne Sossin and Samantha Green “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy.” in *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspective*. (2013), p. 75.

<sup>92</sup> Sossin and Green, p. 75

<sup>93</sup> Freya Kristjanson and Sharon Naipaul. “Active Adjudication or Entering the Arena: How Much is Too Much?” *Canadian Journal of Administrative Law & Practice* 24.2 (Jun 2011): 201-224, at 223.

Although many administrative bodies operate in relative obscurity, the nature of public inquiries means that they are often subject to much greater public and media attention.<sup>94</sup> As a result of this public attention, inquiries are often subject to greater demands from participants for more juridified processes. Although their enabling statutes generally empower commissioners with a relatively large degree of flexibility over their practices and procedures, few inquiries have chosen to depart significantly from those employed in traditional criminal and civil trials.

One of the more practical results is that the cost of calling an inquiry has escalated dramatically. Mr. Justice Estey recalled that he has “seen the cost of an inquiry go from \$60,000 for the Steel Inquiry, which including the printing of the report, to \$1,400,000 for the Banking Inquiry.”<sup>95</sup> Significantly, he noted that more than half of the cost in the Banking Inquiry was paid to lawyers. Although some evolution of the inquiry process is inevitable, the transference or adoption of criminal and civil procedures is not the answer. The escalating costs are preventing inquiries from being called, the formal processes are restricting who is able to participate and the increased presence of lawyers is shifting the focus of inquiries away from truth.

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<sup>94</sup> Justice Grange, in his work examining the role of lawyer at public inquiries he only recalled two “rows with lawyers.” He noted that they were not serious but “they both related to media.” See Grange, S.G.M. “How Should Lawyers and the Legal Profession Adapt?” 12 *Dalhousie L.J.* 151 1989-1990.

<sup>95</sup> Estey, Willard. “The Use and Abuse of Inquiries: Do They Serve a Policy Purpose.” 12 *Dalhousie L.J.* 209 1989-1990, at 210

## Key features of the juridification of Public inquiries

From this story about the juridification of criminal and administrative law, one can extract three principal features or aspects: adversarialism and the rise of lawyers, the increased role of evidence, and a more passive role for the finder of fact. These all map in interesting ways on the public inquiry and its process of juridification.

Inquiries are often called in the wake of events that may have also been subject to criminal prosecutions or were considered for criminal prosecution. Where the two overlap, the call for greater procedural safeguards during the inquiry process is most pronounced. It is, however, important to remember that inquiries, no matter what the subject, are not substitutes for criminal trials. In prophetic words, the Ontario Court of Appeal warned “[a] public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes.” Inquiries are empowered with “coercive procedure” which is “quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility.”<sup>96</sup> However, as discussed above, the push towards greater procedural fairness and rules mimicking those of trials in administrative law has impacted on inquiries. We will see that they have been the engines of juridification in public inquiries.

The possibility for collateral damage to an individual or organization’s reputation as inquiries carry out their mandate is real. One often cited risk associated with inquiries is the negative impact inquiries may have on an individual’s reputation. The Ontario Law Reform Commission commented on this risk in their 1992 report, stating:

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<sup>96</sup> Roach, p. 2 Citing *Nelles v. Grange*, (1984), 42 C.P.C. 109

Although critics have been ready to condemn the high cost of public inquiries, it bears emphasizing that the question whether such inquiries are worth the cost raises considerations beyond the merely financial. Increasingly, the question also involves a balance between the benefits of a public inquiry on the one hand, and, on the other hand, the costs associated with interfering with the privacy, reputation, and legal interests of individuals.<sup>97</sup>

Inquiries have the power to compel individuals and organizations to produce any and all documents relevant to the matter under investigation; this has caused significant concern among inquiry participants. This concern is often heightened by the fact that inquiries are often subject to significant and extensive media coverage. Furthermore, inquiries often look like a trial insofar as they often take place in a courtroom full of lawyers and are presided over by a commissioner, who is often a former judge. Witnesses and participants in inquiries wary of this risk have increasingly relied on lawyers to protect themselves when appearing before or participating in an inquiry. The prevalence of lawyers at inquiries has become so entrenched that interested parties have chosen not to participate in circumstances where funding is not available. For example, the British Columbia Civil Rights Association withdrew from the Missing Women Commission of Inquiry when the B.C. government refused to provide funding for lawyers. Michael Vonn, policy director for the BCCLA, stated that “it is simply impossible to participate in this inquiry without counsel.”<sup>98</sup>

The increased presence of lawyers, as representatives for witnesses and interested parties, has had a dramatic effect on the procedures adopted by inquiries. Lawyers, accustomed to the strict rules employed in both civil and criminal procedures, were quick to demand similar protections for their clients at inquiries. Lawyers pointed to the

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<sup>97</sup> Ontario Law Reform Commission, *Report on Public Inquiries* (1992) at 19.

<sup>98</sup> Neal Hall, “BCCLA and Amnesty International join growing groups boycotting Missing Women inquiry.” *Vancouver Sun*, October 6, 2011.

sparingly utilized powers provided to commissions to make findings of misconduct and demanded that their clients be afforded a number of opportunities to defend against any allegations or potential allegations. While these findings do not carry with them penalties such as fines or incarceration, they undeniably have the potential to cause significant harm to an individual's reputation. As a result, rights such as representation, notice of any potential allegations, the opportunity to respond to any allegations and a number of evidentiary restrictions have increasingly been incorporated in the practices and procedures of public inquiries.

### **Conduct of Lawyers at Inquiries**

The cooperation of lawyers and parties of an inquiry is fundamental to the successful operation of a hearing. Commission counsel is often the initial point of contact for both lawyers and parties and is looked to in order to establish a pattern of resolving procedural issues prior to hearings and an atmosphere and practice of fairness to witnesses. The Commissioner of the Niagara Regional Police Force Inquiry felt so strongly about the adversarial tone set by some participants that he included a chapter in his report entitled "Why So Long? Problems and Frustrations of an Adversarial Inquiry." The commissioner wrote:

Most counsel were responsible and co-operative. Unfortunately there was a marked lack of co-operation and openness on the part of a small minority which greatly prolonged the Inquiry. This was displayed to a greater or lesser degree with almost every witness, almost every day, and on almost every subject.<sup>99</sup>

The commissioner further explained the challenges he faced in the cross-examination techniques used by some counsel.

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<sup>99</sup> Report of the Niagara Regional Police Force Inquiry at 345.

Witnesses were cross-examined endlessly, apparently in the hope that if counsel kept digging, something favourable to their client would eventually emerge. Attempts to limit cross-examination resulted in long arguments in justification of the questioning, with suggestions that limiting cross-examination would give the appearance of a cover-up. As a result, it was often necessary for Commission counsel to call several witnesses to prove a point where, in ordinary circumstances, one would have done.<sup>100</sup>

More broadly, the commissioner noted that “[m]uch of the Inquiry was conducted by some of the parties on an adversarial basis, taking shots at each other in the arena of the Commission.”<sup>101</sup> Commissioner Colter noted that the conduct could not “be explained simply on the basis that counsel responsible were more familiar with adversarial proceedings,”<sup>102</sup> instead the commissioner viewed their actions as “a symptom of an underlying problem” which plagued the Niagara Police Force. Although the commissioner noted other influences that affected counsel’s behaviour at the hearings, their familiarity with adversarial hearings appears to have had a negative impact. In both of his reports on the terms of reference for the Mulroney-Schreiber Inquiry, David Johnson refers to an concern expressed in the Rae Report that an inquiry not become “a circus of lawyers.”<sup>103</sup>

The dominance of lawyers at inquiries is evident when in the sheer number of lawyers present in many hearing rooms. At the start of the Phase 2 of the Braidwood Commission, 12 organizations and individuals chose to be represented by counsel. At times this meant up to 20 lawyers being present in the hearing room. Midway through the commission three individuals applied to be participants, increasing the number of

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<sup>100</sup> Report of the Niagara Regional Police Force Inquiry at 345.

<sup>101</sup> Report of the Niagara Regional Police Force Inquiry at 349.

<sup>103</sup> Ratushny, p. 199

lawyers present. Of these lawyers, approximately 10 - 12 represented the RCMP or Canadian Government in some capacity.

In 1967, the court in *Re Shulman* confirmed the right to examine one's own witness and to cross-examine the witnesses called by commission counsel and others.<sup>104</sup> The court held:

Cross-examination, wherever it is permitted, is not to be a limited cross-examination but is to be cross-examination upon all matters relevant to eliciting the truth or accuracy of the allegations or statements made. Similarly, any person affected by allegations made before the learned Commissioner should be accorded the privilege of examination as a witness by his own counsel and should be subject to a right of cross-examination, not only by counsel for the Commission but by any person affected by the evidence of that witness.<sup>105</sup>

Legislation governing public inquiries has permitted witnesses and those with interests closely tied to the issues related to the inquiry to be represented before the commission by counsel. Like any lawyer acting on behalf of a client, counsel for inquiry participants attempt to ensure that their interests are not adversely affected. While the importance of an individual's right to counsel is not being questioned, the result of this right is often the presence of many lawyers in an inquiry hearing room all poised to cross-examine a witness. The evidence adduced through cross-examination may not always be in the interest of the inquiry, which is to determine the facts of the matter at hand and develop recommendations. Most often inquiries are established in order to determine what happened and develop recommendations in order to address any issues or faults that may be uncovered, they are not, in contrast to criminal trials, established to determine an individual or organization's culpability. As a result, any efforts by counsel to obscure

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<sup>104</sup> *Re Sulman* 119671 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.).

<sup>105</sup> *Re Shulman* (no para nos)

facts or information presented to an inquiry may impact the factual record upon which the inquiry will base its recommendations. This, in turn, may mean that certain issues or faults are not adequately reflected in the factual record and the recommendations may fail to fully address the issues.

Tactics are employed by lawyers in cross-examinations both in traditional trials and increasingly before inquiries are often in order to “win” the hearing room struggle.

Winning often involves tactics that distort or suppress the truth.<sup>106</sup>

### Findings of Misconduct

Participants and their counsel will often point to the possibility of findings of misconduct in order to demand greater procedural protections and rights.

The “section 13 process” derived from the section of the Federal *Inquiry Act* bearing that number involves the right to have notice of and to respond to an allegation of misconduct which the commission or commissioners may make in the report. Although section 13 and its equivalents in provincial statutes are written in relatively simple language, they have proven difficult to manage in practice. Section 13 requires that no report shall be made against any persons until reasonable notice has been given to them of the alleged misconduct and they have been given an opportunity to be heard.

One of the early cases examining section 13 was *Laundreville v. R (No. 2)*, in which the Federal Court Trial Division examined the Rand Inquiry’s report delivered in August of

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<sup>106</sup> Langbein, p. 1



1966. The publication of the Inquiry's report ultimately led to the plaintiff's resignation as a judge. The allegations against Mr. Landreville related to his acquisition of shares in Northern Ontario Natural Gas at a time when he was the mayor of the City of Sudbury. An inquiry was established to examine issues of misconduct surrounding the acquisition of the shares in question. Chief Justice Rand's mandate was broad enough to encompass allegations of misconduct beyond the mere acquisition of shares, however, it was not specific in this connection. In his report, Commissioner Rand found that Mr. Landreville was guilty of "serious misconduct" by reason of the manner in which he gave evidence as a witness in certain judicial proceedings arising out of the North Ontario Natural Gas affair.<sup>107</sup> Collier J. found that the terms of reference of the Rand Commission were broad enough to encompass the findings of gross contempt, which the Commissioner had concluded flowed from Mr. Landreville's evidence in the judicial proceedings, but he also concluded there was no allegation made, at any time, against him with respect to this specific conduct. As such, Mr. Landreville was given no notice nor opportunity to respond as contemplated by section 13.

The difficulty facing commissions of inquiry is finding the balance between fairness and procedural compliance with the requirements under section 13. If reasonable notice is given during the inquiry, either by specifics in its terms of references or through allegations raised during the course of the course of the inquiry, does special notice need to be given under section 13? Furthermore, if specific notice is required, when must it be delivered? If notice is given just before the report is issued, the opportunity to be heard would be nothing more than an illusion.

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<sup>107</sup> Scott, p. 144

Responding to the potential damage to the reputation of an individual involved in an inquiry and the importance of an individual's reputation led the Supreme Court of Canada, in the *Krever* decision, to hold that a commissioner owes a duty of procedural fairness to individuals.<sup>108</sup> The court was examining the actions of the Krever Inquiry. Following the conclusion of evidence at the inquiry, commission counsel invited all parties involved in the inquiry to make confidential, *ex parte*, submissions to commission counsel outlining the detailed findings of misconduct which the parties intended to submit to the commissioner. Commission counsel, in turn reviewed the notices to determine whether to include such allegations in any section 13 notices that may be issued by the commissioner. A large number of notices were subsequently issued to individuals and organizations, many of which resulted in judicial reviews seeking to quash the notices before the report was released. The judicial review applications alleged the commissioner did not have the jurisdiction to form conclusions of law which related to potential civil or criminal liability; that delivering the notices at the end of the hearings violated procedural fairness; and that commission counsel should not participate in the preparation of the final report as they had assisted in preparing the notices and thereby had taken a position against the applications.<sup>109</sup> The Supreme Court dismissed the judicial reviews, holding that the applications were premature and that it would only be in rare occasions that judicial review would result in preventing a report from being published.

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<sup>108</sup> *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System – Krever Commission)*, [1997] F.C. No. 17

<sup>109</sup> Doody, p. 28-29

The Supreme Court provided some guidance to commissions regarding their findings. It held that commissions of inquiry may and often must make findings of fact, from which appropriate conclusions may be drawn as to whether there has been misconduct and who appears to be responsible for it.<sup>110</sup> However, the court was careful to warn that any conclusions reached by a commissioner should not duplicate the wording defining a specific offence in the *Criminal Code* and furthermore that the same care should be taken to avoid making evaluations in terms that are used by courts to express findings of civil liability. Writing for the unanimous Court, Justice Cory stated:

Findings of misconduct should not be the principal focus of this kind of public inquiry. Rather, they should be made only in those circumstances where they are required to carry out the mandate of the inquiry. A public inquiry was never intended to be used as a means of finding criminal or civil liability. No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural safeguards which prevail at a trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability not only should not be made, they cannot be made.

Lawyers, however, are often quick to note that the distinction between a commissioner's findings of fact that give rise to "misconduct" and a conclusion that an individual has done or omitted to do something which is either criminal conduct or would give rise to civil liability is more apparent than real. As a result, lawyers attempting to ensure their client's reputation is not harmed by their involvement in a commission often employ adversarial techniques, such as intense cross-examination of witnesses and demanding more strict rules of evidence be employed.

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<sup>110</sup> Doody, p. 30

## The Role of Evidence at Inquiries

As David Paciocco explains, few cases “ultimately turn on disagreements about the law and what it requires,” rather most “come down to disputes about facts.”<sup>111</sup> Commissions of inquiries are, for the most part, called to determine what happened and are centred around facts. Whether examining the causes leading to a mine collapse, water contamination, or the incongruence between estimated and actual salmon runs, facts are central to the work of inquiries. The law of evidence determines what information, documents, and data can be considered by an adjudicator, how it can be proved and the use to which it can be put.

Most Inquiries are not required by statute to follow the rules of procedure or evidence of criminal or civil trials. Although their attention must often be directed to the past, ultimately their responsibility lies in focusing on the future to ensure any learned failures will never occur again. The rules of evidence employed in civil, criminal and administrative tribunals are designed to ensure the trier of fact has access to evidence in order to determine liability, and are influenced by the fact that one party has the burden to demonstrate that liability. These rules were, in part, developed as a result of the adversarial process, so as to protect the rights of the accused. Inquiries, in which focus lies on facts in order to develop recommendations, are not required to adhere to the same strict admissibility requirements. Inquiries do not have the same kind of balancing of liberties and interests that impel the law of evidence. The law of evidence is not about determining facts but rather excluding facts.

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<sup>111</sup> David Paciocco. *The Law of Evidence, 6<sup>th</sup> Ed.* (Toronto: Irwin Law, 2011), p. 1.

Public inquiries are designed to be more inquisitorial than adversarial. Justice O'Connor, in his examination of public inquiries, warned of the risks that follow when inquiries begin to operate like trials:

Unlike criminal or civil trials, inquiries do not need to be conducted within the confines of the fixed rules of practice and procedures. Inquiries are not trials: they are investigations. They do not result in the determination of rights or liabilities; they result in findings of fact and/or recommendations. Subject to what I say below about the need for procedural fairness for those who may be affected by the report of an inquiry, a commissioner has a very broad discretion to craft the rules and procedures necessary to carry out his or her mandate.<sup>112</sup>

Inquiries, as noted by Justice O'Connor, are at their core investigations. Called in the wake of a tragedy or significant public concern, the end result is not a determination of liability or rights, rather policy recommendations. As a result, the processes used to collect information and evidence need not follow the same strict evidentiary rules required in civil and criminal matters. Recognizing this difference, Justice O'Connor continued:

Traditionally, fact-finding inquiries have used public, evidentiary, court-like hearings to gather and test information. Commission counsel collects and review relevant documents, interview witnesses and then introduce the relevant information through sworn testimony in a court-like setting. Lawyers for parties with an interest in the inquiry are granted standing and are entitled to cross-examine witnesses, and make closing arguments.

These types of hearings can be very complex, time consuming and expensive. When public inquiries are criticized, criticisms are frequently directed at the inefficiency of the process, the time involved, and the expense incurred. Indeed, criticisms of this nature are sometimes used as arguments against holding an

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<sup>112</sup> Associate Chief Justice Dennis R. O'Connor & Freya Kristjanson, "Some Observations on Public Inquiries" (Canadian Institute for the Administration of Justice, Annual Conference, Halifax, NS, 10 October 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.ca>> [Some Observations on Public Inquiries].

inquiry in circumstances which otherwise warrant an independent examination and report.<sup>113</sup>

The inefficiency of process described above by Justice O'Connor is, in large part, due to juridification influence over public inquiries. Attempts by commissions to adopt procedures designed for a very different end goal, specifically criminal or civil liability, has negatively impacted the conduct of inquiries. Criminal trials are asked to examine one very specific incident or set of incidents. Public inquiries, on the other hand, are often established to examine a much broader issue or set of issues. The broad scope of many inquiries often requires a large amount of evidence to be considered by the Commission. In criminal trials evidence is most often introduced through oral evidence. In public inquiries, while oral evidence of witnesses is important, the number of witnesses that would be required to provide the Commission with the necessary facts is often unmanageable. Even when the witness list can be limited to a reasonable number of witnesses, the number of participant counsel permitted to cross-examine witnesses has significant effects not only on the amount of time required for each witness but also the quality of evidence being produced. The evidentiary rules are, thus, not particularly well suited for a process whose primary goal is fact-finding rather than the determination of liability.

In the *Erebus* case, Lord Diplock described the contrast between civil litigation and an inquiry:

Where facts are in dispute in civil litigation conducted under the common law system of procedure, the Judge has to decide where, on the balance of probabilities, he

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<sup>113</sup> Associate Chief Justice Dennis R. O'Connor & Freya Kristjanson, "Some Observations on Public Inquiries" (Canadian Institute for the Administration of Justice, Annual Conference, Halifax, NS, 10 October 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.ca>> [Some Observations on Public Inquiries].

thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth...<sup>114</sup>

In civil litigation, as described above, the judge generally plays a passive role with a focus on determining liability. In inquiries, however, the commissioner is able to play a more direct role and as a result in less emphasis being placed on the rules of evidence. For example, in the Erebus Inquiry the commissioner was required to inquire into and report on the matter in question, in this case the cause of a crash sightseeing plane. His focus, therefore, was on acquiring as much information and drawing on as many facts as possible. In doing so Lord Diplock stated:

[I]t is inevitable, particularly if there are neither survivors or eye-witnesses of the crash, that the emergence of facts, and the realisation of what part, if any, they played in causing the disaster and of their relative importance, should be more elusive and less orderly, as one unanticipated piece of evidence suggests to the Commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be worth while to explore; where, whether in the result, the exploration when pursued leads only to a dead end or... The discovery of other facts which throw a fresh light on what actually happened and why it happened.<sup>115</sup>

Depending on the particular finding and its importance, and notwithstanding that compliance with the strict rules of evidence is not required, cogent and reliable evidence may be required by the Commission before any findings are made.<sup>116</sup> What findings require more formal evidence, however, is a determination that must be made by the Commissioner. Most statutory schemes in Canada recognize that, at a minimum, the application of conventional evidentiary privileges represent protections that remain in

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<sup>114</sup> *Erebus*, para 666

<sup>115</sup> *Erebus*, para 666

<sup>116</sup> Scott, p. 140 12 Dalhousie L.J. 133 1989-1990

force. For example, under section 9 of Alberta's *Public Inquiries Act*, every person appearing before an inquiry has the same privileges as a witness in court.

Finding the balance between procedural fairness and expediency falls to the commissioner. However, Commissioners, who are most often current or former judges, who are surrounded by lawyers familiar with civil and criminal procedures often fall back on the procedures they are familiar with from civil and criminal trials, and the rules of evidence adopted by commissions are beginning to reflect this.

### **The Commissioner recedes**

The impact of judicialization of administrative law on public inquiries is multi-faceted. The adoption of court-like procedures has meant that inquiries have shifted away from the original aim of policy development and fact-finding to one more concerned with rules of evidence, cross-examination times, and rights of participants and witnesses. These trends are accompanied by a shift in the role of the commissioner.

Commissioners derive their authority entirely from the *Inquiries Act* and the terms of reference established for each commission. The Act and terms of reference define the jurisdiction of a commission and impose legal constraints as well as authority.

Furthermore, commissioners are also legally constrained by the principle of fairness.

As discussed in Part 1, the distinction between adversarial and inquisitorial proceedings is blurred in inquiries. Judicial trials are conducted in an adversarial manner, where each side is responsible for assembling its own evidence, presenting it as favourably as



possible and for emphasizing the other side's weaknesses. In these proceedings, judges play a passive role. Commissioners are not legally required to play a passive role; rather inquiries have been described as inquisitorial processes that "require the commissioner to conduct an active search for the evidence."<sup>117</sup> Indeed, this is one of the virtues and possibilities inherent in the inquiries: the commissioner's ability to take an active role in managing the direction of inquiry and the questions being asked. The fact-finding and advisory aims of inquiries are not well suited to the adversarial process utilised in civil and criminal trials. Rather, as Joan Dwyer noted "adversarial procedures for dealing with evidence may be unjust and render proceedings ineffective because they confuse and intimidate witnesses rather than assist a court or tribunal in determining the truth of that witness' evidence."<sup>118</sup>

In civil and criminal proceedings judges are barred from conducting general investigations into related issues. For example, in *R v. Elliot*<sup>119</sup> due to the conduct of the judge a new trial was ordered by the Court of Appeal. Justice Paul Cosgrove oversaw a trial where the accused was charged with murder and dismemberment of the dead body. During the trial, the judge had allowed a number of defence motions that led to the transformation of the criminal trial into an investigation into the conduct of police and those involved in the prosecution. Justice Cosgrove found misconduct on the part of over fifteen police officers, Crown counsel, officials of the attorney general's office, solicitor general, immigration and the Ontario Centre of Forensic Sciences. The findings included: witness tampering, non-disclosure, perjury, deceitful destruction and

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<sup>117</sup> Ratushny, p. 158

<sup>118</sup> Dwyer, p. 259.

<sup>119</sup> (2003), 181 C.C.C. (3d) 118

fabrication of evidence, false and misleading submissions and other serious misconduct. The Court of Appeal found that there was no factual or legal founding for his conclusions and set aside his findings.<sup>120</sup> Commissioners of inquiries are equipped with much broader mandates and discretionary coercive powers and, as such, they are in a position to achieve actively certain ends not structurally available to judges. That said, Commissioners must also find the appropriate balance between investigative zeal and fairness to those involved.

The Supreme Court noted the risks that face commissioners of inquiries, stating:

Again, an interest in promoting a general cause may distort the judgment of even the most judicious person. The danger of distorted perception is especially serious for those who obtain ego-gratification by feeling righteous after being perceived as such. Most public inquiries are about rooting something ever [one] thinks is bad, “drug-use in sports, political corruption, bad police behaviour” and a commissioner can be carried away with the general enthusiasm for reform to the point that individual conduct cannot be fairly evaluated.<sup>121</sup>

It is possible that one expression of the effort to limit the possibility of the commissioner being carried away with his or her mandate has been to employ former or sitting judges to conduct inquiries. As commissions of inquiry, like all legal processes, require public confidence, the person appointed, as commissioner must have some stature within the community. Supported by guarantees of judicial tenure, financial security and administrative independence the office of a judge carries with it a degree of public confidence.

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<sup>120</sup> Ratushny, pp. 166-167

<sup>121</sup> *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System – Krever Commission)*, [1997] F.C. No. 17 at para 32

Legal qualifications and experience managing and conducting hearings are assets to commissioners of investigative inquiries. However, hearings of a commission of inquiry require greater flexibility than those at a criminal trial and the commissioner must be willing and able to adapt procedural fairness to achieve expeditious hearings.

The familiarity with traditional trials may not, however, always be an asset for commissioners. For example, the commissioner of the Cornwall Inquiry, chose to move directly into court-like hearings for “contextual” testimony from eleven expert witnesses. In theory, this type of evidence could have been submitted to the inquiry through written reports. Similarly, the evidence of nineteen corporate officials representing a number of public institutions could also have been received outside of the hearing room, especially as the inquiry’s terms of reference explicitly permitted the inquiry to rely on “factual overview reports.” In contrast, the Goudge Inquiry took a very different approach to evidence. Although governed by more systemic terms of reference, the Goudge Inquiry’s reliance on “overview reports” provided the Commission with the necessary evidence and allowed it to conclude its report within seventeen months.

Commissioners, however, are caught in a difficult position. In cases where they have attempted to regulate the hearing process more closely, for example by limiting cross-examination, counsel have raised objections which in turn often lead to longer delays. Commissioner Corlter noted “attempts to limit cross-examination resulted in long arguments in justification of the questioning, with suggestions that limiting cross-examination would give the appearance of a cover-up.”<sup>122</sup> The reaction of counsel in situations such as this is reminiscent of those to judges in early English criminal trials.

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<sup>122</sup> Niagara Police Force Report at 345.

As previously discussed, in the absence of lawyers, involved parties often looked to judges for legal assistance. This assistance, however, became the basis for significant criticism, leading judges to play less and less of a role. Commissioners of inquiries appear to be facing similar pressures from lawyers appearing before them and are often less involved in the hearing process.

The social function of public inquiries turns, in many ways, on an active commissioner. The judicialization and the increased presence and reliance on lawyers, however, are placing greater and greater pressure on commissioners to take a more passive role. The result is, just like the process of the juridification found in the criminal trial, an erosion of the process initially designed as an alternative to the juridified criminal and civil trial.

Based on this study of criminal and administrative law and the review of some dynamics in commissions of inquiry a number of juridification trends are evident; specifically, the trend towards increased reliance on lawyers and the greater presence of trial processes at inquiries. The processes that juridified and features of juridification in criminal law have migrated and imposed themselves on public inquiries, though as I explained in Part 1, the purposes of the criminal trial and public inquiries are so different. The benefits of public inquiries, namely the public education and participation portions are at risk if the patterns of juridification continue to occur. We now turn to examples of two recent inquiries to examine whether these patterns of juridification have occurred and if so, whether they have impeded on the realization of the goals and purposes of inquiries.

Recently administrative law has also witnessed a push back against juridification. Although adversarial model of adjudication has long been the gold standard in the Western world, it is not always a one-size-fits-all solution. Administrative law has begun to recognize that the unique challenges it faces may require a deviation or modification from the classic adversarial process in order for the tribunal to make a fair and informed decision.<sup>123</sup> Active adjudication has begun to take a more prevalent role in tribunal work along with a movement towards a more inquisitorial model. Inquiries are often faced with similar pressures as though encountered by administrative tribunals such as unrepresented or lay-represented appellants or participants, limited budgets, and time constraints and in the future may also face similar pressures to rely more heavily on the flexibility of procedure permitted under their governing statute.

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<sup>123</sup> Ballagh, p. 28.

### Part 3 - Case studies

Different inquiries have adopted varying processes to meet the unique demands of their mandates while attempting to balance the juridification pressures. Case studies demonstrate how frustration of the public purposes of inquiries can occur through juridification but also provide examples of methods of avoiding or mitigating these effects. In Part 2 the pressure of juridification on public inquiries and administrative processes generally was examined. Also noted was the recognition within the administrative law community that administrative processes are not always served best by adversarial procedures. Courts have demonstrated their commitment to ensuring procedural fairness requirements are met while still permitting tribunals and inquiries flexibility in the creation of their procedures where the legislative intent was not to create an exclusively adversarial tribunal.<sup>124</sup>

Below are two case studies that exhibit how commissioners have navigated the demands of flexibility and procedural fairness in their inquiries. The first inquiry, the Walkerton Commission of Inquiry was governed by Ontario's *Public Inquiry Act* and called in the wake of a tragedy in a small community in Ontario. The Missing Women Commission of Inquiry was similarly established under the provincial inquiries act but this time in British Columbia and called largely in response to community outcry regarding the investigation and response to the disappearance and murder of women who lived or frequented Vancouver's downtown eastside.

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<sup>124</sup> Lorne Sossin and Samantha Green "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy." in *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspective*. (2013), p. 82.

These two inquiries were chosen as they exhibit many similarities in their structure, general subject matter, and size, however, despite their many similarities they had very different experiences. Both inquiries faced significant local and national media attention, required both fact-finding and policy development and dealt with procedural challenges. Additionally, both inquiries were tasked with both investigative and policy functions, involved many participants and witnesses, and attracted significant media attention.

As will be discussed below, the Walkerton inquiry was able to engage and involve the community so as to gain their trust and respect. The Commission made concerted efforts to reach out to the community in order to ensure a good degree of trust and participation. Ten years later, the Missing Women Inquiry, on the other hand, faced many challenges in its attempts to secure the community's participation and support. Constrained by both statutory requirements regarding methods of adducing evidence, budgetary and time limitations, and historical scepticism on the part of the community, the Missing Women Inquiry was criticised from almost every angle and faced nearly daily protests during the course of its hearing.

The manner with which each commission addressed issues they faced and conducted their work provides interesting insight into possible options for resolving the tension between flexibility and conformity to traditional processes.

### **The Walkerton Inquiry**

In May 2000 a small town in southern Ontario, Walkerton, experienced a devastating tragedy. The city's drinking water system became contaminated with a deadly bacteria resulting in the death of seven people and more than 2,300 people becoming ill.

Following the tragedy the government of Ontario responded to the many pressing and important questions by calling an inquiry. Specifically the Ontario government directed the Commission to inquire into the following:

(a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Escherichia coli* bacteria were found to be present in the town's water supply;

(b) the cause of these events including the effect, if any, of government policies, procedures and practices; and

(c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water,

in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.<sup>125</sup>

The Commissioner, Justice Dennis O'Connor, chose to divide the inquiry into two parts. The first focused only on the events in Walkerton. The terms of reference directed the Commission to inquire into the circumstances that caused the outbreak, including the effects, if any, of government policies, procedures and practices. Part 2 went further and examined other matters the Commission considered necessary to ensure the future safety of Ontario's drinking water.

The Commission held Part 1 hearings in the town of Walkerton. The Commission and its staff spent over 9 months in Walkerton conducting hearings, speaking with members of the community and hearing the stories and suffering endured by those who were affected. In July 2000 the Commission convened four days of hearings in Walkerton and invited the members of the community to come and talk about the impact of the outbreak on their lives. Over 50 presentations by individuals, groups and families were

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<sup>125</sup> Order in Council 1170/2000, s. 2



made. The Commission provided the presenters with the option of sharing their stories in public or in private. The high value the Commission placed on the people of Walkerton and their experience cannot be overlooked.

The Rules of Procedure and Practice were drafted by the Commission and based on the principles of thoroughness, expedition, openness to the public and fairness.<sup>126</sup> The rules outlined the basis on which parties would be granted standing, their rights during the hearing, and the rights of witnesses. Parties were only permitted to comment on the rules once they had been granted standing.

Over the course of the hearings the Commission entered 447 exhibits, containing more than 3,000 documents. Over the course of a 9 month period 95 hearing days were conducted and 114 witnesses appeared.<sup>127</sup>

The Walkerton Inquiry has often been cited as an example of a successful inquiry. Allan Manson and David Mullan concluded that “throughout the course of the Walkerton Inquiry and its immediate aftermath, there has been the general sense that this was a commission of inquiry that worked particularly well.”<sup>128</sup> In their article, relied on a number of reasons to support this conclusion. For example, the fact that there were not criticisms, by the public or participants, of the process and no legal challenges were raised in court.

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<sup>126</sup> Walkerton report, 1, p. 472.

<sup>127</sup> Walkerton, part 1, p. 484

<sup>128</sup> Allan Manson & David Mullan, “Lessons from Walkerton” in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) at 501.

## Lawyers

One of the key members of staff involved in a commission of inquiry is commission counsel. Their primary responsibility is to represent the public interest at the inquiry. It is their duty to ensure that all issues bearing on the public interest are brought to the Commissioner's attention. The role of commission counsel is neither adversarial nor partisan.

Individuals and organisations granted standing in Part 1 of the inquiry were also afforded a number of procedural rights under the Public Inquiries Act and the Rules of Procedure and Practice. This included the right to counsel. Additionally, they were also granted:

- Access to documents collected by the Commission
- Advance notice of documents that were proposed to be introduced into evidence
- Advance provision of witness statements prepared by the Commission
- A place a counsel table
- The opportunity to suggest witnesses to be called by Commission counsel or an opportunity to apply to the Commissioner to lead the evidence of a particular witness
- The opportunity to cross-examine witnesses on matters relevant to the basis upon which standing was granted; and
- The opportunity to make closing statements.

## Possibility of criminal charges

Commissioner O'Connor's mandate specifically provided that the Commission "shall ensure that it does not interfere with any ongoing criminal investigation."<sup>129</sup> The issues with the Walkerton water supply were widely reported before and during the

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<sup>129</sup> OIC 1170/2000, s. 3

commission's hearings and the on-going criminal investigation into the conduct of Stan Koebel was of keen interest to the media.

As a result, when Mr. Koebel was called to give evidence, the question arose whether requiring his testimony at the Inquiry would adversely affect his right to a fair trial, if he were charged. Mr. Koebel's testimony was expected to be widely reported in the media and as a result the possibility of tainting pools of jurors across the province was also a real concern. In response, Commission counsel notified counsel for both the Province of Ontario and Mr. Koebel that they could apply to the Commissioner for a publication ban on Mr. Koebel's evidence. However, in the end no application was made and the Commissioner was not required to make a decision whether a publication ban would be appropriate.

In the final report, Justice O'Connor wrote about how an inquiry must respond to the concerns of the public. Quoting Justice Cory, Justice O'Connor highlighted the importance of having an open hearing for the people of Walkerton.

Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. I channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement.<sup>130</sup>

Justice Cory's words are especially relevant to inquiries, such as Walkerton and Cornwall (discussed below) where individuals involved also faced the possibility of criminal charges. It highlights the role of inquiries being that of reform and improvement rather than blame and retribution.

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<sup>130</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, at para 117.

The commissioner noted in his final report that counsel for the parties “performed splendidly.”<sup>131</sup> While the commissioner noted that he considered imposing time limits on cross-examination, he chose not to. He did, however, routinely ask counsel to provide estimates of time and generally held them to their estimates. The Commissioner noted that “counsel for the parties kept their cross-examinations focused, thus avoiding considerable duplication and delay. In an era in which criticism of the legal profession is common, it is heartening to be able to say that counsel in this inquiry performed splendidly.”<sup>132</sup>

## Evidence

In order to obtain the evidence it required the Commission made 17 “detailed” document requests to various government ministries and departments over the course of approximately six months. Prior to complying with the requests, the government requested that the Commission obtain search warrants from the Ontario Superior Court for each of the request. The Commission and government agreed on the mechanism of a “friendly” search warrant as a means of accommodating the government’s concerns regarding privacy interests and third-party notification requirements under the *Freedom of Information and Protection of Privacy Act*, while ensuring that the Commission would receive the relevant documents.<sup>133</sup>

Document production was conducted in waves and took place from August 2000 until approximately February 2001. In his final report, however, the Commissioner noted that

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<sup>131</sup> Walkerton Inquiry (Ont.), & O'Connor, D. R. (2002). *Report of the Walkerton Inquiry*. Toronto: Ontario Ministry of the Attorney General, p. 490 (Walkerton report)

<sup>132</sup> Walkerton report, p. 490.

<sup>133</sup> Walkerton report p. 485

production did not in fact end until after the conclusion of the scheduled Part 1 hearings, in November 2001. Although the Commissioner recognizes that he would have preferred to have received certain document production earlier, he recognized that the process required substantial effort on the part of government staff and counsel.

Document review was undertaken by Commission staff and required a special process be implemented to search and review the documents. Hard copies of the documents were reviewed in order to identify groups of documents that should be electronically scanned into the Commission's database for more detailed review.

At the conclusion of the document production process the Commission obtained certifications of production from senior government personnel for each government ministry or agency that produced documents. Recognizing that although Commission counsel and investigators were thorough in attempting to ensure that all relevant documents were obtained, the Inquiry was reliant on the word of the government that all documents were produced. The certificates confirmed that all documents relevant to the subject matter of the inquiry were produced.

### **Role of the Commissioner**

It has been suggested that one of the most distinguishing features of the Walkerton Inquiry was the Commissioner's sensitivity to the Walkerton community. Shortly after the Commissioner had assembled his team, they began meeting with representatives of local groups in Walkerton. Within two months of the establishment of the commission four days of public meetings were held. The public meetings were held in order to allow

the commission to hear directly from those who wished to tell their story about the on-going impact of the tragedy on their lives.<sup>134</sup>

Although the Commissioner conducted the inquiry with great sensitivity, it appears he held on to some of the formalities more common in the court system. He declined any public comment except when presiding over the proceedings. His silence extended long after the inquiry concluded, as he declined to comment on the Walkerton inquiry for Mullan and Manson's article referred to above.

The Walkerton Inquiry offers an insight into the efforts of a commission to mitigate the pressures of juridification. Commissioner O'Connor was able to work within the legislative framework to ensure that he and his team had the necessary access to the community affected by the tragedy to hear directly from them about their experience in a less formal setting and also conduct hearings that respected and acknowledged more formal rules of evidence. Commissioner O'Connor was able to achieve this balance, in part, due to the way Ontario's public inquiry legislation is drafted. The legislation does not separate the investigative and policy functions of inquiries. The Missing Women Commission of Inquiry, conducted in BC under the relatively new *Public Inquiry Act*, on the other hand, had a very different experience.

### **The Missing Women Commission of Inquiry**

The Missing Women Commission of Inquiry (MWCi) was established through an Order in Council issued by the government of British Columbia on September 27, 2010. The

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<sup>134</sup> Walkerton report at p. 512.

events leading to the MWCI were nothing short of shocking and horrific. Since the early 1990s, women had been reported missing from Vancouver's downtown eastside. Many of the women reported missing were part of the most marginalized groups of society – many were Aboriginal, many were sex trade workers and many were dealing with substance abuse issues and were particularly vulnerable to abuse and violence.

Community groups and individuals raised their concerns and complaints regarding the women who were missing with the Vancouver Police Department. The community's fears of a serial killer were proven to be well founded when in 2002 Robert William Pickton was arrested and charged with 27 counts of first degree murder. He was eventually tried and convicted of 6 counts of second degree murder and sentenced to 6 terms of life imprisonment. Evidence heard at Pickton's trial suggests that he may have been responsible for the deaths of as many as 49 women.

The Government of British Columbia set the following Terms of Reference for the Inquiry:

#### Terms of Reference

4(a) to conduct hearings, in or near the City of Vancouver, to inquire into and make findings of fact respecting the conduct of the missing women investigations;

(b) consistent with the British Columbia (Attorney General) v.

Davies, 2009 BCCA 337, to inquire into and make findings of fact respecting the decision of the Criminal Justice Branch on January

27, 1998, to enter a stay of proceedings on charges against Robert

William Pickton of attempted murder, assault with a weapon, forcible confinement and aggravated assault;

(c) to recommend changes considered necessary respecting the initiation and conduct of investigations in British Columbia of missing women and suspected multiple homicides;

(d) to recommend changes considered necessary respecting homicide investigations in British Columbia by more than one investigating organization, including the co-ordination of those investigations;

(e) to submit a final report to the Attorney General or before December 31, 2011.

The Order-in-Council defined missing women investigations as “the investigations conducted between January 23, 1997 and February 5, 2002 by police forces in British Columbia respecting women reported missing from the Downtown Eastside in the city of Vancouver.”

The Commission, under the Terms of Reference, examined a broad range of issues: missing women investigations, the Crown’s decision to stay a proceeding, homicide investigations and coordination of investigations by more than one investigating organization. The unique and broad range of issues led the inquiry to explore different approaches for community involvement. While initially established as a hearing commission, in March 2011 the government approved the Commissioner’s request to extend the Commission’s powers by revising its mandate to include the powers of a study commission as well.

However, unlike the support and acceptance experienced by the Walkerton inquiry, the MWCI was met with criticism and hostility. Shortly after being appointed to head the Commission, Justice Wally Oppal, QC, a former Attorney General for the province and Court of Appeal judge, was called on to recuse himself for comments he made to the media nearly a decade earlier. Grand Chief Stewart Phillip, of the Union of B.C. Indian



Chiefs was especially harsh in his comments regarding the appointment, calling him a “Liberal Insider” and the “worst possible choice.”<sup>135</sup>

These criticisms were only the beginning of the challenges the MWCI would face. The inquiry was also subject to intense scrutiny when former employees alleged “they encountered a “highly sexualized” workplace environment where male staff members made offensive comments about women and their bodies.”<sup>136</sup> An independent investigator was appointed and following a lengthy review, they were unable to find any evidence to corroborate the anonymous allegations.

In the end, however, the Commission was able to complete its hearings, conduct a number of public policy forums and produce a four-volume report.

## Evidence

MWCI faced an enormous task in its examination of an investigation that spanned nearly a decade. The number of police officers, police agencies, witnesses, and experts involved in the investigations created a large body of evidence for the Inquiry to examine. One of the primary reasons the Commission requested the extension of its mandate to include study powers was to enable it to consult with the communities in a less formal manner. The study and hearing commissions ran parallel and utilised the same staff and resources. Although very different in terms of their processes and procedures, both faced challenges regarding the collection and use of evidence.

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<sup>135</sup> Ian Mulgrew “Province’s parsimony silences needed voices at missing women’s inquiry.” Vancouver Sun, July 26, 2011.

<sup>136</sup> Brian Hutchinson, “Missing Women inquiry beset by ‘sexism’: Ex-staff” National Post, April 3, 2012

## *Hearing Commission*

One of the most significant evidentiary issues facing the hearing commission was ensuring the confidentiality of the documents was maintained as appropriate. However, the requirements of confidentiality had to be balanced with the Inquiry's role of providing the public information. So as to ensure that sensitive information was not released to the public, the Commission devised a system so that when exhibits were first entered they were marked as "NR" or non-redacted so that they could be vetted pursuant to various confidentiality protocols. Once redactions were made, the NR was removed and the exhibit was posted to the Commission's website.

A number of formal evidentiary applications and rulings were made during the course of the Inquiry. The first of these was an application for protective measures to enable and encourage vulnerable witnesses, including current or former sex-trade workers in the downtown eastside and victims of sexual assault, to provide evidence at the Inquiry's evidentiary hearings. The order requested:

- An automatic publication ban preventing the publication of any information that could reveal the identity of a vulnerable witnesses;
- Provisions allowing a witness to provide evidence by way of affidavit, without the possibility of cross-examination, with objections going to the weight of the evidence on balance of the whole.<sup>137</sup>

The requested publication ban was analogous to s. 486.4(1) of the *Criminal Code* which provides a mandatory ban on publication of information tending to identify the complainants of sexual assault. The Commissioner held that "nothing short of strong, clear proactive protection measures sought in this application will facilitate vulnerable

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<sup>137</sup> Ruling on vulnerable witness application, MWCI website (rulings).

witnesses to provide their evidence to the Commission.”<sup>138</sup> Commissioner Oppal, in granting the application, recognised the public interest in hearing from those persons who would otherwise be intimidated and distrustful of the system. In utilizing the flexible procedures available to it, the Commission sought to strike the appropriate balance between ensuring protection and confidentiality of vulnerable witnesses and the rights of individuals who may be negatively impacted by the evidence of those witnesses.

### *Study Commission*

The study Commission was established with the main objectives of:

- Gathering information concerning current police initiatives and on-going challenges in the police protection of vulnerable women and suspected multiple homicides; and
- Gathering input on potential recommendations on issues within the Commission mandate.

The study commission relied on three means of obtaining information: consultations, publication of policy discussion reports to facilitate public submissions, and research and interviews.

One of the challenges that faced the policy forums was the manner in which the evidence was to be dealt with. Organizations and individuals who were unable to participate in the hearing commission due to lack of funding questioned whether the information acquired through the study format would be given the same attention and credence as evidence obtained through the hearing commission. The study commission, unable to take evidence under oath, was seen by some as a secondary and inferior process.

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<sup>138</sup> Ruling, Vulnerable Witness Protection. [www.missingwomeninquiry.ca](http://www.missingwomeninquiry.ca)

Through consultations and research the Commission identified six themes that were to be addressed in policy forums. Along with the in person policy forums, invitations to make written submissions were also sent out and encouraged. In total, sixteen reports were prepared and published on the Commission’s website. These reports were created in order to encourage and facilitate dialogue with experts and the community. In addition to the reports, the commission also prepared a number of question and answer videos with Dr. Melina Buckley, policy counsel for the Commission, to discuss the issues that were to be addressed at the forums.

Although the information obtained at the policy forums could not be considered “evidence” like that obtained through the hearing commission, and thus could not be relied on for the fact finding portion, the Commissioner noted in his final report that “the study commission process made a substantial contribution to my ability to carry out paragraphs 4c and 4d of my terms of reference.”<sup>139</sup>

## Lawyers

One of the most significant obstacles facing the MWCI was the provincial government’s decision to deny the funding requests and recommendations made by the Commissioner. Fourteen groups withdrew from the MWCI following the government’s decision not to accept the Commissioner’s recommendation that lawyers for those groups receive funding. The funding would have gone towards lawyers to enable them

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<sup>139</sup> British Columbia. Missing Women Commission of Inquiry. & Oppal, W. T. (2012). *Forsaken: The report of the Missing Women Commission of Inquiry*. Vancouver: Missing Women Commission of Inquiry, Part 4, p. 26. (Forsaken)

to cross-examine witnesses and make submissions to the commissions. Unfortunately, most of the groups that did not receive funding were those representing the interests of members of the downtown eastside community and civil rights organizations such as Amnesty International and the British Columbia Civil Liberties Association.

Speaking to the press shortly after the decision not to provide funding was released, Alex Neve, secretary general of Amnesty International Canada, said his group had been calling on governments to establish a public inquiry for years and deeply regretted not being able to participate. He noted that Amnesty International had never pulled out of an inquiry before, however, it felt that “the inequity had effectively derailed the process.”<sup>140</sup> Michael Vonn, speaking for BCCLA, noted that the imbalance of numbers was clear. Following the government’s decision not to provide funding to a number of organizations, 14 groups withdrew from the commission. At that time, the various state and police actors were set to have 14 lawyers to defend their interests before the inquiry.

Commissioner Oppal, recognizing the need to have community and aboriginal interests represented at the inquiry, appointed two independent counsel to act on behalf of the downtown eastside community and aboriginal women’s interests respectively.<sup>141</sup>

Although this move was not embraced by all, it was seen as an attempt by the Commission to ensure that despite the government’s decision to deny funding to participants, the interests and understanding of those communities were presented at the inquiry.

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<sup>140</sup> Neal Hall, “BCCLA and Amnesty International join growing list of groups boycotting Missing Women inquiry” Vancouver Sun, October 6, 2011.

<sup>141</sup> Press Release, August 10, 2011 – Missing Women Commission Appoints Two Independent Lawyers; Two Others to Participate Pro Bono, [missingwomeninquiry.ca](http://missingwomeninquiry.ca)

The tendency towards adversarial advocacy was also evident at the Inquiry. On several occasions the lawyer representing the families of a number of missing and murdered women exchanged heated comments with the Commissioner. For example, following the cross-examination of a witness, a misunderstanding regarding the evidence resulted in negative statements being made regarding that witness. Following a clarifying statement being made by a lawyer for the witness, Commissioner Oppal challenged the lawyer whose questions led to the misunderstanding and his cross-examination style in general:

You're cross-examining a witness and you should know the answer that you're going to get in cross-examination and it was left hanging. That's all I'm saying to you. All I'm saying is that I want fairness in cross-examination. We treat people with fairness when they come into a courtroom and those things have to be asked in a proper way so incorrect impressions aren't left after the witness leaves. Similarly in that vein, I don't interrupt cross-examination, as I said, I trust the lawyers. You asked Catherine Astin, the nurse, what the value of her home is. Can you tell me what the relevance of that is? Again, I left you alone and I left here scratching my head, wondering why it was relevant for this commission of inquiry to hear whether Catherine Astin lives in a two million dollar home. What was the purpose of that?

MR. WARD: Again, you're drawing my attention back to events that occurred sometime ago, but my recollection on that -- and I'm content to face any interrogation about my conduct --<sup>142</sup>

In the final report, the Commissioner once again had strong words for Mr Ward. On a number of occasions throughout the course of the inquiry Mr Ward had suggested that the police departments were involved in a “cover up” regarding the investigation into the missing and murdered women. In response to those allegations, the Commissioner stated:

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<sup>142</sup> Missing Women Commission of Inquiry, Transcript, November 2, 2011, p. 9-10 Ins 9-6

I conclude that these allegations are completely unsupported and unsubstantiated by any evidence and there is no air of reality to them, even as a theory. I am not even clear on what theory Mr. Ward is purporting to advance. I am sympathetic with the VPD's submissions that Mr. Ward's position is ludicrous, flippant, unsupported by evidence and unprofessional. His comments are reckless. I do not entertain highly speculative and harmful allegations that are unsupported by evidence or a rational theory.<sup>143</sup>

The impact of Commissioner Oppal's words led to a reaction from many, including the BCCLA. BCCLA raised concerns that the comments made in the report could "chill public interest lawyers from asking difficult questions during future public inquiries."<sup>144</sup> BCCLA further noted that the lawyer in question was one of only four lawyers working on behalf of non-police and non-government groups, facing, at times, more than twenty police and government lawyers.

### *Role of the Commissioner*

Commissioner Oppal faced intense media pressure and scrutiny throughout the inquiry. His appointment was considered controversial and several organizations and community members called for his resignation or for the appointment to be rescinded.<sup>145</sup>

Throughout the course of the inquiry, Commissioner Oppal was plagued with a number of other controversies. In May 2011, the media reported that Commissioner Oppal had taken a role as a gunshot victim in a film about a serial killer. Commissioner Oppal defended his choice to participate in the movie as being a person choice carried on in his own time.<sup>146</sup> Commissioner Oppal was also forced to defend himself again

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<sup>143</sup> Forsaken, p. 103

<sup>144</sup> British Columbia Civil Liberties Association. *Commissioner's Remarks Will Chill Public Interest Lawyers*. BCCLA. N.p., 17 Dec. 2012. Web. 14 Dec. 2012.

<sup>145</sup> Charlie Smith. "Wally Oppal waffled about necessity of Missing Women Commission of Inquiry" Georgia Straight, September 29, 2010

<sup>146</sup> Elaine O'Connor & Suzanne Fournier, "Pickton inquiry boss Oppal rapped for taking role in serial-killer movie" National Post, May 3, 2011

following a “casual” encounter and conversation with a Hells Angel motorcycle club member.

Unlike other Commissioners who chose to avoid interaction with the media during the course of the inquiry, Commissioner Oppal often spoke directly with the media regarding the inquiry and on topics more broadly associated with law and society. The Commissioner’s openness with the media was never challenged by counsel and no formal claims of bias were ever made.

Controversy and conflict were also present within the hearing room. As previously mentioned, on a number of occasions the Commissioner and some of the lawyers appearing before the inquiry were involved in heated exchanges. In an attempt to control the hearings time and process the Commissioner imposed time limits on cross-examinations and would interrupt counsel if they exceeded their time. Furthermore, the Commissioner’s decision to call witnesses as part of a panel, rather than individually, caused some controversy within the hearing room. In Procedural Directive #3 the Commissioner stated that:

We have spent much time and learned a lot about what went wrong and it is now time to focus more actively on any investigative failures and how they can be prevented in the future. Therefore, in addition to the more traditional evidentiary hearings that are underway, we will be introducing a more cooperative approach to allow us to pursue this aspect of the mandate.

It is for these reasons that I set out additional steps that the Commission will be taking in this Process Management Directive. To achieve this I am implementing several strategic approaches to obtaining further information. All of these approaches have a common purpose: working collaboratively with communities, police agencies, governments and women at risk to develop new strategies to protect women at risk. I am asking for help from all those affected, including victims’ families, community members and leaders, First Nations community members and leaders, political leaders, police and policing institutions.



Accordingly, one approach will be to receive information from groups of witnesses which will be constituted as “panels”...<sup>147</sup>

The Directive went on to explain that the purpose of the panels would be to inform the development of recommendations in three core categories: the difficult interface between the policing authorities and the marginalized community of these victims; inter-jurisdictional difficulties between different police forces; and shortcomings in organizational systems.<sup>148</sup> The Commissioner was of the belief that the panel format would enable the Commission to develop the information in an effective and efficient manner. The Commissioner’s directive was met with mixed reactions. Although some counsel argued that the format impeded their ability to effectively cross-examine witnesses,<sup>149</sup> others were more open and willing to work with the new process.<sup>150</sup>

The MWCI is an example of an inquiry that faced numerous and unprecedented pressures and challenges. Governed by a legislative framework that restricted the commission’s flexibility in relation to the collection, analysis and use of evidence, the commission was unable to gain the complete support to the community. Although the commission attempted to work around the juridified processes codified in the legislation, the community was not willing to accept the two processes as being equal. Although the MWCI faced many challenges and it cannot be argued that greater community participation would have benefited the commissions understanding of the issues before them, the final report was thorough.

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<sup>147</sup> Forsaken, p. 61.

<sup>148</sup> Forsaken, p. 61

<sup>149</sup> Missing Women Commission of Inquiry, Transcript, February 23, 2012.

<sup>150</sup> Missing Women Commission of Inquiry, Transcript, February 23, 2012

## Part 4 – Downsides of the Push towards Formality

In the previous part, the increased reliance on the adversarial hearing model was discussed, however, it was also clear that it would be inaccurate to characterize a hearing conducted by a commission of inquiry as a purely adversarial process, as the boundary between the administrative fact-finding nature of inquiries and their public policy goal is often blurred. However, the inquisitorial nature of inquiries places them at odds with the adversarial system of criminal justice in Canada.<sup>151</sup> The difference has, as previously discussed, led to a judicialization and, as a result, adversarialization of the inquiry process so as to bring them more in line with criminal and civil proceedings. Over judicialization of inquiries, however, may destroy the flexibility necessary for a commission to complete its mandate.

Historically, the adversarialization of judicial processes is evident through examples such as the criminal trial. Although this change occurred several hundred years ago, the legacy and continued pressure of judicialization remains and has been evident in administrative law processes for some time. More specifically, inquiries have recently been subject to significant pressures to adopt practices and procedures common in criminal and civil trials. This part will discuss the manner in which judicialization and adversarialization of inquiries damages their ability to achieve the purposes for which they were created. For example, tactics commonly used by lawyers in civil and criminal trials have the potential to impact efforts by an inquiry to determine facts. Furthermore, I will suggest that the pressure to judicialized inquiries is a problem and has had a

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<sup>151</sup> Kent Roach. "Public Inquiries, Projections or Both?" (1994) 43 *UNBLJ* 415 at p. 415.

negative impact on the ability of inquiries to fulfil several of their intended purposes including public participation and education. The two case studies discussed in part 3 demonstrate the challenges that face inquiries that are tasked with investigating a tragedy that was deeply felt by their respective communities while also gathering sufficient information and research to develop meaningful and appropriate recommendations. The inquiries faced similar and significant challenges, however, due to a number of factors experienced very different outcomes.

### **Impact of Adversarial Pressures on Inquiries**

Inquiries, as demonstrated, have been placed in a precarious position given their historic purposes and design on the one hand and the pressures for juridification and alignment with criminal and civil trial processes on the other. Fidelity to the purposes is key should inquiries maintain their useful position in Canadian society. As will be discussed below, inquiries were not designed to follow an adversarial process.

Although they have adapted and made allowances for certain procedural rights, by design, the focus of inquiries should be on fact-finding, public education, and the development of policy recommendations.

Although public inquiries often arise as a result of tragic or shocking events and many are looking for a place to lay blame inquiries were designed as a means to determine facts and formulate recommendations for future policy, not determine culpability.

Although they have often utilized the adversarial trial model to determine facts, the Acts governing the inquiry process provide inquiries with a great deal of flexibility in their

process so as to allow for the fact finding and recommendation development process to occur. Criminal and civil actions are often also commenced following events that lead to the calling of an inquiry; it is in those courtrooms under the more strict rules of evidence and procedure that culpability should be determined.

It would be unreasonable and unnecessary to insist that commissions of inquiries proceed under the same rules of evidence and procedure as criminal and civil trials, as it would render them prohibitively time consuming and expensive. However, as previously mentioned, the threat of damage to reputation of individuals and organizations involved has led to pressure on inquiries be sensitive of the potential damage. Critics have argued that in instances where the Commissioner intends to make a finding of misconduct against an individual, the commission should base findings only on evidence that would ordinarily be admissible in a court of law.<sup>152</sup> These rules have served a useful purpose in protecting the rights of individuals who are prosecuted for criminal offences or sued in civil actions.

For example, following the E. coli outbreak in Walkerton, there were a number of lawsuits filed. In May 2000, a class action lawsuit was commenced on behalf of the people of Walkerton affected by the E. coli contamination. The class action included compensation for death, illness, property damage, economic loss, diminution in property values and the inconvenience of being without water for several months. The events surrounding the Westray mine disaster led to criminal charges being filed against two mine managers.

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<sup>152</sup> David W. Scott, Q.C.. "The Rights and Obligations of Those Subject to Inquiry and of Witnesses." 12 Dalhousie L.J. 133 1989-1990, at 145

As Mr. Justice Estey wrote

The inquiry process is, of course, straightforward. The difficulty at the outset, which continues throughout, is to discharge your mandate without becoming an inquisition, without becoming unduly inquisitorial and without maligning the witnesses and behaving like a New York district attorney on the television.<sup>153</sup>

Inquiries were established as a means for government to obtain information and receive recommendations on a discrete issue or incident. In 1979 the courts analysed the specific nature of commissions of inquiry within the machinery of government.

Examining the McDonald Inquiry, established to examine certain activities of the Royal Canadian Mounted Police (RCMP), the court held that the appointment is the creation of “an organism of the Executive branch of government.”<sup>154</sup> The court noted that even though it conducts hearings, it is not a branch of the judiciary and rather it “fulfils Executive or administrative functions.”

Ratushny concludes that commissions of inquiry may best be described as a “residual institution” as it they are invoked as a remaining alternative when other institutions or processes are inadequate.<sup>155</sup> These other intuitions, including criminal and civil trials, lack the unique combination of powers and processes available to inquiries. The fact finding, analysis and recommendations that often result form inquiries may bring reassurance and closure to individuals or communities affected by the incident or issue.

Following the inquiry, Justice O’Connor commented further on the use of civil and criminal evidentiary rules by inquiries:

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<sup>153</sup> Willard Estey, “The Use and Abuse of Inquiries: Do They Serve a Public Purpose” 12 *Dalhousie L.J.* 209, 1989-1990 at 210

<sup>154</sup> *Re Commission of Inquiry* (1979), 94 D.L.R. (3d) 365 at 360.

<sup>155</sup> Ratushny, Ed. *The Conduct of Public Inquiries: Law, Policy, and Practice*. Toronto: Irwin Law, 2009, p. 20

...[t]hat inquiries have, in my view, tended to overuse the evidentiary, adversarial type of hearing process suited for legal trials to gather information. I think that we have yet to take full advantage of all of the possibilities for different processes that can be tailored to meet the need of investigating and reporting on the various types of matters set out in inquiry mandates. I believe that greater creativity and flexibility in fact-determining processes will ultimately improve the inquiry process from the perspective of all participants, increasing responsiveness, decreasing cost, and ultimately improving the process and results of public inquiries. In my view, there is a real advantage to directly involving groups and individuals in the inquiry process, rather than having them participate only through lawyers. This is particularly the case where the participants have experience, expertise and an understanding of issues under consideration. From a cost perspective, minimizing the involvement of legal counsel, when not necessary, can result in a significant cost reduction.<sup>156</sup>

Justice O'Connor's comments highlight the importance of inquiries maintaining flexibility in their procedures and ensuring that hearings do not simply evolve into alternative courtrooms. Inquiries were designed to determine facts and develop recommendations, while procedural fairness, especially in instances where an individual's reputation may be at risk, must be respected, so too must the goals and purposes of inquiries.

The presence of counsel at hearing commissions has, for better or worse, become the norm. Although not required by statute, the majority of participants involved in inquiries choose to be represented by counsel in the hearing room. If, as previously argued, public inquiries are intended in part to provide greater public access to government in a society where access is largely filtered through the language and habits of judges and lawyers,<sup>157</sup> further judicialization the inquiry process only furthers to widen the undermine the public purpose of inquiries. The presence of lawyers has become so common that participants unable to afford lawyer fees have chosen to withdraw from

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<sup>156</sup> Hon. Associate Chief Justice Dennis R. O'Connor, "Some Observations on Public Inquiries," (Canadian Institute for the Administration of Justice Annual Conference, delivered at Halifax, 10 October 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/publicinquiries.htm>>.

<sup>157</sup> Sossin, Lorne Mitchell, and Colleen M Flood. *Administrative Law in Context*. 2nd ed. Toronto: Emond Montgomery Publications, 2013, p. 574

inquiries rather than represent themselves.<sup>158</sup> Michael Vonn, policy director of the British Columbia Civil Liberties Association, stated “it is simply an impossibility to participate in this inquiry without counsel.”<sup>159</sup> Others argued that not funding lawyers for all groups meant that it was “not a level playing field.”<sup>160</sup>

In his recommendation to the provincial government, Commissioner Oppal held that the 13 participant groups would be in an “unfair position” if they were not granted funding. Following the government’s decision not to provide funding, the Commissioner, in an unprecedented move, asked the government to reconsider. The government, however, chose to maintain its position, stating that

Wally Oppal’s commission is providing very valuable information about the past and how we can make sure that the VPD and other areas of law enforcement in the Lower Mainland have closed the gaps that allowed the tragedy to unfold on the streets of downtown Vancouver. If we can find millions of dollars to spend – and we should – it needs to be about going forward and making sure women today are protected.<sup>161</sup>

It was not only the groups seeking to participate in the inquiry that recognized the inequality of unrepresented parties at inquiries. The MWCI, in an attempt to ensure that all relevant voices were heard at the inquiry chose to appoint two independent lawyers to act on behalf of community and aboriginal women’s interests. The addition of the two independent lawyers demonstrates the impact judicialization has had on inquiries.

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<sup>158</sup> See for example the Missing Women Commission where a number of participant groups chose to withdraw from the inquiry following the provincial government’s decision not to provide funding.

<sup>159</sup> Hall, Neal. “BCCLA and Amnesty International join growing groups boycotting Missing Women inquiry.” *Vancouver Sun*, October 6, 2011.

<sup>160</sup> Alex Neve for Amnesty International, in Hall, Neal. “BCCLA and Amnesty International join growing groups boycotting Missing Women inquiry.” *Vancouver Sun*, October 6, 2011.

<sup>161</sup> Mulgrew, Ian. “Province’s parsimony silences needed voices at missing women’s inquiry.” *Vancouver Sun*, July 26, 2011.

Commissioners are recognizing that individuals and organizations may not be capable of navigating the inquiry process without the assistance of counsel.

The issue of inequality between parties is not one isolated to represented and non-represented participants at an inquiry. In his review of the American adversarial system, Keith Findley was critical of the adversarial process. Although Findley's concern was directed more at the relative skill and experience of lawyers at trial, his comments are also relevant to inquiries where participants are not required to be represented by lawyers.

The current American system is marked by an adversary process so compromised by imbalance between parties – in terms of resources and access to evidence – that true adversary testing is virtually impossible. It is a system in which competing litigants, unequal as they are, control everything from the investigation to presentation of the evidence, and in which their motivation in that process is to win, more than to discover the truth.<sup>162</sup>

Although commissions of inquiry are not purely adversarial processes, given the recent trend of inquiries to conduct hearings where evidence is often tested through cross-examination by multiple lawyers, it is often difficult to distinguish the hearings from a traditional adversarial trial. Mr. Findley's view that litigants are so motivated by the interests of their clients that they will coach witnesses, suppress facts, employ tricks and surprises, distort the truth, and manipulate fact finders.<sup>163</sup> The concerns raised by Mr. Findley are in relation to the issue of high rate of wrongful convictions; the tactics described above would have a significant impact on an inquiry's efforts to determine the facts required by its mandate.

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<sup>162</sup> Keith Findley, "Adversarial Inquisitions: Rethinking the Search for Truth" 56 *N.Y.L. Sch. L. Rev* 911 2011-2012, at 912

<sup>163</sup> Findley, p. 912 citing Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1949) Marvin, E. Frankel, *Partisan Justice* (1978) and William T. Pizzi, *Trials without Truth: Why Our System of Criminal Trial has become an Expensive Failure and what needs to be rebuilt.* (1999)



## Leaving adversarialism at the door – Study Commissions

Issues or events being examined by inquiries will often involve many individuals and organizations all with different interests, views, questions and goals. Parties wishing to participate in an inquiry must fulfil certain criteria in order to be granted participant status. While their interests and goals may differ, rarely can all participants be considered adversaries in the same way as parties to criminal and civil trials as the focus of public inquiries is on fact finding and/or policy development, not culpability.

At inquiries where the primary focus is on policy research and development the issue of adversarialism is diminished. However, inquiries where both hearing and study portions study commissions may be viewed as “secondary” processes. Inquiries, or study commissions, whose mandate focuses on policy research and development may choose to adopt processes such as literature reviews, interviews or forums. The issue of adversarialism, generally, does not come into play. However, on occasions where inquiries involve both hearing and study components, the adversarial tone may be transferred from the hearing to study activities.

The Missing Women Commission of Inquiry, for example, was designated both a study and hearing inquiry to inquire into and make recommendations regarding police investigations into missing women. The legislation governing public inquiries in British Columbia prevents the study commission from conducting hearings where evidence is taken under oath. Instead, study commissions are granted a wide range of powers to research and examine areas within their mandate. Public meetings may be conducted

and submissions, both oral and written are permitted, however, commissions “must not exercise the powers of a hearing commission.”<sup>164</sup> The MWCI study commission was designed as a forum to encourage and engage in a dialogue about issues surrounding the commission’s mandate. Participants, community organizations, and the public were invited to participate through written submissions, comments on study papers released by the commission and attendance at policy forums. It was hoped by the commission that those organizations who were unable to participate in the hearing inquiry due to lack of funding for counsel, would be able to participate as there would be no cross-examination or review of evidence required to participate in the forums. In a lengthy letter addressed to the commission, 17 organizations who, although previously granted participant status, had withdrawn from the inquiry, wrote to express their disappointment in the commission process and their intention not to participate in the study commission or policy forums. The organizations stated that they had

no confidence that the insight or expertise we could now offer would make any difference to the Inquiry’s outcome or the strength of its recommendations. The government’s failure to commit the necessary resources to this Commission does not bode well for its commitment to implementing any of the Commission’s recommendations, and the Commission’s continued exclusion and marginalization of community voices undermines the credibility of the entire process. We see little value in spending our organizations’ extremely limited time and resources contributing to a process that is fundamentally flawed and irredeemably defective.<sup>165</sup>

Individual letters accompanying the open joint letter also noted that the policy forums were viewed as ‘secondary’ and concerns about the weight that would be attached to

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<sup>164</sup> See section 20 of the *Public Inquiry Act* S.B.C. 2007, c. 9.

<sup>165</sup> Aboriginal Front Door Society, et al. “Open Letter: Non-participation in the Policy Forums/Study Commission”. UBCIC Website. April 10, 2012. Electronic.

submissions made at the policy forums were raised.<sup>166</sup> In a letter to the Commission Native Women's Association of Canada, in reference to their invitation to participate in the study commission, NWAC stated "aboriginal women, and their organizations, should not be relegated to a secondary forum."

The community organization's choice not to participate in the study commission was recognized by the commissioner in his final report

The greatest challenge we faced with respect to the study commission process was undoubtedly the boycott by individuals and organizations representing two of the most affected communities, the DTES and Aboriginal communities.<sup>167</sup>

The community groups' choice to boycott the study portion of the Commission and the Commission's recognition of the impact of that decision suggests that the effects of judicialization of inquiries has impacted their ability to perform the social function. Unable to engage organizations involved in the issues being examined or gain support a Commission's ability to foster a dialogue and democratic participation is greatly limited. Processes that engage communities in expressing truths and remove any notions of liabilities, namely truth and reconciliation commissions, have been turned to alternatives to public inquiries in some instances. Although they provide for the public education and engagement in addition to fostering healing within the community, it must be noted that their function and purpose is limited.

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<sup>166</sup> Native Women's Association of Canada. "Letter to Missing Women Commission of Inquiry." BCCLA Website. March 7, 2012. Electronic.

<sup>167</sup> British Columbia. Missing Women Commission of Inquiry. & Oppal, W. T. (2012). *Forsaken: The report of the Missing Women Commission of Inquiry*. Vancouver: Missing Women Commission of Inquiry, p. 26

## Truth and Reconciliation Commissions as an Alternative to Public Inquiries

The judicialization of inquiries has the potential of undermining the original merits imagined for inquiries by reducing their ability to be flexible and adapt to challenges and meet its mandate. Justice O'Connor, in his observations on public inquiries noted that there are alternatives to "full blow evidentiary hearings" for some parts of the information gathering process. He stated that

Tied to the idea that a commissioner can adopt a more informal, less evidentiary type process for some parts of the investigation and some issues is the notion that not all parts of the investigative process need to take place in public. The preparation of investigative summaries, detailed chronologies and background papers can be thoroughly and effectively done by commission staff and experts outside the public hearing process.<sup>168</sup>

Traditionally the mechanism used to address deep societal problems in Canada is public inquiries, however, recently, following examples set in Africa and Australasia, Canada has adopted an alternative process, the truth and reconciliation commission. The impact of judicialization has drawn away from the original purposes of public inquiries, primarily in relation to public participation. Do truth and reconciliation commissions, unlike public inquiries, represent a means of meeting the social engagement and education functions of public inquiries that has been eroded by judicialization?

Truth and reconciliation commissions represent an alternative means of obtaining facts, engaging in dialogue and encouraging healing. Removing adversarial and judicial procedures, a TRC's mandate tends to focus on acknowledgment of events and actions, promoting awareness, establishing a historical record and commemorating victims. A

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<sup>168</sup> Hon. Associate Chief Justice Dennis O'Connor and Freya Kristjanson, "Some Observations on Public Inquiries" *Canadian Institute for the Administration of Justice, Annual Conference* October 10, 2007.

number of different models for truth and reconciliation commissions exist, therefore, like public inquiries, it is difficult to provide a definitive definition. Many TRCs share several core elements including: (1) establishing the legitimacy of the commission through consultation with the public; (2) articulating a properly tailored mandate; (3) selecting neutral and respected personnel; (4) providing for adequate resources and funding; (5) delineating specific activities and powers to enable the commission to fulfil its objective; and (6) producing a final report with concrete and manageable recommendations.<sup>169</sup>

Often included in a TRCs mandate is the establishment of a record of past abuses. It has been suggested by proponents of TRCs that creating such a record may help in holding perpetrators accountable while simultaneously providing a forum for victims to recount the abuses they suffered.<sup>170</sup> Following the failure of legal mechanisms including criminal prosecutions, civil litigation and alternative dispute-resolution programs to address the legacy of Indian Residential Schools (IRS), the government established the a truth and reconciliation commission. The Indian Residential Schools Truth and Reconciliation Commission established by the Canadian government expressly prohibited formal legal processes like those used in public inquiries. No findings of misconduct could be made, the Commission did not have power to compel testimony and participation was voluntary. Furthermore, the Commissioners were required to:

perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and

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<sup>169</sup> Public International Law and Policy Group. *Truth and Reconciliation Commissions: Core Elements*. PILPG. N.p., May 2013. Web. 18 June 2014., p. 1

<sup>170</sup> PILPG, p. 1 from Mark Freeman and Priscilla Hayner, *Truth Telling in Reconciliation After Violent Conflict: A Handbook*, 122, 123 (D. Boomfield et. A, eds, 2003).

recommendations without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings.<sup>171</sup>

Through the removal of any possibility of criminal, civil or even reputational findings of fault, TRCs are designed to foster open and honest communication.

In his autobiography which reflecting on his time as head of South Africa's Truth and Reconciliation Commission, Albie Sachs, questioned why so little truth came out of a court of law, "when so much emerged from the TRC."<sup>172</sup> He opined that the answer was in the differing objectives. As discussed, courts are concerned with accountability in the narrow, individual sense. The end result is punishment and/or compensation for proven wrongs. The due process procedures adopted are designed to bring out proof, or disproof, rather than truth. Inquiries and TRCs on the other hand, are focused on large episodes. The main concern is, in contrast, not punishment or compensation but to achieve an understanding and acknowledgement by society of what happened so that the healing and, if necessary, processes of change, can start. TRCs rely heavily on dialogue as the foundation for repair.<sup>173</sup>

One of the mandates of the IRS TRC was to gather statements from former residents of the IRS and anyone else who may have been impacted by the schools and their

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<sup>171</sup> "Mandate for the Truth and Reconciliation Commission" Schedule N of the Indian Residential Schools Settlement Agreement. May 8, 2006.

<sup>172</sup> Sachs, Albie. *The Strange Alchemy of Life and Law*. Oxford ; New York: Oxford University Press, 2009, 84

<sup>173</sup> Sachs, p. 84.

legacy.<sup>174</sup> In doing so, the TRC dealt with extremely complex witness issues. Most witnesses were indigenous, had a history of abuse that frequently included sexual abuse, many were elderly, many had substance abuse problems and many described a difficult relationship with settler society justice institutions including experiences of criminalization.<sup>175</sup> In order to encourage witness participation, the TRC developed a broad range of procedures for evidence gathering. This included a number of methods of providing statements, including audio/visual submissions, written statements and public presentations. Additionally, as traumatized witnesses faced even more significant and specialized barriers to participation, the TRC sought to address these barriers in a culturally sensitive way. Throughout the statements, ceremonial supports through contact with sacred objects, emotional support through touching and encouraging words and empathetic gestures were provided.<sup>176</sup> No legal or other representation was permitted, however, survivors were permitted to bring support persons with them to the statement takings. Julia Hughes, in her work looking at whether procedural innovations encouraged participation, noted that participation at the first National Event was smaller than anticipated by the TRC.<sup>177</sup> Although the venue was crowded, fewer people than expected provided statements. Subsequent regional hearings, however, were much better attended and the TRC found it necessary to discourage some from attending as it was anticipated in some cases that the demand

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<sup>174</sup> "Share Your Truth" *Truth and Reconciliation Commission of Canada (TRC)*. N.p., n.d., Web. 01 Aug. 2014.

<sup>175</sup> Julia Hughes "Home Truths about Truth Commission Processes: How Victim-Centred Truth and Perpetrator-Focused Adversarial Processes Mutually Challenge Assumptions of Justice and Truth." in Laverne Jacobs and Sasha Baglay eds in *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspective*. (2013), p. 289.

<sup>176</sup> Hughes, p. 291.

<sup>177</sup> *Ibid*, p. 292.

for statement-taking opportunities would exceed the capacity of both the community and the commissioners.<sup>178</sup>

Recently, the Ontario Superior Court confirmed in two separate decisions the important role of TRCs in recording individual and collective truth-telling. Part of the TRC's mandate is the "creation of a legacy" that includes collection of records, taking statements from those involved, and classifying and preserving the materials.<sup>179</sup> In the first decision, Justice Stephen Goudge said that Canada was under an obligation to "provide the documents in its possession or control that are reasonably required to assist the TRC to tell the story of the legacy of Indian residential schools."<sup>180</sup> The court was then asked to look at what to do with the individual testimonies of 40,000 Indian residential school survivors that had been provided to the TRC. Justice Paul M. Perell held that there would be a 15-year retention period during which survivors can choose to have some of their documents spared from destruction.<sup>181</sup> These two decisions confirm the important role TRCs play in recording history. Although this testimony is not a traditional form of "evidence" like that adduced through court processes, the Ontario Supreme Court recognized its importance in the social history of Canada and in the process of reconciliation.

In her work examining the IRS TRC and the Mackenzie Valley Inquiry, Kim Stanton, explores the institutional design strategies employed by the inquiry that may be of assistance to the TRC and assist future inquiries. Starting from the view that inquiries,

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<sup>178</sup> Ibid, p. 292.

<sup>179</sup> The Canadian Press. "Ottawa ordered to provide all residential school documents." January 30, 2013. Electronic.

<sup>180</sup> *Fontaine v. Canada (Attorney General)* 2013, ONSC 684, para 86.

<sup>181</sup> *Fontaine v. Canada (Attorney General)* 2014 ONSC 4585, para 362



in their basic form, “investigate an issue by gathering a broad spectrum of information in order to see the large context that gave rise to the problem” then making “policy recommendations to prevent a recurrence of the problem.”<sup>182</sup> Stanton is clear that the Mackenzie Valley Commission has its differences from truth and reconciliation commissions, namely that it was not structure investigate a pattern of human-rights abuses that occurred over a number of years, and it was established to investigate a prospective issue rather than a retrospective one. Rather, Stanton focuses on the manner in which Commissioner Berger conducted the inquiry and highlights features that can be associated with the truth commission model. She argues that the public inquiry model should not be rejected as a means of addressing historical injustices in established democracies.<sup>183</sup>

Commissioner Berger approached the Commission’s mandate with a focus on the social function of the inquiry of creating awareness of and public support for the inquiry process. This in turn prompted social accountability with respect to the issues before him. Recognizing the social function of inquiries, Berger included a paper as Appendix 1 to his report about the Inquiry Process. In the paper, he discusses Gerard Le Dain’s views of the “emerging function” of public inquiries, specifically the opening of issues to public discussion and providing a forum for the exchange of ideas. Berger stated that “commissions of inquiry have become an important means for public participation in democratic decision-making as well as an instrument to supply informed advice to

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<sup>182</sup> Stanton, Kim. "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry." *Canadian Journal of Law and Society* 27.1 (2012): 81-99, p. 84

<sup>183</sup> Stanton, p. 82.

government.”<sup>184</sup> The Berger Inquiry was successful in educating the public in many respects both through the operation of the inquiry and its reports. As Jull, commented “the Berger Inquiry became a national ‘teach-in’ and turning point in national consciousness. Most importantly it introduced Northern indigenous voices and their needs to the Canadian public.”<sup>185</sup> Throughout the five years of the inquiry, Berger’s credibility was unimpeachable. This was in large part due to his commitment to openness and transparency in all areas of the inquiry process.

The process of the Berger inquiry was not simple and straightforward. Berger, recognizing the diverse range of views and issues his inquiry was facing, chose to combine different types of hearings including: preliminary, community, and formal. In doing so, he clearly set out what types of evidence would be heard, from whom and how the evidence of each type of hearing would be weighed.<sup>186</sup> The community hearings, for example focused on listening to members of the communities that would be directly affected by the pipeline. Evidence gathered at these hearings was to be treated with the same respect and gravity as that taken from experts in formal hearings. Notably, Berger chose to keep lawyers in the background at community hearings and did not permit cross-examination of community members. This, he argued, was to ensure that the community members would feel unfettered in their ability to speak before the inquiry.<sup>187</sup> Similarly, Berger recognized that the information garnered at the

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<sup>184</sup> Berger, T. R., & Mackenzie Valley Pipeline Inquiry (Canada). (1988). *Northern frontier, northern homeland: The report of the Mackenzie Valley Pipeline Inquiry* (Rev. ed. with a new introduction by the author.). Vancouver: Douglas & McIntyre, p.224.

<sup>185</sup> Peter Jull, “ ‘Nations with Whom We Are Connected’ — Indigenous Peoples and Canada’s Political System,” *Australian Indigenous Law Reporter* 6, 2(2001), 13, 7.

<sup>186</sup> Stanton, p. 89.

<sup>187</sup> Stanton, p. 89.

northern hearings and community hearings generated significant reaction from people in the south of the province. Through hearings conducted in the south, Berger demonstrated that inquiries could be used to create a dialogue between different parts of a society.<sup>188</sup>

When Commissioner Berger's views are contrasted with the boycott by community groups of the more recent study commission portion Missing Women Commission of Inquiry, the question is raised as to what has changed in the last few decades that has led to the disenchantment with the public participation portion of public inquiries. The Missing Women Commission attempted to adopt many of the techniques that proved so successful in the Berger Inquiry, different hearing types and locations, public education events and encouraging a dialogue between the northern and southern communities facing similar problems. The difference, however, was that the Missing Women Commission was conducted under the new *Public Inquiry Act*. Bound by rules that limited both the study and hearing commissions, Commissioner Oppal was not as free to design his own process. Relying on the study commission powers to meet with members of northern communities, Commissioner Oppal was able to design a process that like the Berger Inquiry, put lawyers in the background and encouraged an open and unfettered dialogue. However, information gained through these inquiries was not able to be used in the fact finding portion of the inquiry. This distinction led to an outcry that the study commission was a less important process and undermined its ability to engage the community. The legislated distinction between the two types of inquiry is one of the most discernable representations of the judicialization of public inquiries.

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<sup>188</sup> Stanton, p. 89

Legislation governing public inquiries provides them with sufficient flexibility in process so as to fulfil the social function as demonstrated by the Mackenzie Valley Pipeline Commission. Negative experiences with public inquiries and frustration with inadequate political response to commissions' recommendations led IRS negotiators to seek the establishment of a "truth commission."<sup>189</sup> Seeking a body that would perform the social function only represents the community's desire for a process that engendered social accountability.<sup>190</sup> There is, however, no reason that a public inquiry cannot perform both the social functions, including open dialogue, community participation and education and the legal investigative functions such as fact finding. The end goal of many public inquiries is the development of forward-looking recommendations to address the issues uncovered by the inquiry. Engaging communities that have been affected by the issues or events that led to the inquiry provides the commissioner with not only a greater understanding of the issues in question but also is likely to encourage a greater sense of responsibility to ensure that the recommendations are implemented.

The six core elements of TRCs as described in the section above could easily be adopted by public inquiries. TRCs have an important role to play in engaging and healing communities that have experienced tragedy. Inquiries have a similar function in educating and engaging the community, however, are also able through legislative powers to ensure that all parties involved in events are heard from. As a result of the coercive powers granted to inquiries, they are able to engage in a thorough investigation. Recently, these investigations have been the focus of many inquiries.

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<sup>189</sup> Stanton, p. 87

<sup>190</sup> Stanton, p. 87

However, it is evident from inquiries such as the Mackenzie Valley Pipeline and Walkerton that those inquiries that rely on both their investigative function and social engagement are the most successful. Employing elements often associated with TRCs such the community engagement processes adopted in Walkerton encourages not only a greater sense of trust by the community in the inquiry process but also facilitates community healing. The Missing Women Commission of Inquiry, however, demonstrates that in separating the functions of inquiries through strict legislation hinders an inquiry's ability to flexibly move between dual mandates.

## Conclusion

“I am a firm believer in the people. If given the truth, they can be depended upon to meet any national crisis. The great point is to bring them the real facts.”<sup>191</sup> Abraham Lincoln’s words highlight the importance of the investigative and social engagement functions of public inquiries. Unlike any civil or criminal proceedings associated with the issues being addressed, fundamentally inquiries are established to seek facts and, ideally, the truth. It is from this truth that meaningful and impactful policy recommendations can be developed.

Regardless of what one might think of the justness of actual policy outcomes of public inquiries, my point is rather this: the influence of juridification over public inquiries binds their abilities to flexibly investigate and examine issues of public concern. Obscuring the public nature of inquiries through the increased use of juridified processes limits inquiries social and policy impacts. These restrictions have led to a greater number of clashes between inquiries on one hand, bound by increasingly juridified processes and communities and social groups on the other, often with limited resources and experience in juridified processes. The result is often inquiries, such as the Missing Women Inquiry, where participation is dominated by those with access to funding and resources rather than by individuals, organizations and/or communities most involved or impacted by the issues addressed by the inquiry.

The inquiry process, initially developed as an alternative to criminal and civil proceedings, recognized the importance of flexibility and inclusion. The migration of

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<sup>191</sup> Abraham Lincoln. (n.d.). LincolnArchives.com Retrieved May 5, 2014, from Lincolnarchives.com Web site: <http://lincolnarchives.com/LincolnQuotes.php>

elements of evidence law and disclosure practices, for example, restrict an inquiry's ability to engage with the public. Recent inquiries, most notably the Missing Women's Commission, faced extremely difficult challenges engaging with community organizations and individuals. Restricted by financial constraints and unable to participate in the lawyer dominated hearings, organizations, individuals and community groups saw the alternative processes developed by the inquiry as secondary and chose not to participate. The experience of the Missing Women Commission should be seen as a cautionary warning to future inquiries. The separation of investigative and policy processes requires careful consideration so as to ensure that all necessary voices are able to participate.

As Ms. Stanton clearly noted, TRCs have a valuable place in Canadian society and should be considered in times of tragedy where a community requires healing, however, they are not capable of replacing public inquiries. The investigative, social engagement, public education and policy development functions of inquiries are unique. To suggest the two processes are interchangeable weakens the importance and place of both institutions. The examination of TRCs in the context of public inquiries does, however, highlight the need to ensure that inquiries continue to engage in all of their functions, not just the investigative. Pressures to juridify the public inquiry process will likely continue, however, it will be up to commissioners and their staff to ensure that the future inquiries remain true to their fundamental purposes. The two case studies discussed, Walkerton and MWCI, demonstrate both how successful inquiries can be when juridification is resisted and the negative results that occur when the pressures are too great. The MWCI was governed by a legislative framework that restricted its ability to create

practices and procedures that would allow for the investigative and policy processes to work together seamlessly. Instead, the Commission was faced with boycotts and protests unhappy with the dual process and what many saw as an inferior process for those without access to sufficient funding.

Although all future inquiries in BC will, unless the legislation is amended, be faced with the same challenges this does not mean that they are doomed to repeat the same mistakes as MWCI. As discussed, there is not a single process or system that works for all inquiries. Future inquiries, those faced by legislative restrictions and those with more open frameworks, will be required to develop processes that meet the needs of their mandate and the community in which they are operating. By acknowledging, and resisting where necessary, the pressures of juridification while understanding the legislative framework under which an inquiry is called, there is no reason future inquiries cannot continue to serve the Canadian people for years to come.



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